



The Foreign Intelligence Surveillance Act: Comparison of the Senate Amendment to H.R. 3773 and the House Amendment to the Senate Amendment to H.R. 3773

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Summary

During the 110th Congress, several House and Senate committees have engaged in oversight activities, including hearings and requests for expeditious production of documents and information regarding the Administration's warrantless foreign intelligence surveillance programs, as possible changes to the Foreign Intelligence Surveillance Act of 1978, as amended, (FISA) were explored. In July 2007, an unclassified summary of the National Intelligence Estimate on "The Terrorist Threat to the U.S. Homeland" was released. It expressed the judgment, in part, that the U/S. Homeland will face a persistent and evolving threat over the next three years, the main threat coming from Islamic terrorist groups and cells, particularly Al Qaeda. On August 2, 2007, the Director of National Intelligence (DNI) released a statement on "Modernization of the Foreign Intelligence Surveillance Act." In his statement, Admiral McConnell viewed such modernization as necessary to respond to technological changes and to meet the Nation's current intelligence collection needs. He deemed it essential for the intelligence community to provide warning of threats to the United States. In his view, there were two critically needed changes: that a court order should not be required for gathering foreign intelligence from foreign targets located overseas; and that liability protection was needed for those who furnished aid to the government in carrying out its foreign intelligence collection efforts.

Both the House and the Senate have taken action on proposals to address these concerns, but the measures differ somewhat in content and approach. On November 15, 2007, the U.S. House of Representatives passed H.R. 3773, the RESTORE Act of 2007. On February 12, 2008, the Senate passed S. 2248, as amended, then struck all but the enacting clause of H.R. 3773, and inserted the text of S. 2248, as amended, in its stead. On March 14, 2008, the House passed an amendment to the Senate amendment to H.R. 3773. Both the House amendment and the Senate amendment include significant changes to FISA, including provisions on the acquisition of communications of non-U.S. persons and of U.S. persons abroad. The two bills take different approaches to some issues that have played a significant role in the ongoing debate. For example, the Senate amendment would provide retroactive immunity for electronic communications service providers who assisted the government in intelligence activities between September 11, 2001 and January 17, 2007. The House amendment would provide for presentation to a court, with certain safeguards, of evidence and arguments with respect to which state secrets privilege has been asserted in covered civil actions against such electronic communications service providers and other persons who furnished such aid to the government. The House bill also provides for an audit of the Terrorist Surveillance Program and any other wireless electronic surveillance programs, with reporting requirements, while the Senate bill does not. This report provides an overview, a review of legislative activity, and a detailed side-by-side comparison of the provisions of these two bills.

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Introduction

Recent media reports suggest possible movement in the negotiations on legislation to amend the Foreign Intelligence Surveillance Act (FISA).¹ These negotiations are the most recent development in a wide range of legislative and oversight activity in the 110th Congress regarding FISA.

During the 110th Congress, several House and Senate committees have engaged in oversight activities, including hearings and requests for expeditious production of documents and information regarding the Administration's warrantless foreign intelligence surveillance programs, as possible changes to the Foreign Intelligence Surveillance Act of 1978, as amended, were explored. In July 2007, an unclassified summary of the National Intelligence Estimate on "The Terrorist Threat to the U.S. Homeland" was released. It expressed the judgment, in part, that the U.S. Homeland will face a persistent and evolving threat over the next three years, the main threat coming from Islamic terrorist groups and cells, particularly Al Qaeda. On August 2, 2007, the Director of National Intelligence (DNI) released a statement on "Modernization of the Foreign Intelligence Surveillance Act."² In his statement, Admiral McConnell viewed such modernization as necessary to respond to technological changes and to meet the Nation's current intelligence collection needs. He deemed it essential for the intelligence community to provide warning of threats to the United States. He perceived two critically needed changes. First, he stated that a court order should not be required for gathering foreign intelligence from foreign targets located overseas, although he did agree to court review of related procedures after commencement of the needed collection. Second, he contended that liability protection was needed for those who furnished aid to the government in carrying out its foreign intelligence collection efforts.

Legislative Activity

On August 5, 2007, the Protect America Act of 2007 (PAA), P.L. 110-55, was enacted into law with a 180-day sunset provision, providing a temporary solution to concerns raised by the Director of National Intelligence. On January 28, 2008, a cloture motion on an amendment proposed by Senator Reid to S. 2248 to extend the sunset on the Protect America Act for an additional 30 days (S.Amdt. 3918) fell short of the required votes.³ On January 29, 2008, both the House and the Senate passed H.R. 5104, a 15-day extension to the sunset for the Protect America Act, to allow further time to consider proposed legislation to amend FISA, while ensuring that the intelligence community would have the authority it needed in the intervening period. It became which became P.L. 110-182. On February 13, 2008, the House rejected H.R. 5349, which would have extended the sunset provision for an additional 21 days. Bills have been introduced in the

¹ See, e.g., Chris Strohm, "House Chairman Open To Republican Compromise On FISA," *CongressDailyAM* (June 4, 2008); Tim Starks, "Lobbyists Duel Over Rewrite of Surveillance Law," *CQ Today* (June 2, 2008); Ashley Roque, "After Months of Gridlock, Senate and House Negotiations on FISA Continue," *CongressNow* (June 2, 2008); Chris Strohm and Christian Bourge, "Key Republicans Offer Concessions To Kick-Start FISA Bill," *CongressDailyAM* (May 23, 2008); Chris Strohm and Christian Bourge, "Rockefeller Floats Proposal To Break Impasse Over FISA," *CongressDailyAM* (May. 8, 2008).

² Statement by Director of National Intelligence, Subject: Modernization of the Foreign Intelligence Surveillance Act (FISA) (August 2, 2007), which may be found at http://www.odni.gov/press_releases/20070802_release.pdf.

³ Record Vote Number 4, 48-45.

Senate to extend the sunset from 180 to 210 days (S. 2541, S. 2556, and S. 2615), or to extend it to July 1, 2009 (S. 2557). The Protect America Act sunset on February 16, 2008. Under transitional provisions in Section 6 of P.L. 110-55, acquisitions authorized while the PAA was in force and related directives would remain in effect until their expiration dates. Under the terms of the PAA, such acquisitions could be authorized for up to one year.

The House and the Senate each have passed bills to provide a longer-term statutory approach to these concerns. H.R. 3773, the Responsible Electronic Surveillance That is Overseen, Reviewed, and Effective Act of 2007 or the RESTORE Act of 2007, was introduced in the House of Representatives on October 9, 2007, and was referred to the House Judiciary Committee and the House Permanent Select Committee on Intelligence. The bill was reported out of the House Judiciary Committee, as amended, on October 12, 2007, H.Rept. 110-373, Part 1. The same day, the measure was reported out of the House Permanent Select Committee on Intelligence, as amended, H.Rept. 110-373, Part 2. On October 16, 2007, H.Res. 746 was reported out of the House Committee on Rules, H.Rept. 110-385, providing for consideration of an amendment in the nature of a substitute, as modified, to H.R. 3773, in lieu of the amended versions of H.R. 3773 reported out of the House Judiciary Committee and the House Permanent Select Committee on Intelligence. The resolution was agreed to on October 17, 2007. On November 15, 2007, the House passed H.R. 3773.

On October 26, 2007, S. 2248, the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2007 or the FISA Amendment Act of 2007, an original bill, was reported out of the Senate Select Committee on Intelligence by Senator Rockefeller, S.Rept. 110-209. S. 2248 was referred to the Senate Judiciary Committee on November 1, 2007. On November 16, 2007, S. 2248 was reported out of the Senate Judiciary Committee by Senator Leahy with an amendment in the nature of a substitute, without a written report. The written report was filed on January 22, 2008, S.Rept. 110-258. On December 14, 2007, Senator Reid made a motion to proceed with consideration of S. 2248, and presented a cloture motion on the motion to proceed. The motion to proceed was then withdrawn. On December 17, 2007, the Senate considered the motion to proceed with the measure. Cloture on the motion to proceed was invoked by a vote of 76-10.⁴ After some debate in the closing hours before the Senate broke for the holidays, a decision was made to revisit the measure when the Members returned in January.

Senate floor activities on S. 2248 resumed on January 23 and 24, 2008. On January 24, 2008, a modified version of the Senate Judiciary Committee's amendment in the nature of a substitute to S. 2248 was tabled by a vote of 60-36.⁵ Senator Reid sought unanimous consent for consideration of the House-passed bill, H.R. 3773, but Senator McConnell objected. Senator Rockefeller, for himself and Senator Bond, proposed an amendment in the nature of a substitute to S. 2248 (S.Amdt. 3911, the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 or the FISA Amendments Act of 2008). On January 28, 2008, a cloture motion by Senator McConnell on this amendment failed to pass.⁶ A number of other amendments to S.Amdt. 3911 to S. 2248 were proposed and considered between January 24 and February 12, 2008.⁷

⁴ Record Vote Number 435.

⁵ Record Vote Number 2.

⁶ Record Vote Number 3, 48-45.

⁷ For example, pursuant to an agreement and order of January 31, 2008, S.Amdt. 3909, as modified; S.Amdt. 3932, as modified; S.Amdt. 3960, as modified; and S.Amdt. 3945 were agreed to, while other amendments were scheduled for floor debate. S.Amdt. 3930 fell short of the requisite 60 votes and was withdrawn on February 6, 2008, Record Vote (continued...)

On February 12th, pursuant to an agreement and order of January 31, 2008, S.Amdt. 3911 to S. 2248, as amended, was agreed to, and the bill was read for the third time. The Senate then agreed to a cloture motion on S. 2248. After debate, the Senate passed S. 2248, as amended, by a vote of 68-29.⁸ Pursuant to the previous order, H.R. 3773 was taken up, all but the enacting clause was stricken and the text of S. 2248, as amended, was inserted in lieu thereof. The bill was advanced to the third reading, passed, and the motion to reconsider was laid upon the table. Passage of S. 2248 was then vitiated and the bill was returned to the calendar. A message on the Senate action was sent to the House the following day.

On March 12, 2008, the House Rules Committee reported H.Res. 1041 to the House. The resolution passed the House two days later. Pursuant to the resolution, the House considered and agreed to a House amendment to the Senate amendment to H.R. 3773, also entitled the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 or the FISA Amendments Act of 2008, by a vote of 213-197, with one voting present (Roll no. 145). The House and Senate have not gone to conference on FISA legislation. Instead, negotiations are ongoing to find a means of resolving their differences.

Summary of Selected Portions of the Senate Amendment to H.R. 3773 and the House Amendment to the Senate Amendment

Both the Senate amendment to H.R. 3773 and the House amendment to the Senate amendment to H.R. 3773 include amendments to the Foreign Intelligence Surveillance Act. The House amendment differs in a number of ways from the Senate-passed version of the bill. For example, the Senate amendment to H.R. 3773 provides, in new section 701 of FISA, that nothing in the definition of “electronic surveillance” under subsection 101(f) of FISA, 50 U.S.C. § 1801(f), shall be construed to encompass surveillance that is targeted in accordance with proposed title VII of the Foreign Intelligence Surveillance Act (FISA) at a person reasonably believed to be located outside the United States. The House has no parallel provision in its bill.

The two bills differ in their treatment of the role of the Foreign Intelligence Surveillance Court (FISC) with respect to procedures for acquisitions for the purpose of gathering foreign intelligence information of the contents of communications of U.S. persons and non-U.S. persons located outside the United States.

In the absence of an emergency authorization, the House amendment requires prior approval by the FISC of the applicable targeting procedures, minimization procedures, and certification before the Attorney General and the Director of National Intelligence (DNI) may authorize acquisition of

(...continued)

Number 7. S.Amdt. 3941 was agreed to, while S.Amdt. 3913 and S.Amdt. 3915 failed to pass on February 7, 2008. S.Amdt. 3941 was agreed to by voice vote, while S.Amdt. 3915 was rejected by a vote of 40-56, Record Vote Number 11, and S.Amdt. 3913 was rejected by a vote of 38-57, Record Vote 12. On February 12, 2008, S.Amdt. 3910, S.Amdt. 3979, S.Amdt. 3907, S.Amdt. 3912, S.Amdt. 3927, and S.Amdt. 3919 were rejected. Record Vote Number 13, 57-41; Record Vote Number 14, 35-63; Record Vote Number 15, 31-67; Record Vote 16, 37-60; Record Vote Number 17, 30-68; and Record Vote Number 18, 41-57; respectively.

⁸ Record Vote Number 20.

the contents of communications of non-U.S. persons reasonably believed to be located outside the United States. The FISC would have 30 days after a certification is submitted to review the certification and the targeting and minimization procedures and to approve or deny an order regarding such an acquisition. The House bill also requires the Attorney General, in consultation with the DNI, to adopt guidelines to ensure compliance with limitations imposed by the bill on such acquisitions and to ensure that an application is filed under section 104 or 303 of FISA, if required by that act. The guidelines are to be submitted to the FISC, the congressional intelligence committees, and the House and Senate Judiciary Committees.

Under the House bill, if the FISC finds that the certification satisfies statutory requirements and targeting and minimization procedures are consistent with statutory standards and constitutional requirements under the Fourth Amendment, the FISC is to approve the certification and use of the procedures for the acquisition. In a non-emergency situation, if the FISC finds that a certification or applicable procedures fall short of these requirements, the court would deny the order, identify any deficiency in the certification or the procedures, and provide the government with an opportunity to correct such deficiency. If the Attorney General and the DNI determine that an emergency situation exists, that immediate action by the Government is required, and that time does not permit the completion of judicial review prior to the initiation of an acquisition, they may authorize the acquisition and submit a certification to the FISC as soon as possible but in no event more than seven days after the determination is made. In the context of an emergency authorization, the FISC would enter an order directing the government, at the government's election and to the extent required by the FISC's order, to correct any deficiency within 30 days or cease the acquisition.

In contrast, the Senate bill does not require prior approval by the FISC of applicable certifications, targeting procedures and minimization procedures in connection with the acquisition of communications of non-U.S. persons abroad, nor does it require adoption and submission of compliance guidelines. Rather, the Senate bill requires submission of a certification or a targeting or minimization procedure, or an amendment thereto, to the FISC within five days of making or amending the certification or adopting or amending the procedure. Where the Attorney General and the DNI determine that immediate action is required and time does not permit preparation of a certification prior to initiation of an acquisition, the Senate bill requires the Attorney General and the DNI to prepare the certification, including such determination, within seven days after the determination is made. If the FISC finds that a certification meets statutory requirements and targeting and minimization procedures are consistent with statutory requirements and meet constitutional standards under the Fourth Amendment, the FISC would enter an order approving continued use of the procedures involved. If the court finds that the required standards are not met, then the FISC would enter an order directing the government, at the government's election and to the extent required by the FISC order, to correct any deficiencies within 30 days or cease the acquisition.

The House provides that nothing in its bill is to be construed to require an application under section 104 of FISA for an acquisition that is targeted in accordance with new section 703 of FISA at a non-U.S. person reasonably believed to be located outside the United States. The Senate bill has no similar language.

Both bills provide for targeting of U.S. persons reasonably believed to be located outside the United States for up to 90 days pursuant to a FISC order if statutory criteria are met. Such an order could be renewed for additional 90 day periods upon submission of renewal applications meeting the same standards. In the case of an emergency authorization by the Attorney General of

an acquisition, each bill requires notice to a FISC judge by the Attorney General or his designee at the time the decision is made to conduct such an acquisition and requires the filing of an application for a FISC order within seven days of the Attorney General's authorization of the emergency acquisition. Applicable minimization procedures would apply to such an acquisition. In the absence of a judicial order approving an acquisition originally authorized by the Attorney General on an emergency basis, the acquisition would terminate when the information sought is obtained, when an application for the order is denied, or when seven days have elapsed, whichever is earliest. Without a FISC order, no information acquired or evidence derived from an emergency acquisition, except under circumstances where the target of the acquisition is determined not to be a U.S. person, may be received in evidence or disclosed in federal, state, or local proceedings; nor could any information concerning a U.S. person acquired from such acquisition subsequently be used or disclosed in any other manner by federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

The House and Senate bills differ as to how they craft language emphasizing the exclusivity of FISA as a means of engaging in electronic surveillance to gather foreign intelligence information. The House amendment would add a new section to FISA, providing that "the procedures of chapters 119, 121, and 206 of title 18, United States Code,⁹ and [FISA] shall be the exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic communications may be conducted," except for "an express statutory authorization for electronic surveillance or the interception of domestic wire, oral, or electronic communications, other than as an amendment to this Act or chapters 119, 121, or 206 of title 18, United States Code." The Senate amendment to H.R. 3773 would add a new section FISA, providing that "[t]he procedures of chapters 119, 121, and 206 of title 18, United States Code, and [FISA] shall be the exclusive means by which electronic surveillance (as defined in section 101(f), regardless of the limitation of section 701) and the interception of domestic wire, oral, or electronic communications may be conducted."¹⁰

Both bills would expand the definition of "foreign power" and "agent of a foreign power" under FISA to address groups or individuals, other than U.S. persons, that engage in international proliferation of weapons of mass destruction or activities in preparation therefor, although the House and Senate definitions of these terms differ somewhat. Both bills would also permit federal officers who engage in electronic surveillance or physical searches to obtain foreign intelligence information to consult with federal, state, or local law enforcement personnel to coordinate to investigate against international proliferation of weapons of mass destruction.

While both the House and the Senate provide prospective limitations of liability for those who furnish aid to the government in connection with acquisitions authorized under their respective bills, they differ in their treatment of electronic communication service providers who assisted the government with warrantless electronic surveillance for foreign intelligence purposes between September 11, 2001 and January 17, 2007. Title II of the Senate's version includes retroactive immunity for electronic communication service providers who may have furnished aid to the

⁹ Chapter 119, 18 U.S.C. §§ 2510 *et seq.*, deals with interception of wire, oral and electronic communications; chapter 121, 18 U.S.C. §§ 2701 *et seq.*, addresses stored wire and electronic communications and transactional records access; and chapter 206, 18 U.S.C. §§ 3121 *et seq.*, concerns pen registers and trap and trace devices.

¹⁰ Media accounts also suggest that the exclusivity language is a focus of interest for those seeking to negotiate language that is acceptable to both the House and the Senate. *Id.*

government from September 11, 2001, through January 17, 2007, if certain criteria are satisfied.¹¹ The House measure does not afford retroactive immunity to electronic communications service providers who may have furnished aid to the government in connection with the Terrorist Surveillance Program or other intelligence activities in the wake of the terrorist attacks of September 11, 2001.¹²

Title II of the House amendment provides a procedure by which a court, while taking steps to protect classified information, could examine submissions, arguments and information with respect to which state secrets privilege has been asserted in covered civil actions against such electronic communications service providers and other persons who may have furnished such aid to the government. The Senate amendment contains no parallel language.

In addition, the House amendment provides for an audit by the Inspector General of the Department of Justice of the Terrorist Surveillance Program and any similar programs. Within 30 days of completion of the audit, the bill would require that the report be submitted to the House and Senate intelligence committees and the House and Senate judiciary committees, along with any underlying documentation. The Senate bill has no similar provision. The House bill would also establish a Commission on Warrantless Electronic Surveillance within the legislative branch. No parallel provision exists in the Senate Amendment to H.R. 3773. The House bill provides additional manpower and training to facilitate submission to and disposition of applications to the FISC. The Senate amendment to H.R. 3773 does not address this issue.

In the following table, this report provides a detailed side-by-side comparison of the provisions of these two measures, using H.R. 3773 as passed by the Senate as the basis for the comparison. As title I of FISA defines a number of key terms critical to understanding the import of the bills' language, a glossary of FISA terms as defined in section 101 of FISA, 50 U.S.C. § 1801 is attached to assist in understanding the effect of these measures.

¹¹ The Senate rejected proposals to permit substitution of the United States as a party defendant in pending law suits against such telecommunications carriers. *See, e.g.*, S. 2402, S.Amdt. 3927.

¹² Immunity for the telecommunication service providers who furnished aid to the government in connection with a warrantless electronic surveillance program after 9/11 has been a point of contention in the FISA debate. In the House bill's judicial alternative to an immunity grant, the court involved would seem to be a U.S. district court. A recent news report indicates that the negotiators may be considering a proposal to place this authority in the FISC instead of in a U.S. district court. *See*, Chris Strohm, "House Chairman Open To Republican Compromise On FISA," *CongressDailyAM* (June 4, 2008).

Table I. Comparison of the Senate Amendment to H.R. 3773 and the House Amendment to the Senate Amendment to H.R. 3773

H.R. 3773 (S. 2248) as passed by the Senate	H.R. 3773—House Amendment to the Senate Amendment
Short Title—"Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008" or the "FISA Amendments Act of 2008"	Short Title—"Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008" or the "FISA Amendments Act of 2008"
Limitation on Definition of Electronic Surveillance	
<p>Subsection 101(a) of the bill strikes the existing title VII of FISA and replaces it with a new title VII.</p> <p>Limitation on Definition of Electronic Surveillance: Under new section 701 of a new title VII of FISA, nothing in the definition of "electronic surveillance" under subsection 101(f) of FISA, 50 U.S.C. § 1801(f), shall be construed to encompass surveillance that is targeted in accordance with proposed title VII of the Foreign Intelligence Surveillance Act (FISA) at a person reasonably believed to be located outside the United States. Subsection 101(a)(2) of the bill.</p>	<p>Similar provision. Subsection 101(a) of the bill.</p> <p>No similar provision.</p>
Definitions	
<p>New section 702 of FISA: Definitions. See also new section 801 of FISA on definitions. Uses existing definitions from section 101 of FISA of the terms "agent of a foreign power," "Attorney General," "contents," "electronic surveillance," "foreign intelligence information," "foreign power," "minimization procedures," "person," "United States," and "United States person," except as specifically provided in the new title VII of FISA. Provides new definitions of "congressional intelligence committees," "Foreign Intelligence Surveillance Court" and "Court," "Foreign Intelligence Surveillance Court of Review" and "Court of Review," "electronic communication service provider," and "element of the intelligence community".</p>	<p>New section 701 of FISA: Definitions. Uses existing definitions from section 101 of FISA of the terms "agent of a foreign power," "Attorney General," "contents," "electronic surveillance," "foreign intelligence information," "foreign power," "minimization procedures," "person," "United States," and "United States person," except as specifically provided in the new title VIII of FISA. Provides new definitions of "congressional intelligence committees," "Foreign Intelligence Surveillance Court" and "Court," "Foreign Intelligence Surveillance Court of Review" and "Court of Review," "electronic communication service provider," and "intelligence community".</p>
Targeting of Persons Other Than U.S. Persons Reasonably Believed to be Outside the United States to Acquire Foreign Intelligence Information	
<p>Subsection 101(a)(2) of the bill, new section 703 of FISA: Permits Attorney General (AG) and the Director of National Intelligence (DNI) to jointly authorize, for up to 1 year, targeting of persons reasonably believed to be outside United States other than U.S. persons to acquire foreign intelligence information (see glossary for definition of Attorney General, subsection 101(g) of FISA, and of United States person, subsection 101(i) of FISA). Such an acquisition:</p> <p>—may not intentionally target any person known at the time of the acquisition to be located in the United States</p>	<p>Subsection 101(a)(2) of the bill, new section 702 of FISA: Permits the AG and DNI, <i>pursuant to a FISC order approving the AG/DNI certification, applicable targeting procedures and minimization procedures under new subsection 702(i)(3) or an emergency determination under subsection 702(g)(1)(B)</i>, to jointly authorize for up to 1 year targeting of non-U.S. persons reasonably believed to be located outside the United States to acquire foreign intelligence information. [Emphasis added.] Such an acquisition:</p> <p>—may not intentionally target any person known at the time of acquisition to be located in the United States;</p>

H.R. 3773 (S. 2248) as passed by the Senate

—may not intentionally target a person reasonably believed to be located outside the United States if *the purpose* of the acquisition is to target a particular, known person reasonably believed to be in the United States, except in accordance with title I (dealing with electronic surveillance) or title III (dealing with pen registers and trap and trace devices) of FISA.

—may not intentionally target a U.S. person reasonably believed to be located outside the U.S., except in accordance with new sections 704, 705, or 706 of FISA;

—shall not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the U.S.

—must be conducted in a manner consistent with the fourth amendment to the U.S. Constitution. New subsection 703(a), (b).

Conduct of acquisition: Such an acquisition may be conducted only in accordance with an AG/DNI certification; targeting procedures; and minimization procedures. New subsection 703(c).

H.R. 3773—House Amendment to the Senate Amendment

—may not intentionally target a person reasonably believed to be located outside the United States in order to target a particular, known person reasonably believed to be in the United States;

may not intentionally target a U.S. person reasonably believed to be located outside the United States;

—may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and

—shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States. New subsection 702(a), (b).

Conduct of acquisition: Such an acquisition may only be conducted in accordance with an AG/DNI certification under new subsection 702(g) or an emergency determination under new subsection 702(g)(1)(B), targeting procedures, minimization procedures, and guidelines for compliance with the above limitations and with requirements for filing an application under section 104 for electronic surveillance or 303 for physical searches where required. New subsections 702(c), (f).

Adoption of Targeting Procedures, Minimization Procedures, Certifications, and Guidelines

Adoption of targeting procedures: Under new subsection 703(d), the AG, in consultation with the DNI, shall adopt targeting procedures that are reasonably designed to ensure that any acquisition authorized under subsection 703(a) is limited to targeting persons reasonably believed to be located outside the United States and does not result in the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.

Similar provision, new subsection 702(d).

Adoption of minimization procedures: Under new subsection 703(e), the AG, in consultation with the DNI, shall adopt minimization procedures that meet the definition of minimization procedures under subsection 101(h) or subsection 301(4) of FISA for acquisitions authorized under new subsection 703(a).

Similar provision, new subsection 702(e).

H.R. 3773 (S. 2248) as passed by the Senate

Requirements for AG/DNI certification as prerequisite to an acquisition, new subsection 703(f) of FISA: Subject to subparagraph (B), before initiation of an acquisition, the AG and the DNI shall provide, under oath, a written certification attesting that:

—there are reasonable procedures in place for determining that the acquisition authorized is targeted at persons reasonably believed to be located outside the United States and that such procedures have been approved by, or will be submitted within 5 days for approval by, the FISC;

—there are reasonable procedures in place for determining that the acquisition authorized under subsection 703(a) does not result in the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States, and that such procedures have been approved by, or will be submitted within 5 days for approval by, the FISC;

No similar provision.

—the procedures are consistent with the requirements of the fourth amendment to the U.S. Constitution and do not permit the intentional targeting of any person who is known at the time of acquisition to be located in the United States or the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States;

—a significant purpose of the acquisition is to obtain foreign intelligence information;

—under new subsection 703(e), the minimization procedures to be used with respect to such acquisition meet the definition of minimization procedures under subsection 101(h) (minimization procedures in connection with FISA electronic surveillance) or 301(4) (minimization procedures in connection with FISA physical searches) of FISA; and have been approved by, or will be submitted within 5 days for approval by, the FISC pursuant to new subsection 703(h)(4).

—the acquisition involves obtaining the foreign intelligence information from or with the assistance of an electronic communication service provider;

—the acquisition does not constitute electronic surveillance, as limited by section 701;

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

Requirements for AG/DNI certification, new subsection 702(g): Subject to subparagraph (B), if the AG and the DNI seek to authorize an acquisition under this section, the AG and the DNI shall provide, under oath, a written certification, attesting that:

—there are reasonable procedures in place for determining that the acquisition authorized is targeted at persons reasonably believed to be located outside the United States and such procedures have been submitted to the FISC; and

—there are reasonable procedures in place for determining that the acquisition does not result in the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States, and such procedures have been submitted to the FISC;

—guidelines have been adopted in accordance with subsection (f) to ensure compliance with the limitations in subsection (b) and to ensure that applications are filed under section 104 or section 303, if required by this Act;

—the targeting procedures, minimization procedures, and guidelines referred to in clauses 702(g)(2)(A)(i), (ii), and (iii) are consistent with the requirements of the fourth amendment to the Constitution of the United States;

—a significant purpose of the acquisition is to obtain foreign intelligence information;

—the minimization procedures to be used with respect to such acquisition meet the definition of minimization procedures under section 101(h) or section 301(4) in accordance with new subsection 702(e) and have been submitted to the FISC;

—the acquisition involves obtaining the foreign intelligence information from or with the assistance of an electronic communication service provider;

No similar provision.

—the acquisition complies with the limitations in subsection (b);

H.R. 3773 (S. 2248) as passed by the Senate

—the certification must be supported, as appropriate, by the affidavit of any appropriate official in the area of national security who is appointed by the President, by and with the consent of the Senate; or the head of any element of the intelligence community.

No similar provision.

—Such a certification is not required to identify the specific facilities, places, premises, or property at which the acquisition will be directed or conducted.

Exception to certification requirement where immediate government action required : Under new subsection 703(f)(1)(B), if the AG and the DNI determine that immediate federal government action is required and time does not permit the preparation of a certification before initiation of an acquisition, the AG and the DNI shall prepare a certification, including such determination, as soon as possible but in no event more than 7 days after the determination is made.

Submission of certification and supporting affidavit to FISC: The AG must transmit a copy of a certification and any supporting affidavit under seal to the FISC as soon as possible within 5 days after such certification is made, there to be maintained under security measures adopted by the Chief Justice of the United States and the AG, in consultation with the DNI. The certification shall be subject to judicial review under subsection 703(h).

H.R. 3773—House Amendment to the Senate Amendment

—the certification must be supported, as appropriate, by the affidavit of any appropriate official in the area of national security who is appointed by the President, by and with the consent of the Senate; or the head of an element of the intelligence community;

—the certification must include—

—an effective date for the authorization that is between 30 and 60 days from the submission of the written certification to the court; or

—if the acquisition has begun or will begin in less than 30 days from the submission of the written certification to the court—

—the date the acquisition began or the effective date for the acquisition;

—a description of why implementation was required in less than 30 days from the submission of the written certification to the court; and

—if the acquisition is authorized under paragraph (1)(B), the basis for the determination that an emergency situation exists, immediate action by the government is required, and time does not permit the completion of judicial review prior to the initiation of the acquisition.

—A certification made under this subsection is not required to identify the specific facilities, places, premises, or property at which the acquisition will be directed or conducted.

Exception to certification requirement for emergency authorization: Under new subsection 702(g)(1)(B), if the AG and the DNI determine that an emergency situation exists, immediate action by the Government is required, and time does not permit the completion of judicial review pursuant to subsection (i) prior to the initiation of an acquisition, the AG and the DNI may authorize the acquisition and shall submit to the Foreign Intelligence Surveillance Court a certification under this subsection as soon as possible but in no event more than 7 days after such determination is made.

Submission of certification and supporting affidavit to FISC: The AG shall transmit a copy of a certification and any supporting affidavit under seal to the FISC before the initiation of an acquisition under this section, except in accordance with paragraph (1)(B). The AG shall maintain such certification under security measures adopted by the Chief Justice of the United States and the AG, in consultation with the DNI. The certification submitted pursuant to this subsection shall be subject to judicial review pursuant to subsection 702(i).

H.R. 3773 (S. 2248) as passed by the Senate

No similar provisions.

No similar provision.

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

Criteria for guidelines: The guidelines for compliance, which must be adopted by the AG in consultation with the DNI, are to contain specific criteria for determining whether a significant purpose of an acquisition is to acquire the communications of a specific U.S. person reasonably believed to be located in the United States. Such criteria shall include consideration of whether—

—the department or agency of the Federal Government conducting the acquisition has made an inquiry to another department or agency of the Federal Government to gather information on the specific U.S. person;

—the department or agency of the Federal Government conducting the acquisition has provided information that identifies the specific U.S. person to another department or agency of the Federal Government;

—the department or agency of the Federal Government conducting the acquisition determines that the specific U.S. person has been the subject of ongoing interest or repeated investigation by a department or agency of the Federal Government; and

—the specific U.S. person is a natural person.

Training with regard to guidelines: The Director of National Intelligence shall establish a training program for appropriate personnel of the intelligence community to ensure that the guidelines adopted pursuant to paragraph (1) are properly implemented.

Submission of guidelines to congressional intelligence and judiciary committees and to the FISC: The Attorney General shall submit the guidelines adopted pursuant to paragraph (1) to the congressional intelligence committees; the Committees on the Judiciary of the House of Representatives and the Senate; and the Foreign Intelligence Surveillance Court. New subsection 702(f).

Directives and Judicial Review of Directives

Directives to electronic communication service provider in connection with an acquisition authorized jointly by the AG and the DNI, new subsection 703(g) of FISA: The AG and the DNI may direct in writing an electronic communication service provider to immediately provide the government with all information, facilities, or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services that such electronic communication service provider is providing to the target; and to maintain under security procedures approved by the AG and the DNI any records concerning the acquisition or the aid furnished that such electronic communication service provider wishes to maintain.

Compensation: The federal government shall compensate, at the prevailing rate, an electronic communication service provider for providing information, facilities, or assistance.

Release from liability for electronic communication service providers who furnish aid to the government pursuant to such a directive: Notwithstanding any other law, no cause of action shall lie in any court against any electronic communication service provider for providing any information, facilities, or assistance in accordance with such a directive.

Challenging of directives: Permits an electronic communication service provider receiving such a directive to challenge it by filing a petition to modify it or set it aside with the FISC. Within 24 hours, the presiding judge of the FISC would assign the petition to a judge of the FISC petition review pool established under subsection 103(e)(1) of FISA, 50 U.S.C. § 103(e)(1).

Standard of review: The judge considering the petition to modify or set aside a directive may grant it only if the judge finds that the directive does not meet the requirements of new section 703 of FISA or is otherwise unlawful

Directives to electronic communication service provider in connection with an acquisition authorized jointly by the AG and the DNI pursuant to an order issued by the FISC in accordance with subsection 702(i)(3) or an emergency determination under subsection 702(g)(1)(B), new subsection 702(h) of FISA: The AG and the DNI may direct in writing an electronic communication service provider to immediately provide the government with all information, facilities, or assistance necessary to accomplish the acquisition authorized in accordance with this section in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services that such electronic communication service provider is providing to the target of the acquisition; and maintain under security procedures approved by the AG and the DNI any records concerning the acquisition or the aid furnished that such electronic communication service provider wishes to maintain.

Similar provision.

Similar provision.

Similar provision.

Similar provision, except reference is to new section 702 of FISA.

H.R. 3773 (S. 2248) as passed by the Senate**H.R. 3773—House Amendment to the Senate Amendment**

Procedures for Initial Review of Petition: A judge shall conduct an initial review not later than 5 days after being assigned a petition. If the judge determines that the petition consists of claims, defenses, or other legal contentions that are not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, the judge shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition and order the recipient to comply with the directive or any part of it. Upon making such a determination or promptly thereafter, the judge shall provide a written statement for the record of the reasons for a determination under this subparagraph.

Similar provision.

Procedures for Plenary Review: If a judge determines that a petition requires plenary review, the judge shall affirm, modify, or set aside the directive that is the subject of that petition within 30 days of assignment of the petition to that judge. Exception to 30 day time limit: The judge may extend the 30 day time frame as needed to comport with the Fifth Amendment due process clause. Such extension must be by order stating the reasons therefor. Unless the judge sets aside the directive, he or she shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the records of the reasons for a determination under this subparagraph.

Similar provision.

Continued Effect: Any directive not explicitly modified or set aside under this paragraph shall remain in full effect.

Similar provision.

Contempt of Court: Failure to obey an order of the FISC issued under this paragraph may be punished as contempt of court.

Similar provision.

Enforcement of new subsection 703(h) directives: In a case of failure to comply with such a directive, the AG may petition the FISC for an order to compel compliance. The presiding judge of the FISC shall assign the case to a judge of the petition review pool of the FISC within 24 hours of filing of the petition.

Enforcement of new subsection 702(g) directives: Similar provisions.

H.R. 3773 (S. 2248) as passed by the Senate

Standard for review: A judge considering a petition filed under subparagraph (A) shall issue an order requiring the electronic communication service provider to comply with the directive or any part of it, as issued or as modified, if the judge finds that the directive meets the requirements of this section, and is otherwise lawful.

Procedures for review: The judge shall render a determination not later than 30 days after being assigned a petition filed under subparagraph (A), unless the judge, by order for reasons stated, extends that time if necessary to comport with the due process clause of the fifth amendment to the Constitution of the United States. The judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

Contempt of Court: Failure to obey an order of the FISC issued under this paragraph may be punished as contempt of court.

Service of process: Any process under this paragraph may be served in any judicial district in which the electronic communication service provider may be found.

Appeal to the Foreign Intelligence Surveillance Court of Review (FISCR) of an FISC order affirming, modifying, or setting aside a directive, or punishing failure to obey such an order: An appeal to the FISCR may be filed by the government or an electronic communication service provider receiving such a directive. The FISCR shall have jurisdiction to consider such a petition and shall provide a written statement for the record of the reasons for a decision under this paragraph.

Certiorari to the U.S. Supreme Court: The government or an electronic communication service provider receiving a such a directive may petition the U.S. Supreme Court for review of an such an FISCR decision. The record for such review shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

Judicial Review of Certifications, Targeting Procedures and Minimization Procedures

Jurisdiction of FISC: The FISC shall have jurisdiction to review any certification required by new subsection 703(c), and targeting procedures and minimization procedures adopted under new subsections 703(d) and (e).

H.R. 3773—House Amendment to the Senate Amendment

No similar provision.

Procedures for review: A judge considering such a petition shall issue an order requiring the electronic communication service provider to comply with the directive or any part of it, as issued or as modified not later than 30 days after being assigned the petition if the judge finds that the directive meets the requirements of this section and is otherwise lawful. The judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

Similar provision.

Similar provision.

Similar provision.

Similar provision.

Jurisdiction of FISC: The FISC shall have jurisdiction to review any certification submitted pursuant to new subsection 702(g), and targeting procedures and minimization procedures adopted under new subsections 702(d) and (e).

H.R. 3773 (S. 2248) as passed by the Senate

Submission of certifications, targeting procedures or minimization procedures to the FISC: Certifications, targeting procedures, and minimization procedures are to be submitted by the AG to the FISC within 5 days after making or amending the certification or adopting the procedures.

No similar provision.

Judicial review of certifications: Under subsection 703(h), the FISC shall review the certification to determine whether the certification contains all the required elements.

Judicial review of targeting procedures: Under subsection 703(h), the FISC shall review the targeting procedures required by subsection (d) to assess whether the procedures are reasonably designed to ensure that the acquisition authorized under subsection (a) is limited to the targeting of persons reasonably believed to be located outside the United States and does not result in the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.

Judicial review of minimization procedures: Under subsection 703(h) of FISA, the FISC shall assess whether such procedures meet the definition of minimization procedures under section 101(h) or section 301(4).

Approval of certifications, targeting procedures and minimization procedures by the FISC: Under new subsection 703(h)(5) of FISA, if the FISC finds the certification contains all such required elements and the targeting procedures and the minimization procedures meet the required standards and are consistent with the fourth amendment to the U.S. Constitution, the court must enter an order approving the continued use of the procedures for the acquisition authorized under new subsection 703(a) of FISA.

H.R. 3773—House Amendment to the Senate Amendment

No similar provision.

Time period for review: The Court shall review the certification submitted pursuant to new subsection 702(g) and the targeting and minimization procedures required by new subsections 702(d) and (e) and approve or deny an order under this subsection not later than 30 days after the date on which a certification is submitted.

Judicial review of certifications: The FISC shall review the certification to determine whether the certification contains all the required elements.

Similar provision, new subsection 702(i).

Similar provision, new subsection 702(i) of FISA.

Approval of certifications, targeting procedures and minimization procedures by the FISC: If the FISC finds that a certification submitted pursuant to new subsection 702(g) of FISA contains all of the required elements and that the procedures required by new subsections 702(d) and (e) are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States, the FISC shall enter an order approving the certification and the use of the procedures for the acquisition.

H.R. 3773 (S. 2248) as passed by the Senate

Correction of deficiencies: If the FISC finds that a certification required by new subsection 703(f) of FISA does not contain all of the required elements, or that the procedures required by new subsections 703(d) and (e) are not consistent with the requirements of those subsections or the fourth amendment to the Constitution of the United States, the Court shall issue an order directing the Government to, at the Government's election and to the extent required by the FISC's order, correct any deficiency identified by the FISC's order not later than 30 days after the date the FISC issues the order; or cease the acquisition authorized under new subsection 703(a). Simultaneously with the orders, the FISC must provide a written statement for the record of the reasons for its decision.

Appeals of any FISC order under section 703 to FISCR and petitions for certiorari to the U.S. Supreme Court: Under new subsection 703(h)(6) of FISA, the government may appeal any FISC order under this section to the FISCR and may file a petition for certiorari to the U.S. Supreme Court to review an FISCR decision. The FISCR must provide a written statement of the reasons for its decision.

H.R. 3773—House Amendment to the Senate Amendment

Correction of deficiencies: If the FISC finds that a certification submitted pursuant to new subsection 702(g) of FISA does not contain all of the required elements or that the procedures required by subsections 702(d) and (e) are not consistent with the requirements of those subsections or the fourth amendment to the Constitution of the United States—

—in the case of a certification submitted in accordance with new subsection 702(g)(1)(A) of FISA, the Court shall deny the order, identify any deficiency in the certification or procedures, and provide the Government with an opportunity to correct such deficiency; and

—in the case of a certification submitted in accordance with new subsection 702(g)(1)(B) of FISA, the Court shall issue an order directing the Government to, at the Government's election and to the extent required by the Court's order:

—correct any deficiency identified by the Court not later than 30 days after the date the Court issues the order; or

—cease the acquisition authorized under new subsection 702(g)(1)(B) of FISA.

Simultaneously with the orders, the FISC must provide a written statement for the record of the reasons for its decision.

Similar provision, new subsection 702(i)(4) of FISA.

H.R. 3773 (S. 2248) as passed by the Senate

Continuation of acquisition pending rehearing or appeal. Any acquisition affected by an order under new subsection 703(h)(5) of FISA to correct deficiencies within 30 days or to cease the acquisition may continue during the pendency or any rehearing or the order by the FISC en banc. (See subsection 109(b) of the bill creating FISC en banc authority. Section 109 of the bill gives the FISC authority, on its own initiative, or upon the request of the government or of a party under subsections 501(f) or new subsections 703(h)(4) or (5) of FISA, to hold a hearing or rehearing en banc when ordered by a majority of the FISC judges upon a determination that en banc consideration is necessary to secure or maintain uniformity of the court's decisions, or the proceeding involves a question of exceptional importance.)

—If the government appeals an order under section 703 of FISA, any acquisition affected by an order under subsection 703(h)(5)(B) may continue until the FISC enters an order regarding implementation of a correction order pending appeal under subsection 703(h)(5)(C).

Implementation of any or all of a deficiency order pending appeal: Under subsection 703(h)(6)(C) of FISA, not later than 60 days after the filing of an appeal of an FISC order under subsection 703(h)(5)(B), directing the correction of a deficiency, the FISC shall determine and enter a corresponding order regarding whether all or any part of the correction order, as issued or as modified, shall be implemented during the pendency of the appeal.

Judicial Proceedings

Expedited proceedings: Judicial proceedings shall be as expeditious as possible. New subsection 703(i) of FISA.

No similar provision.

All petitions under new section 703 of FISA are to be filed under seal. Upon the request of the government, any government submission or portions thereof which may include classified information shall be reviewed *ex parte* and *in camera*. Records of such proceedings must be maintained under security measures adopted by the Chief Justice of the United States in consultation with the AG and the DNI. A directive or an order granted under new section 703 of FISA must be retained for at least 10 years. New subsection 703(k) of FISA.

H.R. 3773—House Amendment to the Senate Amendment

Continuation of acquisition pending rehearing or appeal: Any acquisition affected by an order under new subsection 702(i)(3)(B)(ii) of FISA (dealing with a certification submitted to the FISC within 7 days of an emergency authorization) to correct deficiencies within 30 days or to cease the acquisition may continue during the pendency or any rehearing or the order by the FISC en banc. (See subsection 109(b) of the bill creating FISC en banc authority. Section 109 of the bill gives the FISC authority, on its own initiative, or upon the request of the government or of a party under subsections 501(f) or new subsections 703(h)(4) or (5) of FISA, to hold a hearing or rehearing en banc when ordered by a majority of the FISC judges upon a determination that en banc consideration is necessary to secure or maintain uniformity of the court's decisions, or the proceeding involves a question of exceptional importance.)

—If the government appeals an order under section 702 of FISA, any acquisition affected by an order under new subsection 702(i)(3)(B)(ii) (dealing with a certification submitted to the FISC within 7 days of an emergency authorization) to correct deficiencies within 30 days or to cease the acquisition may continue until the FISC enters an order under new subsection 702(i)(4)(A).

Implementation of any or all of a deficiency order pending appeal: Under subsection 702(i)(3)(C) of FISA, not later than 60 days after the filing of an appeal of an FISC order under subsection 702(i)(3)(B), directing the correction of a deficiency, the FISC shall determine and enter a corresponding order regarding whether all or any part of the correction order, as issued or as modified, shall be implemented during the pendency of the appeal. The Government shall conduct an acquisition affected by such an order issued under paragraph (3)(B)(ii) in accordance with an order under issued under subsection 702(i)(3)(C) or cease the acquisition.

Expedited proceedings: Judicial proceedings under this section shall be conducted as expeditiously as possible. New subsection 702(j)(1) of FISA.

Time limits: A time limit for a judicial decision in this section shall apply unless the Court, the Court of Review, or any judge of either the Court or the Court of Review, by order for reasons stated, extends that time for good cause. New subsection 702(j)(2) of FISA.

Similar provision. New subsection 703(k) of FISA.

Replacement and Reauthorization of Authorizations in Effect; Schedule

No similar provision.

Replacement of Authorizations in Effect under PAA: Under new subsection 702(i)(5)(A) of FISA, if the AG and the DNI seek to replace an authorization issued under section 105B of FISA, as added by section 2 of the PAA, the AG and DNI shall, to the extent practicable, submit to the FISC a certification under new subsection 702(g) of FISA, and the targeting and minimization procedures and compliance guidelines required by new subsections 702(d), (e), and (f) of FISA at least 30 days before the expiration of the PAA authorization involved.

No similar provision.

Reauthorization of Authorizations in Effect: Under new subsection 702(i)(5)(B), if the AG and the DNI seek to replace an authorization issued under this section (which appears to refer to authorizations issued under new section 702 of FISA), the AG and DNI shall, to the extent practicable, submit to the FISC a certification under new subsection 702(g) of FISA, and the targeting and minimization procedures and compliance guidelines required by new subsections 702(d), (e), and (f) of FISA at least 30 days before the expiration of the authorization involved.

No similar provision.

Consolidated submissions: Under new subsection 702(i)(5)(C) of FISA, the AG and DNI shall, to the extent practicable, annually submit to the FISC a consolidation of certifications under subsection (g) for reauthorization of authorizations in effect; the targeting procedures, minimization procedures, and compliance guidelines required by new subsections 702(d), (e), and (f) of FISA; and the annual review required by new subsection 702(l)(3) to be conducted by each element of the intelligence community conducting an acquisition under new subsection 702(a) to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition.

—To the extent practicable, the AG and DNI shall schedule the completion of the annual review required under new subsection 703(l)(3) and the semiannual assessment required under subsection 702(l)(1) so that they may be submitted to the FISC at the time of the consolidated submission under new subsection 702(i)(5)(C). New subsection 702(i)(5)(D) of FISA.

—This shall not be construed to preclude the DNI and AG from submitting certifications for additional authorizations at other times of the year as needed. New subsection 702(i)(5)(E) of FISA.

—At or before the end of the time period for which a certification and applicable targeting procedures and minimization procedures are approved by a FISC order under new section 702, the FISC may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning U.S. persons was acquired, retained, or disseminated. New subsection 702(i)(6) of FISA.

Assessments and Reviews

Semiannual Assessment: Not less than every six months, the AG and DNI shall assess compliance with targeting and minimization procedures. Assessments shall be submitted to the FISC and the congressional intelligence committees.

Agency Assessment: Inspectors General (IGs) of USDOJ and of any element of the intelligence community authorized to acquire foreign intelligence information under new subsection 703(a) of FISA are authorized to review compliance with targeting and minimization procedures by their department, agency, or element. In connection with such acquisitions, these IGs shall review the number of disseminated intelligence reports containing a reference to a United States person identity and the number of U.S. person identities subsequently disseminated by the element concerned in response to requests for identities that were not referred to by name or title in the original reporting; and the number of targets later determined to be located in the United States and, to the extent possible, whether their communications were reviewed. Each review shall be provided to the AG, the DNI, and the congressional intelligence committees.

Annual Review: The head of an element of the intelligence community conducting an acquisition under new subsection 703(a) of FISA shall direct that element to conduct an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition. Such annual review shall include the number of disseminated intelligence reports containing a reference to a U.S. person identity; the number of U.S. person identities subsequently disseminated by that element in response to requests for identities that were not referred to by name or title in the original reporting; and the number of targets that were later determined to be located in the United States and, to the extent possible, whether their communications were reviewed. The annual review shall also include a description of any procedures developed by the head of an element of the intelligence community and approved by the DNI to assess, in a manner consistent with national security, operational requirements and the privacy interests of U.S. persons, the extent to which the acquisitions authorized under new subsection 703(a) of FISA acquire the communications of U.S. persons, as well as the results of any such assessment.

Use of Review: The head of each element of the intelligence community that conducts such an annual review shall use each such review to evaluate the adequacy of the minimization procedures utilized by that element or the application of the minimization procedures to a particular acquisition authorized under new subsection 703(a) of FISA.

Semiannual Assessments: Not less than every six months, the AG and DNI shall assess compliance with targeting and minimization procedures and compliance guidelines. Assessments shall be submitted to the FISC, the congressional intelligence committees and the House and Senate Judiciary Committees. New subsection 702(l).

Agency Assessment: Similar, but not identical provision. The points of difference are: The IGs of USDOJ and of any element of the intelligence community authorized to acquire foreign intelligence information under new subsection 702(a) of FISA are authorized to review compliance with targeting and minimization procedures *and compliance guidelines by their department or element*. The review shall be provided not only to the AG, the DNI and the congressional intelligence committees, *but also to the House and Senate Judiciary Committees and the FISC*. [Emphasis added.] New subsection 702(l)(2).

Similar, but not identical, provision. New subsection 703(l)(3) requires the head of the element of the intelligence community to conduct the annual review.

Similar provision.

H.R. 3773 (S. 2248) as passed by the Senate

Provision of Review: Each such annual review shall be provided by the head of the relevant intelligence community element to the FISC, the AG, the DNI, and the congressional intelligence committees.

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

Similar, but not identical provision. Such annual review would be provided not only to the FISC, the AG, the DNI, and the congressional intelligence committees, but also to the House and Senate Judiciary Committees.

Construction: Under new subsection 702(m) of FISA, Nothing in FISA shall be construed to require an application under section 104 of FISA for an acquisition that is targeted in accordance with section 702 at a person reasonably believed to be located outside the United States.

Acquisitions Inside the United States Targeted at U.S. Persons Located Outside the United States

Certain acquisitions under new subsection 704 of FISA inside the United States targeted at U.S. persons outside the United States. Under new subsection 704(a) of FISA, the FISC has jurisdiction to enter an order approving targeting of a U.S. person reasonably believed to be located outside the United States to acquire foreign intelligence information, if such an acquisition constitutes electronic surveillance as defined under subsection 101(f) of FISA, regardless of the limitation in new section 701 of FISA, or the acquisition of stored electronic communications or stored electronic data that requires an order under FISA, and such acquisition is conducted in the United States.

—**Limitation:** if a U.S. person so targeted is reasonably believed to be located in the U.S. during the pendency of an order issued under new subsection 704(c) of FISA, then the acquisition must cease until authority, other than under new section 704, is obtained under FISA or the targeted U.S. person is again reasonably believed to be located outside the U.S. during the pendency of an order issued under new subsection 704(c).

—**Application:** new subsection 704(b) of FISA sets out the requirements for an application for a FISC order authorizing targeting of a U.S. person reasonably believed to be located outside the United States for a period of up to 90 days. Each application shall be made by a federal officer in writing upon oath or affirmation to a judge having jurisdiction under subsection 704(a)(1) of FISA. Each application shall require the approval of the AG based upon the AG's finding that it satisfies the criteria and requirements of such application, as set forth in this section. An application shall include the identity of the federal officer making the application;

(B) the identity, if known, or a description of the U.S. person who is the target of the acquisition;

(C) a statement of the facts and circumstances relied upon to justify the applicant's belief that the U.S. person who is the target of the acquisition is—

(i) a person reasonably believed to be located outside the United States; and

(ii) a foreign power, an agent of a foreign power, or an officer or employee of a

Certain acquisitions under new subsection 703 of FISA inside the United States of U.S. persons outside the United States. Under new subsection 703(a) of FISA, the FISC has jurisdiction to *review an application and* to enter an order approving targeting of a U.S. person reasonably believed to be located outside the United States to acquire foreign intelligence information *if the acquisition constitutes electronic surveillance or the acquisition of stored electronic communications or stored electronic data that requires an order under FISA* and such acquisition is conducted within the United States. [Emphasis added.]

—**Limitation:** if a U.S. person targeted under subsection 703(a) is reasonably believed to be located in the United States during the pendency of an order issued under new subsection 703(c), such acquisition shall cease unless authority, other than under new section 703, is obtained pursuant to FISA or the targeted U.S. person is again reasonably believed to be located outside the United States during the pendency of an order issued pursuant to new subsection 703(c).

—**Application:** Similar provision in new subsection 703(b) of FISA.

foreign power;

(D) a statement of the proposed minimization procedures that meet the definition of minimization procedures under section 101(h) (with respect to electronic surveillance) or section 301(4) (with respect to physical searches);

(E) a description of the nature of the information sought and the type of communications or activities to be subjected to acquisition;

(F) a certification made by the AG or an official specified in section 104(a)(6) that—

(i) the certifying official deems the information sought to be foreign intelligence information;

(ii) a significant purpose of the acquisition is to obtain foreign intelligence information;

(iii) such information cannot reasonably be obtained by normal investigative techniques;

(iv) designates the type of foreign intelligence information being sought according to the categories described in section 101(e); and

(v) includes a statement of the basis for the certification that—

(I) the information sought is the type of foreign intelligence information designated; and

(II) such information cannot reasonably be obtained by normal investigative techniques;

(G) a summary statement of the means by which the acquisition will be conducted and whether physical entry is required to effect the acquisition;

(H) the identity of any electronic communication service provider necessary to effect the acquisition, provided, however, that the application is not required to identify the specific facilities, places, premises, or property at which the acquisition authorized under this section will be directed or conducted;

(I) a statement of the facts concerning any previous applications that have been made to any judge of the FISC involving the U.S. person specified in the application and the action taken on each previous application; and

(J) a statement of the period of time for which the acquisition is required to be maintained, provided that such period of time shall not exceed 90 days per application.

(2) OTHER REQUIREMENTS OF THE ATTORNEY GENERAL- The AG may require any other affidavit or certification from any other officer in connection with the application.

(3) OTHER REQUIREMENTS OF THE JUDGE- The judge may require the applicant to furnish such other information as may be necessary to make the findings required by subsection 704(c)(1) of FISA.

—**Order:** new subsection 704(c) of FISA sets out the requirements for a FISC order under this section authorizing targeting of a U.S. person reasonably believed to be outside the U.S. and the scope of judicial review. To issue such an order, a FISC judge must find, in part, that, on the basis of facts submitted by the applicant, there is probable cause that the U.S. person who is the target of the acquisition is reasonably believed to be located outside the U.S., and is a foreign power, an agent of a foreign power, or an officer or employee of a foreign power. Review by a FISC judge is limited to that needed to make the findings required. The Government may appeal a FISC judge's determination (1) that the facts submitted in the application are insufficient to establish probable cause to issue an order; (2) that the proposed minimization procedures do not meet the definition of minimization procedures in subsection 101(h) or 301(4) of FISA; (3) that the application does not contain all of the required elements; or (4) that the certification(s) made by the AG or an official specified in subsection 104(a)(6) is (are) clearly erroneous on the basis of the statement upon which the certification(s) is (are) based and any other information that the judge may require as may be necessary to make the required findings. The Government may seek appellate review of such FISC judge's determination before the FISCR, and may file a petition for certiorari to the U.S. Supreme Court.

—**Duration:** A section 704 order may be for up to 90 days, and may be renewed for additional 90-day periods upon submission of renewal applications. The original applications and renewal applications must satisfy the same criteria under new subsection 704(b). New subsection 704(c)(6).

—**Compliance review:** At or before the end of the period for which an acquisition is approved by a FISC order or extension under new section 704, the judge may assess compliance with applicable minimization procedures by reviewing the circumstances under which information concerning U.S. persons was acquired, retained, or disseminated.

—**Order:** Similar provision, new subsection 703(c) of FISA.

—**Duration:** Similar provision, new subsection 703(c)(6).

—**Compliance review:** Similar provision, new subsection 703(c)(7).

H.R. 3773 (S. 2248) as passed by the Senate

—Emergency authorization: New subsection 704(d) permits emergency authorization by the AG of an acquisition of foreign intelligence information for which an order under subsection 704(c) may be obtained, if the AG reasonably determines that an emergency situation exists with respect to the acquisition of such foreign intelligence information before an order under subsection 704(c) may with due diligence be obtained; and that the factual basis for issuance of such an order exists. The AG, or his designee, must give a FISC judge notice at the time of the emergency authorization, and an application for a court order under section 704 must be made as soon as practicable within 7 days after the emergency authorization of the acquisition. Minimization procedures required for issuance of a court order under section 704 must be followed during an emergency authorization. An emergency authorization must be terminated when the information sought is obtained, when the application for an order is denied, or when 7 days from the time of the emergency authorization expires, whichever is earliest. Unless the target of the acquisition is determined to be a non-U.S. person during the 7-day period, if no court order is issued approving the emergency acquisition then (1) no information obtained or evidence derived from the emergency acquisition shall be received in evidence or otherwise disclosed in any proceeding before a federal, state, or local authority; and (2) no information concerning any U.S. person acquired from such emergency acquisition shall subsequently be used or disclosed in any other manner by federal officers or employees without the consent of that U.S. person, except with the approval of the AG if the information indicates a threat of death or serious bodily harm to any person.

—Release from liability: Under new subsection 704(e) of FISA, notwithstanding any other law, no cause of action shall lie in any court against any electronic communication service provider for providing any information, facilities, or assistance in accordance with an order or request for emergency assistance under new subsection 704(c) or (d).

—Appeal: Under new subsection 704(f) of FISA, the Government may seek appellate review of a section 704 FISC order before the FISCR, and may file a petition for certiorari to the U.S. Supreme Court.

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

—Emergency authorization: Similar provision. New subsection 703(d).

—Release From Liability: Under new subsection 703(e) of FISA, notwithstanding any *other provision of law*, no cause of action shall lie in any court against any electronic communication service provider for providing any information, facilities, or assistance in accordance with an order or request for emergency assistance issued pursuant to subsection (c) or (d). [Emphasis added.]

—Appeal: Similar provision, new subsection 703(f).

—Construction: Nothing in this Act shall be construed to require an application under section 104 of FISA for an acquisition that is targeted in accordance with this section at a person reasonably believed to be located outside the United States.

Other Acquisitions Targeting United States Persons Outside the United States

Other acquisitions targeting U.S. persons outside the U.S. under new section 705 of FISA.

Jurisdiction and Scope: The FISC has jurisdiction to enter orders under subsection 705(c). Section 705 prohibits any element of the intelligence community from intentionally targeting, for purposes of acquiring foreign intelligence information, a U.S. person reasonably believed to be located outside the U.S. under circumstances in which the targeted U.S. person has a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the U.S. for law enforcement purposes, *unless* a FISC judge has entered an order or the AG has authorized an emergency acquisition under FISA.

Limitations:

—If a U.S. person so targeted is reasonably believed to be located in the U.S. during the pendency of an order issued under new subsection 705(c) of FISA, then such acquisition must cease until authority, other than under new section 704, is obtained under FISA or the targeted U.S. person is again reasonably believed to be located outside the U.S. during the pendency of such order. New subsection 705(a)(3)(A).

—**Applicability:** Under new subsection 705(a)(3)(B) of FISA, if the acquisition is to be conducted inside the United States and could be authorized under new section 704, then the section 704 procedures apply, unless an order or emergency acquisition authority has been issued under another provision of FISA other than section 705.

—**Application:** New subsection 705(b) of FISA sets out the requirements for an application for a FISC order authorizing targeting of a U.S. person reasonably believed to be located outside the U.S. Each application shall be made in writing under oath by a federal officer to a FISC judge. Each application shall require the approval of the AG based upon the AG’s finding that it satisfies the criteria and requirements set forth in subsection 705(b). These include:

—the identity, if known, or a description of the specific United States person who is the target of the acquisition;

—a statement of the facts and circumstances relied upon to justify the applicant’s belief that the United States person who is the target of the acquisition is a person reasonably believed to be located outside the United States; and a foreign power, an agent of a foreign power, or an officer or employee of a foreign power;

Other acquisitions targeting U.S. persons outside the United States under new section 704 of FISA.

Jurisdiction and Scope: The FISC has jurisdiction to enter orders under subsection 704(c). Section 704 provides that *no department or agency of the federal government* may intentionally target, for the purpose of acquiring foreign intelligence information, a U.S. person reasonably believed to be located outside the United States under circumstances in which the targeted U.S. person has a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes, *unless* a FISC judge has entered an order with respect to such targeted U.S. person or the AG has authorized an emergency acquisition pursuant to subsection 704(c) or (d) or any other provision of FISA.

Limitations:

Similar, but not identical provision. If a targeted United States person is reasonably believed to be in the United States during the pendency of an order issued pursuant to subsection 704(c), *acquisitions relating to such targeted U.S. person shall cease* unless authority is obtained pursuant to FISA or the targeted U.S. person is again reasonably believed to be located outside the United States during the pendency of such order. [Emphasis added.] New subsection 704(a)(3)(A).

—**Applicability:** Under new subsection 704(a)(3)(B) of FISA, if the acquisition is to be conducted inside the United States and could be authorized under new section 703, *then the acquisition may only be conducted if authorized under section 703 or in accordance with another provision of FISA other than section 704.*

—**Application:** Similar, but not identical provision. New subsection 704(b) of FISA sets out the requirements for an application for a FISC order authorizing targeting of a U.S. person reasonably believed to be located outside the U.S. Each application shall be made in writing under oath by a federal officer to a FISC judge. Each application shall require the approval of the AG based upon the AG’s finding that it satisfies the criteria and requirements set forth in subsection 704(b). These criteria and requirements differ in two respects from the Senate version of the bill. The House amendment to the Senate amendment to H.R. 3773 requires that the application include the identity of the federal officer making the application, while the Senate amendment to H.R. 3773 does not. In addition, the House bill specifies that the definition of minimization procedures under section 101(h) of FISA apply in the case of electronic surveillance, while the definition of minimization procedures in subsection 301(4) of FISA apply in the case of a physical search.

—a statement of the proposed minimization procedures that meet the definition of minimization procedures under section 101(h) or section 301(4);

—a certification made by the AG, an official specified in section 104(a)(6) of FISA, or the head of an element of the intelligence community that the certifying official deems the information sought to be foreign intelligence information; and that a significant purpose of the acquisition is to obtain foreign intelligence information;

—a statement of the facts concerning any previous applications that have been made to any judge of the FISC involving the U.S. person specified in the application and the action taken on each previous application; and

—a statement of the period of time for which the acquisition is required to be maintained, provided that such period of time shall not exceed 90 days per application.

—**Order:** New subsection 705(c) of FISA sets out the requirements for an ex parte FISC order under this section finding that the all of the applicable requirements in subsection 705(c)(1) have been satisfied. The subsection also specifies the scope of judicial review of the FISC order.

—To issue such an order, a FISC judge must find, in part, that, on the basis of facts submitted by the applicant, there is probable cause to believe that the U.S. person who is the target of the acquisition is reasonably believed to be located outside the U.S.; and is a foreign power, an agent of a foreign power, or an officer or employee of a foreign power. In making such a probable cause determination, a FISC judge may consider past activities of the target and facts and circumstances related to future activities of the target. No U.S. person may be considered a foreign power, an agent of a foreign power, or an officer or employee of a foreign power solely on the basis of activities protected by the first amendment of the U.S. Constitution.

—The FISC judge must also find that the dissemination provisions of the proposed minimization procedures meet the definition of minimization procedures under subsection 101(h) or subsection 301(4); that the application which has been filed contains all statements and certifications required by subsection 705(b), and that the certification provided under subsection 705(b)(4) is not clearly erroneous on the basis of the information furnished under subsection 705(b).

—Review by an FISC judge is limited to that needed to make the findings required. The FISC judge does not have jurisdiction to review the means by which an acquisition under section 705 may be conducted. New subsection 705(c)(3)(A).

—**Order:** Under new subsection 704(c) of FISA, where an application has been made under subsection 704(b), the FISC shall enter an ex parte order as requested or as modified if it finds that the applicable requirements in subsection 704(c)(1) have been satisfied. The subsection also specifies the scope of judicial review of the FISC order.

—These requirements differ from those in the Senate bill in two respects. First, the FISC must find as to whether the application has been made by a federal officer and approved by the AG. Second, the FISC is explicitly required to make a finding as to whether the minimization procedures, *in the case of an electronic surveillance*, meet the definition under subsection 101(h) of FISA, and, *in the case of a physical search*, meet the definition in subsection 310(4) of FISA. While the application of the two definitional sections, respectively, to these two types of investigative techniques may be seen as implicit in the Senate bill, it is not explicit.

Similar provision, new subsection 704(c)(3)(A).

H.R. 3773 (S. 2248) as passed by the Senate

—Appeal to the FISC of an FISC judge’s decision under section 705 and petition of certiorari to the U.S. Supreme Court from an FISC decision:

Under new subsections 705(c)(3) and (e), the Government may appeal a FISC judge’s written determination (1) that the facts submitted in the application are insufficient to establish probable cause to issue an order; (2) that the proposed minimization procedures do not meet the definition of minimization procedures in subsection 101(h) or 301(4) of FISA; or (3) that the certification made by the AG, an official specified in subsection 104(a)(6) of FISA, or the head of an element of the intelligence community is clearly erroneous on the basis of the information furnished in the application. The Government may seek appellate review of such FISC judge’s determination before the FISC, and may seek review of the FISC’s decision by filing a petition for certiorari to the U.S. Supreme Court.

—Duration: A section 705 order may be for up to 90 days, and may be renewed for additional 90-day periods upon submission of renewal applications. The original applications and renewal applications must satisfy the same criteria under new subsection 705(b).

—Compliance review: At or before the end of the period for which an acquisition is approved by a FISC order or extension under new section 705, the judge may assess compliance with applicable minimization procedures by reviewing the circumstances under which information concerning U.S. persons was acquired, retained, or disseminated. New subsection 705(c)(5) of FISA.

—Emergency authorization: New subsection 705(d) permits emergency authorization by the AG of an acquisition of foreign intelligence information for which an order under subsection 705(c) may be obtained, if the AG reasonably determines that an emergency situation exists with respect to the acquisition of such foreign intelligence information before an order under subsection 705(c) may with due diligence be obtained; and that the factual basis for issuance of such an order exists. The AG, or his designee, must give a FISC judge notice at the time of the emergency authorization, and an application for a court order under section 705 must be made as soon as practicable within 7 days after the emergency authorization of the acquisition.

—Minimization procedures: Minimization procedures required for issuance of a court order under section 705 must be followed during an emergency authorization.

—Termination of emergency authorization: An emergency authorization must be terminated when the information sought is obtained, when the application for an order is denied, or when 7 days from the time of the emergency authorization expires, whichever is earliest.

H.R. 3773—House Amendment to the Senate Amendment

—Appeal to the FISC of an FISC judge’s decision under section 704 and petition for certiorari to the U.S. Supreme Court from an FISC decision:

Similar provision. New subsections 704(c)(3) and (e).

—Duration: Similar provision. A section 704 order may be for up to 90 days, and may be renewed for additional 90-day periods upon submission of renewal applications. The original applications and renewal applications must satisfy the same criteria under new subsection 704(b).

—Compliance review: Similar provision, new subsection 704(c)(5) of FISA.

—Emergency authorization: Similar provision, new subsection 704(d).

Similar provision.

Similar provision.

H.R. 3773 (S. 2248) as passed by the Senate

—Use of information: Except under circumstances in which the target of the acquisition is determined to be a non-U.S. person *during the pendency of the 7-day emergency acquisition period*, if no court order is issued approving the emergency acquisition then (1) no information obtained or evidence derived from the emergency acquisition shall be received in evidence or otherwise disclosed in any proceeding before an federal, state, or local authority; and (2) no information concerning any U.S. person acquired from such emergency acquisition shall subsequently be used or disclosed in any other manner by federal officers or employees without the consent of that U.S. person; except with the approval of the AG if the information indicates a threat of death or serious bodily harm to any person. New subsection 705(d).

—Appeal: The Government may seek appellate review of a section 705 FISC order before the FISCR, and may file a petition for certiorari to the U.S. Supreme Court. New subsection 705(e).

Joint applications and concurrent authorizations, new section 706 of FISA:

—Joint applications and orders: Under new section 706 of FISA, if an acquisition targeting a U.S. person under section 704 or section 705 of FISA is proposed to be conducted both inside and outside the U.S., then, upon the request of the Government in a joint application complying with the requirements of subsection 704(b) or 705(b), an FISC judge may simultaneously issue orders under subsection 704(c) or 705(c), as applicable.

—Concurrent authorization: If an order authorizing electronic surveillance or physical search has been obtained under section 105 or section 304 of FISA, and that order is still in effect, then the AG may authorize, without an order under section 704 or an order under section 705, an acquisition of foreign intelligence information targeting that U.S. person while such person is reasonably believed to be located outside the United States.

H.R. 3773—House Amendment to the Senate Amendment

Similar provision with respect to limitations on the use of information acquired under an emergency authorization, or evidence derived therefrom, in the absence of a court order approving the acquisition, *except under circumstances in which the target of the acquisition is determined not to be a U.S. person*. The House bill does not include the phrase “during the pendency of the 7-day emergency acquisition period” found in the Senate bill. New subsection 704(d).

—Appeal: Similar provision, new subsection 704(e).

Joint applications and concurrent authorizations, new section 705 of FISA:

—Joint applications and orders: Similar provision.

—Concurrent authorization: If an order authorizing electronic surveillance has been obtained under section 105 of FISA and that order is still in effect, during the pendency of that order the AG may authorize, without an order under section 703 or 704, electronic surveillance for the purpose of acquiring foreign intelligence information targeting that U.S. person while such person is reasonably believed to be located outside the United States. If an order authorizing a physical search has been obtained under section 304 of FISA and that order is still in effect, during the pendency of that order the AG may authorize, without an order under section 703 or 704, a physical search for the purpose of acquiring foreign intelligence information targeting that U.S. person while such person is reasonably believed to be located outside the United States.

Use of Information Acquired under New Title VII of FISA

Use of information acquired under new title VII of FISA, new section 707 of FISA:

Information acquired under new section 703. Under new subsection 707(a), information acquired from an acquisition conducted under new section 703 shall be deemed to be information acquired from an electronic surveillance pursuant to title I of FISA for purposes of section 106, except for the purposes of subsection 106(j). (Subsection 106(j) deals with “notification of emergency employment of electronic surveillance; contents; postponement, suspension or elimination.”)

Information acquired under new section 704. Under new subsection 707(b), information acquired from an acquisition conducted under new section 704 shall be deemed to be information acquired from an electronic surveillance pursuant to title I of FISA for purposes of section 106.

Congressional Oversight

Congressional oversight under new section 708: Section 708 sets out the requirements for such reports with respect to sections 703, 704, and 705.

Semiannual Report. Every six months or less, the AG shall fully inform, in a manner consistent with national security, the congressional intelligence committees and the House and Senate Judiciary Committees concerning the implementation of new title VII of FISA.

Use of information acquired under new title VII of FISA, new section 706 of FISA:

Information acquired under new section 704. Similar but not identical provision. The House bill has no exception for purposes of subsection 106(j).

Information acquired under new section 705. Similar provision.

Congressional oversight under new section 707: Section 707 sets out the requirements for such reports with respect to sections 702, 703, and 704.

Semiannual Report. Similar provision.

H.R. 3773 (S. 2248) as passed by the Senate

—Requirements for each reporting period with respect to new section 703 of FISA include: any certifications made under subsection 703(f); any directives issued under subsection 703(g); a description of the judicial review of any such certifications and targeting and minimization procedures utilized with respect to such acquisition, including a copy of any order or pleading in connection with such review that contains a significant legal interpretation of the provisions of this section; any actions taken to challenge or enforce a directive under subsection 703(g)(4) or (5); any compliance reviews conducted by DOJ or the ODNI of acquisitions authorized under subsection 703(a); a description of any incidents of noncompliance with a directive issued by the AG and the DNI under subsection 703(g), including both incidents of noncompliance by an element of the intelligence community with procedures adopted pursuant to subsection 703(d) and (e) and incidents of noncompliance by a specified person to whom the AG and DNI issued a directive under subsection 703(g); and any procedures implementing this section.

—Requirements for each reporting period with respect to new section 704 of FISA include: the total number of applications made for orders under subsection 704(b); the total number of such orders either granted, modified, or denied; and the total number of emergency acquisitions authorized by the AG under subsection 704(d) and the total number of subsequent orders approving or denying such acquisitions.

—Requirements for each reporting period with respect to new section 705 of FISA include: the total number of applications made for orders under subsection 705(b); the total number of such orders either granted, modified, or denied; and the total number of emergency acquisitions authorized by the AG under subsection 705(d) and the total number of subsequent orders approving or denying such applications.

Savings Provision

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

—Requirements for each reporting period with respect to new section 702 of FISA include: any certifications made under section 702(g) during the reporting period; with respect to each certification made under subsection 702 (1)(B), the reasons for exercising the authority under such paragraph; any directives issued under section 702(h) during the reporting period; a description of the judicial review during the reporting period of any such certifications and targeting and minimization procedures adopted pursuant to subsections (d) and (e) of section 702 utilized with respect to such acquisition, including a copy of any order or pleading in connection with such review that contains a significant legal interpretation of the provisions of section 702; any actions taken to challenge or enforce a directive under paragraph (4) or (5) of section 702(h); any compliance reviews conducted by the Attorney General or the Director of National Intelligence of acquisitions authorized under subsection 702(a); a description of any incidents of noncompliance with a directive issued by the AG and the DNI under subsection 702(h), including incidents of noncompliance by an element of the intelligence community with procedures and guidelines adopted pursuant to subsections (d), (e), and (f) of section 702, and incidents of noncompliance by a specified person to whom the AG and DNI issued a directive under subsection 702(h); and any procedures implementing section 702.

—Requirements for each reporting period with respect to new section 703 of FISA include: Similar provision, the requirements including the total number of applications made for orders under section 703(b); the total number of such orders granted, modified, or denied; and the total number of emergency acquisitions authorized by the AG under section 703(d) and the total number of subsequent orders approving or denying such acquisitions.

—Requirements for each reporting period with respect to new section 704 of FISA include: similar provision, the requirements including the total number of applications made for orders under 704(b); the total number of such orders granted, modified, or denied; and the total number of emergency acquisitions authorized by the AG under subsection 704(d) and the total number of subsequent orders approving or denying such applications.

New section 708 of FISA would include a savings provision stating that, nothing in new title VII of FISA shall be construed to limit the authority of the federal government to seek an order or authorization under, or otherwise engage in any activity that is authorized under, any other title of FISA.

Technical and Conforming Amendments to 18 U.S.C. §§ 2232 and 2511

18 U.S.C. § 2232(e) would be amended by section 101(c)(1)(A) of the Senate bill to provide that, “[w]hoever, having knowledge that a Federal officer has been authorized or has applied for authorization to conduct electronic surveillance (as defined in section 101(f) of [FISA], regardless of the limitation of section 701 of that Act) in order to obstruct, impede, or prevent such activity, gives notice or attempts to give notice of the possible activity to any person shall be fined under [title 18, U.S.C.] or imprisoned not more than five years, or both.” [Emphasis added.]

18 U.S.C. § 2511(2)(a)(ii)(A) would be amended by section 101(c)(1)(B) of the Senate bill to provide that, “[n]otwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other person, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications tor to conduct electronic surveillance, as defined in section 101 of [FISA], if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with a court order directing such assistance or a court order pursuant to section 705 of [FISA] signed by the authorizing judge.” [Emphasis added.]

No similar provision.

No similar provision.

Similar provision. 18 U.S.C. § 2511(2)(a)(ii)(A) would be amended by section 101(c)(1) of the House bill to provide that, “[n]otwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other person, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications tor to conduct electronic surveillance, as defined in section 101 of [FISA], if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with a court order directing such assistance or a court order pursuant to section 704 of [FISA] signed by the authorizing judge.” [Emphasis added.]

Section 102(c) of the House bill would amend 18 U.S.C. § 2511(2)(a) to add a new subparagraph (iii), providing, “If a certification under subparagraph (ii)(B) for assistance to obtain foreign intelligence information is based on statutory authority, the certification shall identify the specific statutory provision, and shall certify that the statutory requirements have been met.” [Also noted below under the section entitled **Statement of Exclusive Means by which Electronic Surveillance and Interception of Domestic Communications May Be Conducted**]

Technical and Conforming Amendments to FISA

Section 101(b) of the Senate bill makes conforming amendments to the table of contents of FISA.

Section 109 of FISA, 50 U.S.C. § 1809, dealing with criminal sanctions, would be amended to add a definition of “electronic surveillance,” meaning “electronic surveillance as defined in section 101(f) of [FISA] regardless of the limitation of section 701 of this Act.” Section 101(c)(2)(A) of the Senate bill.

Section 110 of FISA, 50 U.S.C. § 1810, dealing with civil liability, would be amended to add a new definition of “electronic surveillance,” meaning “electronic surveillance as defined in section 101(f) of [FISA] regardless of the limitation of section 701 of this Act.” Section 101(c)(2)(B) of the Senate bill.

Similar provision.

No similar provision.

No similar provision.

H.R. 3773 (S. 2248) as passed by the Senate

Subsection 601(a)(1) of FISA, 50 U.S.C. § 1871(a)(1), dealing with a semiannual report by the AG to the congressional intelligence committees and the House and Senate Judiciary Committees on the aggregate number of persons targeted for orders issued under FISA, would be amended to provide that each report would include a breakdown of those targeted for electronic surveillance under section 105; physical searches under section 304; *pen registers under section 402; access to records under section 501; acquisitions under section 704; and acquisitions under section 705.* [Emphasis added.] Section 101(c)(2)(C) of the Senate bill.

H.R. 3773—House Amendment to the Senate Amendment

Similar provision. Under section 101(c)(2) of the House bill, section 601(a)(1) of FISA, 50 U.S.C. § 1871(a)(1), dealing with the AG's semiannual reports to the congressional intelligence committees and the House and Senate Judiciary Committees on the aggregate numbers of persons targeted for orders issued under FISA, would be amended to provide that each report would include a breakdown of those targeted for orders issued under FISA would include a breakdown of those targeted for electronic surveillance under section 105 of FISA; physical searches under section 304 of FISA; *pen registers under section 402; access to records under section 501; acquisitions under section 703; and acquisitions under section 704.* [Emphasis added.]

Termination of Authority for New Title VII of FISA, Applicable Changes to the FISA Table of Contents, and Certain Technical and Conforming Amendments

Pursuant to subsection 101(d) of the FISA Amendments Act of 2008, new title VII of FISA, the applicable changes to the FISA table of contents, and the technical and conforming amendments to 18 U.S.C. §§ 2232 and 2511 and to sections 109, 110, and 601 of FISA, 50 U.S.C. §§ 1809, 1810, and 1871, respectively, would sunset on December 31, 2013, except for certain transitional provisions. New subsection 703(g)(3) of FISA, as amended, dealing with release from liability for electronic communications service providers in accordance with a directive, would remain in effect with respect to any directive issued pursuant to new subsection 703(g) of FISA for information, facilities, or assistance provided during the period the directive was or is in effect. New subsection 704(e), dealing with release from liability for electronic communication service providers furnishing aid in accordance with an order or request for emergency assistance, would remain in effect with respect to an order or request for emergency assistance under that section. Use of information acquired by an acquisition conducted under new section 703 of FISA would continue to be governed by the provisions of new section 707 of FISA.

Pursuant to subsection 403(b) of the House bill, except as provided in the transition procedures in section 404 of the House bill, new title VII of FISA would be repealed on December 31, 2009, and the applicable changes to the FISA table of contents would be stricken at that time. Also on December 31, 2009, except as provided in section 404 of the House bill, the reporting requirements in section 601(a)(1) of FISA, 50 U.S.C. § 1871(a)(1), would sunset, so that this subsection would read as it read on the day before the date of enactment of the bill into law. In addition, as of December 31, 2009, except as provided in section 404, 18 U.S.C. § 2511(2)(A)(ii)(A) would be amended to strike “or a court order pursuant to section 704 of [FISA].”

Statement of Exclusive Means by which Electronic Surveillance and Interception of Domestic Communications May Be Conducted

Section 102 of the FISA Amendment Act of 2008 would add a new section 112 to title I of FISA, providing that, “[t]he procedures of chapters 119, 121, and 206 of title 18, United States Code, and [FISA] shall be the exclusive means by which electronic surveillance (as defined in section 101(f), regardless of the limitation of section 701) and the interception of domestic wire, oral, or electronic communications may be conducted.”

Conforming amendment to 18 U.S.C. § 2511(2)(f): As amended, section 2511(2)(f) would provide that, “[n]othing contained in [chapters 119, 121, or 206 of title 18, U.S.C.], or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of [FISA], and procedures in [chapter 119 or chapter 121 of title 18, U.S.C., and FISA] shall be the exclusive means by which electronic surveillance, (as defined in section 101(f) of [FISA] regardless of the limitation of section 701 of such Act), and the interception of wire, oral, and electronic communications may be conducted.” [Emphasis added.]

No similar provision.

Section 102 of the House bill would amend title I of FISA to add a new section 112 at the end of the title, providing:

(a) Except as provided in subsection (b), the procedures of chapters 119, 121, and 206 of title 18, United States Code, and this Act shall be the exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic communications may be conducted.

(b) Only an express statutory authorization for electronic surveillance or the interception of domestic wire, oral, or electronic communications, other than as an amendment to this Act or chapters 119, 121, or 206 of title 18, United States Code, shall constitute an additional exclusive means for the purpose of subsection (a).

The table of contents of FISA would be amended to reflect this addition.

No similar provision.

Subsection 109(a) of FISA, 50 U.S.C. 1809(a), is amended by subsection 102(b) of the House bill to strike “authorized by statute” each place it appears in such section and inserting “authorized by this Act, chapter 119, 121, or 206 of title 18, United States Code, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 112.” The amended provision would read:

(a) Prohibited activities

A person is guilty of an offense if he intentionally—

(1) engages in electronic surveillance under color of law except as *authorized by this Act, chapter 119, 121, or 206 of title 18, United States Code, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 112*; or

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No similar provision.

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(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not *authorized by this Act, chapter 119, 121, or 206 of title 18, United States Code, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 112.* [Emphasis added.]

Conforming amendment to 18 U.S.C. § 2511(2)(a): 18 U.S.C. § 2511(2)(a) is amended by adding at the end a new subparagraph 2511(2)(a)(iii) providing that, if a certification under 18 U.S.C. § 2511(2)(a)(ii)(B) for assistance to obtain foreign intelligence information is based on statutory authority, the certification shall identify the specific statutory provision, and shall certify that the statutory requirements have been met.

Submittal to Congress of Certain Court Orders under FISA

Section 103 of the Senate amendment to H.R. 3773, the FISA Amendment Act of 2008, would amend subsection 601(a)(5) of FISA, 50 U.S.C. § 1871, to require the AG, in his semi-annual report to the congressional intelligence committees and the House and Senate Judiciary Committees, in a manner consistent with national security, to include copies of all decisions, *orders*, or opinions of the FISC or the FISCR that include significant construction or interpretation of the provisions of FISA. [Emphasis added.] Under current law, orders were excluded from the copies to be provided by the AG under this subsection.

Similar provision.

In addition, section 601 would be amended, adding a new subsection 601(c), which would require submission to the congressional intelligence committees and the House and Senate Judiciary Committees:

Similar provision.

—a copy of any decision, order, or opinion issued by the FISC or the FISCR that includes significant construction or interpretation of any provision of FISA, and any pleadings, applications, or memoranda of law associated with such decision, order, or opinion, not later than 45 days after such decision, order, or opinion is issued; and

—a copy of any such decision, order, or opinion, and any pleadings, applications, or memoranda of law associated with such decision, order, or opinion, that was issued during the 5-year period ending on the date of the enactment of the FISA Amendments Act of 2008 and not previously submitted in a report under subsection 601(a) of FISA, 50 U.S.C. § 1871(a).

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New subsection 601(d) of FISA would permit the AG, in consultation with the DNI, to authorize redactions of materials disclosed to the congressional intelligence committees and the House and Senate Judiciary Committees under new subsection 601(c), if such redactions are necessary to protect the national security of the United States and are limited to sensitive sources and methods information or the identities of targets.

Similar provision.

New subsection 601(e) would define the Foreign Intelligence Surveillance Court as the court established under subsection 103(a) of FISA, while the Foreign Intelligence Surveillance Court of Review is defined to mean the court established under subsection 103(b) of FISA.

Similar provision.

Amendments to Section 104 of FISA Regarding Applications for FISC Orders

Section 104 of the Senate Amendment to H.R. 3773 streamlines to some degree the application process under section 104 of FISA, 50 U.S.C. § 1804, for FISC orders authorizing electronic surveillances to gather foreign intelligence information.

Section 104 of the Senate Amendment to H.R. 3773 streamlines to some degree the application process under section 104 of FISA, 50 U.S.C. § 1804, for FISC orders authorizing electronic surveillances to gather foreign intelligence information.

—It would strike the requirement in subsection 104(a)(2) of FISA that the application include the authority conferred on the AG by the President and the approval of the AG; and the requirement in subsection 104(a)(11) of FISA that, whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the application include the coverage of the devices involved and what minimization procedures apply to information acquired by each device. Paragraphs 104(a)(3) through (10) would be renumbered 104(a)(2) through (9).

Similar provision.

—While a description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance would be required for a section 104 application, the description would no longer be required to be detailed under new subsection 104(a)(5) (current subsection 104(a)(6)).

Similar provision.

—A certification or certifications to be made under new subsection 104(a)(6) (current subsection 104(a)(7)) could be made by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate, or the Deputy Director of the FBI, if designated by the President as a certifying official. [Emphasis added.]

No similar provision.

—Under new subsection 104(a)(7) (current subsection 104(a)(8)), an application would require a *summary* statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance.

Similar provision.

H.R. 3773 (S. 2248) as passed by the Senate**H.R. 3773—House Amendment to the Senate Amendment**

—The Senate amendment to H.R. 3773 would strike current subsection 104(b), which excludes from application requirements certain information where the target of the electronic surveillance is a foreign power as defined in subsection 101(a)(1), (2), or (3) of FISA, and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power. Subsection 101(a)(1), (2) and (3) of FISA define “foreign power” to include a foreign government or any component thereof, whether or not recognized by the United States; a faction of a foreign nation or nations, not substantially composed of United States persons; or an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments. Under current subsection 104(b) an application involving such foreign power targets shall state whether physical entry is required to effect the surveillance and shall contain such information about the surveillance techniques and communications or other information concerning United States persons likely to be obtained as may be necessary to assess the proposed minimization procedures.

Similar provision.

—Under new subsection 104(d)(1)(A) (current subsection 104(e)(1)(A)), upon written request of the Director of the FBI, the Secretary of Defense, the Secretary of State, the DNI, or the Director of the Central Intelligence Agency, the AG shall personally review under subsection 104(a) an application under that subsection for a target described in subsection 101(b)(2) of FISA. Subsection 101(b)(2) lists those categories of individuals falling within the definition of “agent of a foreign power” under FISA that include “any person,” including a U.S. person.

Similar provision.

Amendments to Section 105 of FISA Regarding Issuance of an Order Authorizing Electronic Surveillance

Section 105 of the Senate version of H.R. 3773 would strike the requirement in subsection 105(a)(1) that a FISC judge, in issuing an order authorizing electronic surveillance to gather foreign intelligence information under section 105 of FISA, 50 U.S.C. § 1805, find that the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information. Paragraphs 105(a)(2) through (5) are redesignated (1) through (4), respectively, and a conforming amendment is made to subsection 105(b) to insert a reference to (a)(2) in place of (a)(3).

Similar provision in section 105 of the House amendment to the Senate amendment to H.R. 3773.

—The Senate bill would strike subsection 105(c)(1)(F) of FISA, which currently requires that, whenever more than one electronic, mechanical, or other surveillance device is to be used under the order, the specifications in the order include the authorized coverage of the devices involved and what minimization procedures shall apply to information subject to acquisition by each device.

Similar provision.

H.R. 3773 (S. 2248) as passed by the Senate**H.R. 3773—House Amendment to the Senate Amendment**

—Current subsection 105(d) of FISA would also be stricken from the Act. Current section 105(d) excludes certain information from a FISC order whenever the target of the electronic surveillance is a foreign power, as defined in subsection 1801(a)(1), (2), or (3) of this title, and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power. Current subsection 105(d) of FISA also requires that a FISC order involving such foreign targets generally describe the information sought, the communications or activities to be subjected to the surveillance, and the type of electronic surveillance involved, including whether physical entry is required. Current subsections 105(e) through (i) would be redesignated (d) through (h), respectively.

Similar provision.

Section 105(6) of the bill, amending subsection 105(e)(1)-(6) of FISA, 50 U.S.C. § 1805(e)(1)-(6) (formerly subsection 105(f) as redesignated by section 105(5) of the bill): Emergency authorization of electronic surveillance: Notwithstanding any other provision of this title, the AG may authorize the emergency employment of electronic surveillance for up to 168 hours while a FISC order authorizing the surveillance is sought, if statutory criteria are met:

Similar provision.

—these include a requirement that the AG reasonably determine that an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained;

Similar provision.

—the AG must also reasonably determine that the factual basis for issuance of an order under title I of FISA to approve such electronic surveillance exists;

Similar provision.

—the AG must inform, either personally or through a designee, a judge having jurisdiction under section 103 of FISA at the time of such authorization that the decision has been made to employ emergency electronic surveillance; and

Similar provision.

—the AG must make a section 104 application to a FISC judge as soon as practicable, but not later than 7 days after the Attorney General authorizes such surveillance.

Similar provision.

—If the AG authorizes such emergency employment of electronic surveillance under redesignated paragraph 105(e)(1), he shall require that the minimization procedures required by this title for the issuance of a judicial order be followed.

Similar provision.

Effect of absence of judicial order approving such electronic surveillance: In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 7 days from the time of authorization by the Attorney General, whichever is earliest.

Similar provision.

H.R. 3773 (S. 2248) as passed by the Senate**H.R. 3773—House Amendment to the Senate Amendment**

Limitations on use of information from surveillance if application denied or surveillance terminated without issuance of a court order approving it: If such an application is denied or the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any authority of the United States, a State, or political subdivision thereof, and no information concerning any U.S. person acquired from such surveillance shall subsequently be used or disclosed in any other manner by federal officers or employees without the consent of such person, except with the approval of the AG if the information indicates a threat of death or serious bodily harm to any person. The AG shall assess compliance with these requirements.

Similar provision.

Section 105 of the bill, amending section 105 of FISA to add a new subsection (i), 50 U.S.C. 1805(i): Adding pen registers and trap and trace devices, at applicant's request, to orders approving electronic surveillance:

The new subsection 105(i) of FISA would provide that, “[i]n any case in which the Government makes an application to a judge under this title to conduct electronic surveillance involving communications and the judge grants such application, upon the request of the applicant, the judge shall also authorize the installation and use of pen registers and trap and trace devices, and direct the disclosure of the information set forth in section 402(d)(2) [of FISA].” The information set forth in subsection 402(d)(2) includes the identity, if known, of the target of the investigation; the identity, if known, of the person to whom the phone line or other facility to which the pen register or trap and trace device is to be attached or applied is leased or in whose name it is listed; the attributes of the communications to which the order applies.

Similar provision.

Amendment to Section 106 of FISA Regarding Use of Information Gathered Under a Section 105 FISC Order

Under subsection 106(i), as amended by the Senate amendment to H.R. 3773, in circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of *any communication*, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person. [Emphasis added. Current subsection 106(i) addresses the unintentional acquisition of the contents of “any radio communication” instead of “any communication.”] Section 106 of the Senate bill.

Similar provision in section 106 of the House bill.

Amendments to Sections 303, 304, and 305 of FISA Regarding Physical Searches

Amendments to section 303 of FISA, 50 U.S.C. § 1823, regarding applications for FISC orders authorizing physical searches: Section 107 of the Senate version of H.R. 3773 would amend section 303 of FISA, dealing with applications for orders authorizing physical searches to gather foreign intelligence information.

—The bill would eliminate the requirement that such applications include the authority conferred on the Attorney General by the President and the approval of the Attorney General to make the application, striking paragraph 303(a)(2) of FISA and redesignating paragraphs 3 through 9 as 2 through 8.

—Under new subsection 303(a)(2) of FISA (current subsection 303(a)(3)), the bill would require that such applications include the identity, if known, or a description of the target of the search, and a description of the premises or property to be searched and of the information, material, or property to be seized, reproduced, or altered. Current law requires that the description of the premises or property to be searched and of the information, material or property to be seized, reproduced, or altered be a detailed description.

—Under new subsection 303(a)(3)(C) of FISA (current subsection 303(a)(3)(B)), an application must include “a statement of the facts and circumstances relied upon by the applicant to justify the applicant’s belief that . . . the premises or property to be searched is owned, used, possessed by, or is in transit to or from a foreign power or an agent of a foreign power.” As amended by the Senate bill, an application would have to include “a statement of the facts and circumstances relied upon by the applicant to justify the applicant’s belief that . . . the premises or property to be searched is *or is about to be* owned, used, possessed by, or is in transit to or from a foreign power or an agent of a foreign power.” [Emphasis added.]

—Under new subsection 303(a)(6) of FISA (current subsection 303(a)(7)), an application must include a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive branch officers employed in the area of national security or defense and appointed by the President, by and with the advice and consent of the Senate, *or the Deputy Director of the FBI, if designated by the President as a certifying official.* [Emphasis added.]

Amendments to section 303 of FISA, 50 U.S.C. § 1823, regarding applications for FISC orders authorizing physical searches: Section 107 of the House amendment to the Senate amendment to H.R. 3773 would amend section 303 of FISA, dealing with applications for orders authorizing physical searches to gather foreign intelligence information.

Similar provision.

Similar provision.

Similar provision.

No similar provision.

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H.R. 3773—House Amendment to the Senate Amendment

—Under subsection 303(d)(1)(A), as amended by the bill, upon written request of the Director of the Federal Bureau of Investigation, the Secretary of Defense, the Secretary of State, the Director of National Intelligence, or the *Director of the Central Intelligence Agency*, the Attorney General shall personally review under subsection 303(a) of FISA an application under that subsection for a target described in subsection 101(b)(2) of FISA. Subsection 101(b)(2) lists those categories of individuals falling within the definition of “agent of a foreign power” under FISA that include “any person,” including a U.S. person. [Emphasis added.]

Amendments to section 304 of FISA, 50 U.S.C. § 1824, regarding FISC orders authorizing physical searches: Subsection 107(b) of the bill makes amendments to section 304 of FISA, dealing with physical searches to gather foreign intelligence information.

—Section 304 of FISA, as amended by subsection 107(b) of the bill, would eliminate the requirement that a FISC judge, in issuing an order for a physical search under FISA, find that the President has authorized the Attorney General to approve applications for physical searches for foreign intelligence purposes, striking paragraph (a)(1) and redesignating paragraphs (a)(2) through (a)(5) as (a)(1) through (a)(6).

Emergency authorization of physical searches to gather foreign intelligence information: Subsection 304(e), as amended by the bill, permits the AG to authorize emergency employment of a physical search if certain criteria are met. The AG may authorize such emergency use of a physical search under FISA, if he reasonably :

—determines that an emergency situation exists with respect to the employment of a physical search to obtain foreign intelligence information before an order authorizing such physical search can with due diligence be obtained;

—determines that the factual basis exists for issuance of an order under title III of FISA to approve such physical search;

—informs, either personally or through a designee, a judge of the FISC at the time of such authorization that the decision has been made to employ an emergency physical search; and

—makes an application in accordance with title III of FISA to a judge of the FISC as soon as practicable within 7 days after the AG authorizes the physical search.

Minimization procedures required: In connection with such an emergency authorization of a physical search under FISA, the AG shall require that the minimization procedures required by title III of FISA for the issuance of a judicial order be followed.

Similar provision.

Amendments to section 304 of FISA, 50 U.S.C. § 1824, regarding FISC orders authorizing physical searches: Subsection 107(b) of the bill makes amendments to section 304 of FISA, dealing with physical searches to gather foreign intelligence information.

Similar provision.

Similar provision.

Similar but not identical provision. The House bill requires that this determination be reasonable.

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Similar provision.

Similar provision.

Similar provision.

H.R. 3773 (S. 2248) as passed by the Senate**H.R. 3773—House Amendment to the Senate Amendment**

Termination of emergency physical search in absence of judicial approval: If no judicial order approving such physical search is forthcoming, the search must be terminated when the information sought is obtained, when the application for the order is denied, or after the expiration of 7 days from the time of authorization by the AG, whichever is earliest.

Similar provision.

Appeal from denial of application for court order approving emergency physical search: If an application for judicial approval of such a search is denied, the government may seek review by the FISCR. If the denial is affirmed by the FISCR, the government may file a petition for certiorari to the U.S. Supreme Court.

Similar provision.

Limitations on use of information from emergency physical search in absence of judicial approval: If an application for judicial approval is denied, or in any other case where the physical search is terminated and no order is issued approving the physical search, no information obtained or evidence derived from such physical search shall be received in evidence or otherwise disclosed in any federal, state, or local proceeding, and no information concerning a U.S. person acquired from the physical search shall subsequently be used or disclosed in any other manner by federal officers or employees without the consent of such person, except with the approval of the AG if the information indicates a threat of death or serious bodily harm to any person.

Similar provision.

The AG must assess compliance with these requirements.

Similar provision.

Conforming Amendments to Title III of FISA

Subsection 107(c) of the bill makes conforming amendments to section redesignated 304(a)(4), and 305(k)(2) of FISA. In subsection 304(a)(4), as redesignated, “303(a)(7)(E)” is stricken and “303(a)(6)(E)” is inserted in its stead. In subsection 305(k)(2), “303(a)(7)” is stricken and “303(a)(6)” is inserted.

Similar provision.

Amendments to Title IV of FISA for Emergency Pen Registers and Trap and Trace Devices

Section 108 of the bill amends subsections 403(a)(2) and 403(c)(1)(C) of FISA, 50 U.S.C. §§ 1843(a)(2) and 1843(c)(1)(C). Section 403 permits the AG to authorize emergency authorization of a pen register or trap and trace device on an emergency basis to gather foreign intelligence information not concerning a U.S. person or information to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution if two criteria are met. At the time of the emergency authorization, the AG or his designee must advise a FISC judge, or a U.S. Magistrate Judge publicly designated by the Chief Justice of the Supreme Court to act on behalf of a FISC judge to approve the installation and use of a pen register or trap and trace device under FISA, of the emergency authorization. As amended, subsection 403(a)(2), extends the time from 48 hours to 7 days after the emergency authorization as the time period within which an application may be made to such a FISC judge or U.S. Magistrate Judge, in accordance with section 403 of FISA, 50 U.S.C. § 1842, for judicial approval of the installation and use of the pen register or trap and trace device involved.

Similar provision.

As amended, subsection 403(c)(1)(C) of FISA would require that, in the absence of a court order approving the installation and use of the pen register or trap and trace device, such installation and use shall terminate at the earlier of when the information sought is obtained; when the application for the order is denied under section 402 of FISA; or 7 days after the time of the emergency authorization by the AG.

Similar provision.

Amendments Regarding the FISC

Section 109 of the bill, amending section 103(a) of FISA:

Section 109 of the bill, amending section 103(a) of FISA:

Expansion of number of judicial circuits from which FISC judges may be designated: Subsection 109(a) of the bill amends subsection 103(a) of FISA, 50 U.S.C. § 1803(a) to permit FISC judges to be drawn from “at least” seven of the U.S. judicial circuits.

Similar provision.

FISC en banc authority: As amended by subsection 109(b)(1) of the bill, subsection 103(a) of FISA provides that the FISC may, on its own initiative, or upon the request of the government in any proceeding or a party under subsection 501(f) of FISA or new subsection 703(h)(4) or (5) of FISA, hold a hearing or rehearing en banc, when ordered by a majority of the FISC judges upon a determination that en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or the proceeding involves a question of exceptional importance. The court en banc may exercise any authority granted by FISA to an FISC judge, and must comply with any requirements of FISA on the exercise of such authority.

Similar provision.

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Conforming amendments: Subsection 109(b)(2) of the bill makes conforming amendments to subsection 103(a) of FISA, 50 U.S.C. § 1803(a), and subsection 302(c) of FISA, 50 U.S.C. § 1833(c).

Similar provision.

Stay or modification of a FISC or FISCER order during a rehearing or an appeal: Subsection 109(c) of the bill amends section 103 of FISA to redesignate subsection (f) as subsection (g) and to insert a new subsection (f) permitting a judge of the FISC, the FISCER or a judge of that court, or the U.S. Supreme Court or a justice of that court, to, in accordance with the rules of their respective courts, enter a stay of an order or an order modifying an order of the FISC or the FISCER entered under any title of FISA, while the FISC conducts a rehearing, while an appeal is pending before the FISCER, or while a petition of certiorari is pending in the U.S. Supreme Court, or during the pendency of any review by that court. This authority is to apply to an order entered under any FISA provision.

Similar provision.

No change to inherent authority of FISC: Subsection 109(d) of the bill would add a new subsection 103(h) to FISA, proposed 50 U.S.C. § 1803(h), to provide that nothing in FISA shall be considered to reduce or contravene the inherent authority of the FISC to determine, or enforce, compliance with an order or rule of the FISC or with a procedure approved by the FISC.

Similar provision.

As used in this subsection, the bill defines “Foreign Intelligence Surveillance Court” and “Court” to mean the court established in subsection 103(a) of FISA.

No similar provision.

Inspector General Review of Previous Actions

No similar provision.

Definitions: Section 110(a) of the House bill would add new definitions for purposes of this section of “appropriate committees of Congress,” “Foreign Intelligence Surveillance Court,” and “President’s Surveillance Program” and “Program.” The “appropriate committees of Congress” means the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence and the House and Senate Judiciary Committees. The “Foreign Intelligence Surveillance Court” means the court created under subsection 103(a) of FISA. Both the terms “President’s Surveillance Program” and “Program” mean the “intelligence activity involving communications that was authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007, including the program referred to in a radio address on December 17, 2005 (commonly known as the Terrorist Surveillance Program).” (hereinafter TSP).

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No similar provision.

No similar provision.

No similar provision.

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

Reviews: Section 110(b) of the House bill would require the Inspectors General (IGs) of the USDOJ, the Office of the DNI (“ODNI”), the NSA, and any other element of the intelligence community that participated in the TSP, with respect to the oversight authority and responsibility of each such IG, to complete a comprehensive review of all of the facts necessary to describe the establishment, implementation, product, and use of the product of the TSP; the procedures and substance of, and access to, the legal reviews of the TSP; communications with and participation of individuals and entities in the private sector related to the TSP; interaction with the FISC and transition to court orders related to the TSP; and any other matters identified by any such IG that would enable that IG to complete a review of the TSP, with respect to such Department or element.

Coordination and Cooperation: Subsection 110(b) of the House bill also requires each IG required to conduct such a review, to the extent practicable, to work in conjunction with any other IG required to conduct such a review; and, to the extent practicable, to utilize and not unnecessarily duplicate or delay such review or audits that have been completed or are being undertaken by any such IG or any other office of the Executive Branch with respect to the TSP. In addition, it requires the IGs to designate one of their number, who is appointed by the President with the advice and consent of the Senate, to coordinate the conduct of the reviews and the preparation of the reports.

Reports: Within 60 days after enactment of the bill, subsection 110(c) of the House bill requires these IGs to submit a preliminary interim report to the appropriate committees of Congress that describes the planned scope of the review. Within 1 year of the date of enactment of the bill, the IGs would have to submit the final report to the appropriate committees of Congress and to the Commission on Warrantless Surveillance Activities created under section 301 of the House bill. A report submitted under subsection 110(c) of the House bill is to be submitted in an unclassified form but may include a classified annex. The unclassified report is not to disclose the name or identity of any individual or entity of the private sector that participated in the TSP, or with whom there was communication about the TSP, to the extent that information is classified.

Resources: Subsection 110(d) of the House bill would require the DNI to ensure that the process for the investigation and adjudication of an application by an IG or any appropriate staff of an IG for a security clearance necessary to conduct a review under subsection 110(b)(1) of the bill is carried out as expeditiously as possible. In addition, the bill authorizes the IGs required to conduct such a review and submit such a report to hire such additional personnel as may be necessary to carry out the review and submit the report in a prompt and timely manner. Such personnel would perform such duties relating to the review as the relevant IG shall direct and would be in addition to any other personnel authorized by law.

Weapons of Mass Destruction

Definitions: Subsection 110(a) of the bill would amend the definitions of “foreign power,” “agent of a foreign power,” and “foreign intelligence information” in section 101 of FISA, 50 U.S.C. § 1801, to address international proliferation of weapons of mass destruction, and would add a new definition of “weapon of mass destruction” to section 101 of FISA, 50 U.S.C. § 1801.

“Foreign power” as defined in subsection 101(a)(4) of FISA, 50 U.S.C. § 1801(a)(4), as amended by section 110 of the bill, would include a group engaged in international terrorism, *the international proliferation of weapons of mass destruction*, or activities in preparation therefor.” [Emphasis added.]

“Agent of a foreign power” under subsection 101(b)(1) of FISA, 50 U.S.C. § 1801(b)(1) would be amended by the bill to add new subparagraphs (D) and (E) to address the international proliferation of weapons of mass destruction:

—New subsection 101(b)(1)(D) appears to create a “lone wolf” provision applicable to any person other than a U.S. person who “engages in international proliferation of weapons of mass destruction, or activities in preparation therefor,” similar to the “lone wolf” provision in subsection 101(b)(1)(C) applicable to a non-U.S. person who engages in international terrorism or activities in preparation therefor. Neither requires the “agent of a foreign power” involved to have any connection with a foreign power or to act for or on behalf of a foreign power.

—New subsection 101(b)(1)(E) defines “agent of a foreign power” to include *any person other than a U.S. person* who “engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor, for or on behalf of a foreign power.” This provision differs from its counterpart in subsection 101(b)(2)(C), which defines “agent of a foreign power” to include *any person* who “engages in international terrorism or activities in preparation therefor, for or on behalf of a foreign power.” [Emphasis added.] Thus, the new provision in subsection 101(b)(1)(E) would apply only to non-U.S. persons, while the definition in subsection 101(b)(2)(C) covers both U.S. persons and non-U.S. persons.

“Foreign intelligence information,” as defined in subsection 101(e)(1)(B) of FISA, 50 U.S.C. § 1801(e)(1)(B), would be amended by the bill to include “information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against . . . sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; . . .”

Definitions: Subsection 111(a) of the House bill would amend the definitions of “foreign power,” “agent of a foreign power,” and “foreign intelligence information” in section 101 of FISA, 50 U.S.C. § 1801, to address international proliferation of weapons of mass destruction, and would add a new definition of “weapon of mass destruction” to section 101 of FISA, 50 U.S.C. § 1801.

“Foreign power” as defined in subsection 101(a) of FISA would be amended to add a new subsection 101(a)(7) defining the term to mean “an entity not substantially composed of United States persons that is engaged in the international proliferation of weapons of mass destruction.”

“Agent of a foreign power” under subsection 101(b)(1) of FISA, 50 U.S.C. § 1801(b)(1) would be amended to add a new subparagraph (D), which appears to create a “lone wolf” provision applicable to any person other than a U.S. person who “engages in international proliferation of weapons of mass destruction, or activities in preparation therefor,” similar to the “lone wolf” provision in subsection 101(b)(1)(C) applicable to a non-U.S. person who engages in international terrorism or activities in preparation therefor. Neither requires the “agent of a foreign power” involved to have any connection with a foreign power or to act for or on behalf of a foreign power.

No similar provision.

Similar provision.

H.R. 3773 (S. 2248) as passed by the Senate

“Weapon of mass destruction” would be defined in new subsection 101(p) of FISA, proposed 50 U.S.C. § 1801(p), to mean “any destructive device described in section 921(a)(4)(A) of title 18, United States Code, that is intended or has the capability to cause death or serious bodily injury to a significant number of people;” “any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals or their precursors;” “any weapon involving a biological agent, toxin, or vector (as such terms are defined in section 178 of title 18, United States Code);” or “any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.”

Uses of information: Subsection 110(b) of the bill would amend subsections 106(k)(1)(B) and 305(k)(1)(B) of FISA, 50 U.S.C. §§ 1806(k)(1)(B) and 1825(k)(1)(B), to permit federal officers who conduct electronic surveillance and physical searches to acquire foreign intelligence information under FISA to consult with federal law enforcement officers or law enforcement personnel of a state or political subdivision of a state (including the chief executive officer of that state or political subdivision who has the authority to appoint or direct the chief law enforcement officer of that state or political subdivision) to coordinate efforts to investigate or protect against sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power. [Emphasis added.]

Technical and conforming amendment to the definitions applicable to physical searches under FISA: Subsection 110(c) of the bill would amend subsection 301(1) of FISA to read, “(1) The terms ‘foreign power’, ‘agent of a foreign power’, ‘international terrorism’, ‘sabotage’, ‘foreign intelligence information’, ‘Attorney General’, ‘United States person’, ‘United States’, ‘person’, ‘*weapon of mass destruction*’, and ‘State’ shall have the same meanings as in section 101 of [FISA, 50 U.S.C. § 1801], except as specifically provided by this title [subchapter of title 50, U.S.C.]” [Emphasis added.]

Technical and Conforming Amendments to Section 103 of FISA

Section 111 of the bill makes technical and conforming amendments to subsection 103(e) of FISA. As amended, the section would address the jurisdiction of the FISC petition review pool over petitions filed pursuant to “sections 501(f)(1) or 703” of FISA, and publication of rules of procedure to govern its review of such petitions. This replaces language reflecting the enactment of P.L. 110-55 on August 5, 2007, which referred to petitions filed under “sections 105B(h) and 501(f)(1)” of FISA. Section 105B is among the sections to be repealed by Subsection 302(b) of the Senate amendment to the H.R. 3773.

H.R. 3773—House Amendment to the Senate Amendment

“Weapon of mass destruction” would be defined in new subsection 101(p) of FISA, proposed 50 U.S.C. § 1801(p), to mean “any explosive, incendiary, or poison gas device that is intended or has the capability to cause a mass casualty incident;” “any weapon that is designed or intended to cause death or serious bodily injury to a significant number of persons through the release, dissemination, or impact of toxic or poisonous chemicals or their precursors;”

“any weapon involving a biological agent, toxin, or vector (as such terms are defined in section 178 of title 18, United States Code) that is designed, intended, or has the capability of causing death, illness, or serious bodily injury to a significant number of persons;” or “any weapon that is designed, intended, or has the capability of releasing radiation or radioactivity causing death, illness, or serious bodily injury to a significant number of persons.”

Similar provision.

Similar provision.

Similar provision, section 403(a)(1)(B)(ii), striking “105B(h) or 501(f)(1)” and inserting “501(f)(1) or 702(h)(4)” in section 103(e) of FISA.

Statute of Limitations

No similar provision.

Section 112 of the House bill would amend section 109 of FISA, 50 U.S.C. § 1809, to add a 10 year statute of limitations, which would be applicable “to any offense committed before the date of enactment of [the bill] if the statute of limitations applicable to that offense has not run as of such date.”

Protections for Electronic Communication Service Providers

Title II of the Senate bill deals with both retrospective and prospective protections for electronic communication service providers furnishing aid to the government.

Section 201 of the bill provides pertinent definitions. In one such definition, the term “covered civil action” is defined to mean a civil action filed in federal or state court that alleges that an electronic communication service provider furnished assistance to an element of the intelligence community; and seeks monetary or other relief from the electronic communication service provider related to the provision of such assistance. Other definitions are provided for the terms “assistance,” “contents,” “electronic communication service provider,” and “element of the intelligence community.” The House bill has no parallel to the definition of “element of the intelligence community,” but does define “intelligence community.” See also definitions in new title VIII of FISA as added by section 203 of the Senate bill.

Section 202 of the bill, limitations on civil actions against electronic service providers:

Notwithstanding any other provision of law, subsection 202(a) of the bill bars a covered civil action in a federal or state court, and requires that such an action must be promptly dismissed, if the AG certifies to the court that the assistance alleged to have been provided by the electronic communication service provider was:

Title II of the House bill deals with protection of persons assisting the government.

Section 201 of the House bill addresses statutory defenses. It adds a new title VIII to FISA dealing with protection of persons assisting the government. New section 801 of FISA provides the definitions to be used in connection with new title VIII of FISA. Under the House bill, the term “covered civil action” is defined to mean a suit in federal or state court against any person for providing assistance to an element of the intelligence community. The House bill has a definition of “intelligence community,” but no definition of “element of the intelligence community.” The House bill also defines “Attorney General” as having the same meaning as that term is given in section 101(g) of FISA. “State” is defined to mean any state, political subdivision of a state, the Commonwealth of Puerto Rico, the District of Columbia, and any territory of possession of the United States, and includes any officer, public utility commission, or other body authorized to regulate an electronic communication service provider.” The definitions of “assistance,” “contents,” and “electronic communication service provider” are identical to those in the Senate bill. The definitions in new section 801 of FISA as added by section 201 of the House bill parallel those in new title VIII of FISA as added by section 203 of the Senate bill.

No similar provision. *But see*, new section 802 to FISA, as added by section 201 of the House bill, addressing procedures for covered civil actions, discussed below.

H.R. 3773 (S. 2248) as passed by the Senate

—in connection with an intelligence activity involving communications that was authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

—described in a written request or directive from the AG or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was authorized by the President and determined to be lawful.

A covered civil action in federal or state court would also be barred and should be promptly dismissed if the AG certifies to the court that the electronic communication service provider did not provide the alleged assistance.

Judicial review of such certifications:

Standard of review: Such a certification is to be subject to review by a court for abuse of discretion.

Procedure for review, limitations on disclosure: If the AG files a declaration under 28 U.S.C. § 1746 that disclosure of a certification made under subsection 202(a) of the bill would harm United States national security, the court shall review the certification in camera and ex parte, and limit public disclosure concerning such certification, including any public order following such ex parte review, to a statement that the conditions of subsection 202(a) of the bill have been met, without disclosing the subparagraph of subsection 202(a)(1) that is the basis for the certification.

The authorities of the AG under section 202 are to be performed by the AG or the Acting AG, or a designee in a position not lower than the Deputy AG.

Nothing in this shall be construed to limit any otherwise available immunity, privilege, or defense under any other provision.

H.R. 3773—House Amendment to the Senate Amendment

No similar provision. *But see*, new section 802 of FISA, addressed below, entitled “Procedures for Covered Civil Actions.” [New section 802, in part, provides authority for the government to intervene in any covered civil action; for any party to submit to the court evidence, briefs, arguments, or other information on any matter with respect to which a state secrets privilege has been asserted; authorizes the court to review any such submissions in accordance with procedures set forth in section 106(f) of FISA; and permits the court, on motion of the AG, to take additional steps to protect classified information; and permits the court, to the extent practicable and consistent with national security, to request any party to present briefs and arguments on any legal question the courts finds raised by such submission, regardless of whether that party has access to the submission.] Under new subsection 802(e) of FISA, for any covered civil action alleging that a person provided assistance to an element of the intelligence community pursuant to a request or directive during the period from September 11, 2001 through January 17, 2007, the AG shall provide to the court any request or directive related to the allegations under the procedures set forth in new subsection 802(b). See below for a discussion of new section 802 of FISA, including the procedures under new subsection 802(b).

No similar provision.

No similar provision.

No similar provision.

No similar provision.

No similar provision.

No similar provision.

H.R. 3773 (S. 2248) as passed by the Senate

Civil action in State court removal: A civil action brought in state court against a person for providing assistance to an element of the intelligence community is to be deemed to arise under the Constitution and laws of the United States and shall be removable under 28 U.S.C. § 1441.

Effective date and application of section 202 of the Senate bill: This section applies to any covered civil action pending on or filed after the date of enactment of the bill, the FISA Amendments Act of 2008.

Protection of Persons Assisting the Government

Section 203 of the bill provides procedures for implementing statutory defenses under FISA. It adds a new title VIII of FISA entitled “Protection of Persons Assisting the Government”:

New section 801 of FISA, pertinent definitions. For purposes of new title VIII of FISA, new section 801 defines the following terms:

—“Assistance” is defined to mean provision of, or provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication), facilities, or other form of assistance.

—“Attorney General” and “contents” have the same meanings as those terms have under subsections 101(g) and 101(n) of FISA, respectively.

H.R. 3773—House Amendment to the Senate Amendment

Civil action in State court removal: Under new section 802 of FISA, a covered civil action (defined to mean to mean a suit in federal or state court against any person for providing assistance to an element of the intelligence community) that is brought in a state court shall be deemed to arise under the Constitution and laws of the United States and shall be removable under 28 U.S.C. § 1441. See below for more discussion of new section 802 of FISA.

Applicability of new section 802 of FISA as added by section 201 of the House bill: This section shall apply to a civil action pending on or filed after the date of the enactment of the House bill. See below for more discussion of new section 802 of FISA.

Section 201 of the House bill provides procedures for implementing statutory defenses under FISA. It adds a new title VIII of FISA entitled “Protection of Persons Assisting the Government”:

New section 801 of FISA, pertinent definitions. Under section 201 of the House bill, for purposes of new title VIII of FISA, new section 801 defines the same terms as those defined in new section 801 of FISA under the Senate bill.

Similar provision.

Similar provision.

H.R. 3773 (S. 2248) as passed by the Senate

H.R. 3773—House Amendment to the Senate Amendment

—“Electronic communication service provider” means:

Similar provision.

—(A) a telecommunications carrier, as that term is defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153);

—(B) a provider of electronic communication service, as that term is defined in section 2510 of title 18, United States Code;

—(C) a provider of a remote computing service, as that term is defined in section 2711 of title 18, United States Code;

—(D) any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored;

—(E) a parent, subsidiary, affiliate, successor, or assignee of an entity described in subparagraph (A), (B), (C), or (D); or

—(F) an officer, employee, or agent of an entity described in subparagraph (A), (B), (C), (D), or (E).

—“Element of the intelligence community” is defined to mean an element of the intelligence community as specified or designated under subsection 3(4) of the National Security Act of 1947, 50 U.S.C. 401a(4).

Similar provision.

—“Person” is defined to mean:

Similar provision.

—(A) an electronic communication service provider; or

—(B) a landlord, custodian, or other person who may be authorized or required to furnish assistance pursuant to—

—(i) an order of the court established under section 103(a) directing such assistance;

—(ii) a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code; or

—(iii) a directive under section 102(a)(4), 105B(e), as in effect on the day before the date of the enactment of the FISA Amendments Act of 2008 or 703(h).

—“State” is defined to mean any state, political subdivision of a state, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States, and includes any officer, public utility commission, or other body authorized to regulate an electronic communication service provider.

Similar provision.

H.R. 3773 (S. 2248) as passed by the Senate

H.R. 3773—House Amendment to the Senate Amendment

New section 802 of FISA, procedures for implementing statutory defenses:

Limitation on civil actions, required AG certification: Notwithstanding any other provision of law, this section bars any civil action in federal or state court against any person for providing assistance to an element of the intelligence community if the AG certifies:

—that any assistance provided by that person was provided pursuant to an FISC order;

—that any assistance by that person was provided pursuant to a certification in writing under 18 U.S.C. §§ 2511(2)(a)(ii)(B) or 2709(a);

—that any assistance by that person was provided pursuant to a directive under sections 102(a)(4), 105B(e) as in effect the day before enactment of the bill, or 703(h) of FISA directing such assistance; or

—the person did not provide the alleged assistance.

Judicial review of such certifications:

Standard of review: Such a certification is to be subject to review by a court for abuse of discretion.

Procedure for review, limitation on disclosure: If the AG files a declaration under 28 U.S.C. § 1746 that disclosure of a certification made under subsection 203(a) of the bill would harm United States national security, the court shall review the certification in camera and ex parte, and limit public disclosure concerning such certification, including any public order following such ex parte review, to a statement that the conditions of subsection 203(a) of the bill have been met, without disclosing the subparagraph of subsection 203(a)(1) that is the basis for the certification.

Nothing in this section shall be construed to limit any otherwise available immunity, privilege, or defense under any other provision.

Civil action in state court, removal: A civil action brought in state court against a person for providing assistance to an element of the intelligence community is to be deemed to arise under the Constitution and laws of the United States and shall be removable under 28 U.S.C. § 1441.

Effective date and application of new section 802 of FISA as added by section 203 of Senate bill: This section applies to any civil action pending on or filed after the date of enactment of the Senate bill.

New section 802 of FISA, procedures for covered civil actions:

No similar provision.

No similar provision.

No similar provision.

No similar provision.

No similar provision.

Civil action in state court removal: Under new subsection 802(d) of FISA, a covered civil action (defined to mean to mean a suit in federal or state court against any person for providing assistance to an element of the intelligence community) that is brought in a state court shall be deemed to arise under the Constitution and laws of the United States and shall be removable under 28 U.S.C. § 1441. See below for more discussion of new section 802 of FISA.

Applicability of new section 802 of FISA as added by section 201 of the House bill: Under new subsection 802(f) of FISA, this section shall apply to a civil action pending on or filed after the date of the enactment of the House bill. See below for more discussion of new section 802 of FISA.

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No similar provision.

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

Intervention by the government: Under new subsection 802(a) of FISA, in any covered civil action, the court shall permit the Government to intervene. Whether or not the Government intervenes in the civil action, the AG may submit any information in any form that the AG determines is appropriate, and the court shall consider all such submissions.

Factual and Legal Determinations: Under new subsection 802(b) of FISA, in any covered civil action, any party may submit to the court evidence, briefs, arguments, or other information on any matter with respect to which a privilege based on state secrets is asserted. The court shall review any such submission in accordance with the procedures set forth in section 106(f) of FISA and may, based on the review, make any appropriate determination of fact or law. [Section 106 of FISA deals with use in federal, state, or local proceedings against an aggrieved person of information acquired or derived from a FISA electronic surveillance. In the context of a notification by a federal, state, or local government of an intention to use such information in such a proceeding, or of a motion to discover, obtain, or suppress such information made by an aggrieved person, section 106(f) of FISA permits a U.S. district court to review in camera and ex parte the lawfulness of the authorization and conduct of the relevant FISA electronic surveillance of the aggrieved person, if the AG files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.]

—Under new subsection 802(b) of FISA, the court may, on motion of the AG, take any additional actions the court deems necessary to protect classified information.

—New subsection 802(b) of FISA also provides that the court may, to the extent practicable and consistent with national security, request that any party present briefs and arguments on any legal question the court determines is raised by such a submission even if that party does not have full access to the submission. The court shall consider whether the employment of a special master or an expert witness, or both, would facilitate proceedings under this section.

Location of Review: Under new subsection 802(c) of FISA, the court may conduct the review in a location and facility specified by the AG as necessary to ensure security.

Section 202 of the House bill amends the table of contents of FISA to add new title VIII.

H.R. 3773 (S. 2248) as passed by the Senate

H.R. 3773—House Amendment to the Senate Amendment

Section 204 of the bill, new section 803 of FISA, preemption of state investigations: This section provides that no state shall have authority to conduct an investigation into an electronic communication service provider's alleged assistance to an element of the intelligence community; require through regulation or any other means the disclosure of information about an electronic communication service provider's alleged assistance to an element of the intelligence community; impose any administrative sanction on an electronic communication service provider for assistance to an element of the intelligence community; or commence or maintain a civil action or other proceeding to enforce a requirement that an electronic communication service provider disclose information concerning alleged assistance to an element of the intelligence community.

No similar provision.

The United States may bring suit to enforce the provisions of new section 803 of FISA.

No similar provision.

District Court Jurisdiction: United States district courts shall have jurisdiction over any civil action brought by the United States to enforce the provisions of new section 803 of FISA.

No similar provision.

Application: This section shall apply to any investigation, action, or proceeding that is pending on or filed after the date of enactment of the bill.

No similar provision.

Commission on Warrantless Electronic Surveillance Activities

No similar provision.

Title III of the House bill creates a new Commission on Warrantless Electronic Surveillance Activities in the legislative branch.

No similar provision.

Duties of the Commission: Under section 301 of the House bill, the duties of this commission are: to ascertain, evaluate, and report upon the facts and circumstances relating to electronic surveillance activities conducted without a warrant between September 11, 2001 and January 17, 2007; to evaluate the lawfulness of such activities; to examine all programs and activities relating to intelligence collection inside the United States or regarding United States persons that were in effect or operation on September 11, 2001, and all such programs and activities undertaken since that date, including the legal framework or justification for those activities; and to report to the President and Congress the findings and conclusions of the Commission and any recommendations the Commission considers appropriate. Such duties are to be carried out in a manner consistent with the need to protect national security.

H.R. 3773 (S. 2248) as passed by the Senate

No similar provision.

No similar provision.

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

Composition of Commission: The nine members of the Commission are to include five members appointed jointly by the majority leader of the Senate and the Speaker of the House of Representatives; and four members appointed jointly by the minority leader of the Senate and the minority leader of the House of Representatives. These members are to be prominent United States citizens with significant depth of experience in national security, Constitutional law, and civil liberties. The Chair of the Commission is to be jointly appointed by the majority leader of the Senate and the Speaker of the House of Representatives from among the five members they jointly appointed to the Commission. The Vice Chair of the Commission is to be jointly appointed by the minority leader of the Senate and the minority leader of the House of Representatives from among the four members they jointly appointed to the Commission.

—The members of the Commission are to be appointed within 90 days of the date of enactment of the House bill.

—The Commission shall hold its first meeting and begin operations not later than 45 days after the date on which a majority of its members have been appointed. Subsequent meetings are to be held upon the call of the Chair. A majority of the members of the Commission shall constitute a quorum, but a lesser number may hold hearings.

—Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner in which the original appointment was made.

Powers of Commission: The Commission or, on the authority of the Chair, any subcommittee or member thereof, is authorized to hold hearings, take testimony, receive evidence, and administer oaths to carry out the Commission’s responsibilities. The Commission is given subpoena power, and may require attendance of witnesses and production of evidence at any place within the United States designated for a hearing. Subpoenas issued under this paragraph may be issued under the signature of the Chair of the Commission, the chair of any subcommittee created by a majority of the Commission, or any member designated by a majority of the Commission and may be served by any person designated by such Chair, subcommittee chair, or member.

Enforcement: The Commission may seek the assistance of a U.S. district court in the judicial district where the hearing is conducted or where a person refusing to obey a subpoena is found, resides, or transacts business, to compel compliance with the subpoena. Failure to comply with a U.S. district court order may be punished as civil contempt of court. The Commission may also certify a statement of fact attesting to a person’s failure to comply with a subpoena or to testify when summoned to the appropriate U.S. Attorney. Such U.S. Attorney is to bring the matter before the grand jury under the same statutory authority and procedures as if the U.S. Attorney had received a certification under 2 U.S.C. §§ 192-194.

H.R. 3773 (S. 2248) as passed by the Senate

No similar provision.

No similar provision.

No similar provision.

No similar provision.

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

Contracting authority: The Commission is giving contracting authority to carry out its duties to the extent and in such amounts as are provided in appropriations acts.

Information from federal agencies: The Commission is authorized to secure information directly from any executive department, bureau, agency, board, commission, office, independent establishment, or instrumentality of the Government documents, information, suggestions, estimates, and statistics for the purposes of this section. Each department, bureau, agency, board, commission, office, independent establishment, or instrumentality shall furnish such documents, information, suggestions, estimates, and statistics directly to the Commission upon request made by the Chair, the chair of any subcommittee created by a majority of the Commission, or any member designated by a majority of the Commission.

—Information shall only be received, handled, stored, and disseminated by members of the Commission and its staff in a manner consistent with all applicable statutes, regulations, and Executive orders.

—The Administrator of General Services shall provide to the Commission on a reimbursable basis administrative support and other services for the performance of the Commission’s functions.

—In addition to the assistance provided by federal agencies and entities under the authority above, departments and agencies of the United States may provide to the Commission such services, funds, facilities, staff, and other support services as they may determine advisable and as may be authorized by law.

Other authorities: Among other things, the Commission is also authorized to enter into contracts, receive gifts, appoint and compensate staff, and employ consultants. Federal employees may be detailed to the Commission without reimbursement from the Commission, and such detailees shall retain the rights, status, and privileges of his or her regular employment without interruption.

Security Clearances for Commission Members and Staff: The appropriate Federal agencies or departments shall cooperate with the Commission in expeditiously providing to the Commission members and staff appropriate security clearances to the extent possible pursuant to existing procedures and requirements, except that no person shall be provided with access to classified information under this section without the appropriate security clearances.

Access to classified information: All members of the Commission and commission staff, as authorized by the Chair or the designee of the Chair, who have obtained appropriate security clearances, shall have access to classified information related to the surveillance activities within the scope of the examination of the Commission and any other related classified information that the members of the Commission determine relevant to carrying out the duties of the Commission under this section.

H.R. 3773 (S. 2248) as passed by the Senate

No similar provision.

No similar provision.

No similar provision.

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

Facilities and resources: The DNI shall provide the Commission with appropriate space and technical facilities approved by the Commission.

When engaged in performance of their Commission duties, Commission members are entitled to compensation at a rate not to exceed the daily equivalent of the annual rate of basic pay in effect for a position at level IV of the Executive Schedule under 5 U.S.C. § 5315, and are allowed travel expenses..

The Federal Advisory Committee Act shall not apply to the Commission.

Public meetings and hearings: The Commission shall hold public hearings and meetings to the extent appropriate. Any public hearings of the Commission shall be conducted in a manner consistent with the protection of information provided to or developed for or by the Commission as required by any applicable statute, regulation, or Executive order.

Reports and Recommendations of Commission:

—**Interim reports:** The Commission may submit to the President and Congress interim reports containing such findings, conclusions, and recommendations for corrective measures as have been agreed to by a majority of Commission members.

—**Final report:** The Commission, in consultation with appropriate representative of the intelligence community, must file its final report within one year after the date of its first meeting. The final report, containing such information, analysis, findings, conclusions, and recommendations as have been agreed to by a majority of Commission members, shall submit to the President and Congress. It shall be in an unclassified form, but may have a classified annex.

—**Recommendations for declassification:** The Commission may make recommendations to the appropriate department or agency of the Federal Government regarding the declassification of documents or portions of documents.

—**Termination:** The Commission and its authorities shall terminate 60 days after submission of its final report. The Commission may use that 60-day period for the purpose of concluding its activities, including providing testimony to committees of Congress concerning its report and disseminating the final report.

Definitions: “Intelligence community” and “United States person” are defined for purposes of this section:

H.R. 3773 (S. 2248) as passed by the Senate

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

Authorization and availability of appropriations: There are authorized to be appropriated such sums as may be necessary to carry out the activities of the Commission under this section. Such appropriated amounts shall remain available until the termination of the Commission.

Severability, Effective Date, Repeal of Protect America Act Provisions, and Transition Procedures

Title III of the Senate bill, other provisions:

Section 301 of the Senate bill is a severability provision.

Section 302 of the bill addresses the effective date of the bill if enacted into law; repeal of certain FISA provisions added by the Protect America Act; and transition procedures:

—**Effective date:** Under subsection 302(a) of the bill, the date of enactment of the bill into law is to be the effective date, except as provided in subsection 302(c), dealing with transitional procedures and authorizations and directives in effect on the date of enactment of the bill and on the date the bill sunsets.

—**Repeal of certain Protect America Act (PAA) provisions and related table of contents entries:** Except as provided in the transition procedures under subsection 302(c) of FISA, sections 105A, 105B, and 105C of FISA, 50 U.S.C. §§ 1805A, 1805B, and 1805C are repealed by subsection 302(b) of the bill, along with related table of contents entries.

Title IV of the House bill, other provisions:

Similar provision, section 401 of the House bill.

Similar provision.

Similar provision. Except as provided in section 404, sections 105A, 105B, and 105C of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1805a, 1805b, and 1805c, are repealed, along with related table of contents entries. In addition, except as provided in section 404, section 4 of the PAA (dealing with semi-annual reporting by the AG to the congressional intelligence committees and the House and Senate Judiciary Committees regarding non-compliance with directives issued by the AG and DNI under Section 105B of FISA in connection with PAA acquisitions) and section 6 of the PAA (dealing with transition procedures) are repealed.

H.R. 3773 (S. 2248) as passed by the Senate**—Transitions Procedures:**

—Protection from liability: Subsection 105B(l) of FISA, as added by the Protect America Act, protected from civil suit those who furnished information, facilities, or assistance to the government pursuant to a directive issued by the AG under section 105B. Under Section 105B of FISA, as added by the PAA, acquisitions of the contents of communications concerning persons reasonably believed to be located outside the United States could be authorized for up to 1 year. The PAA was enacted on August 5, 2007, and sunset on February 16, 2008. Depending upon the expiration date of acquisitions authorized during this period, some may continue in effect until between August 5, 2008 and February 16, 2009. The transition provisions in section 6 of the Protect America Act explicitly provided that acquisitions authorized under the amendments to FISA made by the PAA before its sunset, and related directives requiring recipients of those directives to furnish aid to the government in connection with such acquisitions, were to remain in effect until their expiration. However, those PAA transition procedures did not expressly provide for continuation of the protection from civil liability under section 105B(l) of FISA afforded those who furnished aid to the government related to such acquisitions pursuant to related directives. The last sentence of section 6 of the PAA stated the acquisitions that were to remain in force until their expiration “shall be governed by the applicable provisions of such amendments [to FISA made by the PAA] and shall not be deemed to constitute electronic surveillance as that term is defined in section 101(f) of [FISA].” While it might be argued that subsection 105B(l) might be considered an “applicable provision” and might therefore remain in effect as long as the acquisition and related directives do, the absence of express language on the point may give rise to ambiguity.

Under section 302(c)(1) of H.R. 3773 as passed by the Senate that ambiguity is resolved. Subsection 302(c)(1) of the bill provides that subsection 105B(l) of FISA “shall remain in effect with respect to any directives issued pursuant to such section 105B for information, facilities, or assistance provided during the period such directive was or is in effect.”

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment**—Transitions Procedures:****—Protection from liability:**

Under section 404(a)(4) of the House bill, subsection 105B(l) of FISA, as added by section 2 of the PAA, “shall continue to apply with respect to any directives issued pursuant to such 105B.” Under section 404(a)(7) of the House bill, section 404(a)(4) of the bill shall apply as if it had been enacted on August 5, 2007, when the PAA was enacted.

Under section 404(a)(5) of the House bill, the petition review pool of the FISC shall continue to have jurisdiction over petitions challenging the legality of a directive issued pursuant to section 105B of FISA, as added by section 2 of the PAA, until the expiration of all orders, authorizations, and directives issued or made pursuant to that section. Under section 404(a)(7) of the House bill, section 404(a)(5) of the bill shall apply as if it had been enacted on August 5, 2007, when the PAA was enacted.

H.R. 3773 (S. 2248) as passed by the Senate

—Orders in effect:

—Under subsection 302(c)(2)(A) of the Senate bill, notwithstanding any other provision of the bill or of FISA, any order in effect on the date of enactment pursuant to FISA or section 6(b) of the PAA is to remain in effect until the order’s expiration date. In addition, at the request of the applicant, the FISC shall reauthorize such order if the facts and circumstances continue to justify issuance of the order under FISA as it existed before enactment of the PAA, except as provided in sections 102 through 110 of the Senate bill.

—Under subsection 302(c)(2)(B) of the Senate bill, any order issued under title VII of FISA, as amended by section 101 of the Senate bill, in effect on December 31, 2013, shall continue in effect until the date of expiration of the order, and shall be governed by the applicable provisions of FISA as so amended.

—Authorizations and directives in effect:

—Authorizations and directives in effect on date of enactment: Under subsection 302(c)(3)(A) of the bill, notwithstanding any other provision of the bill or of FISA, authorizations and directives in effect on the date of enactment of the Senate bill that were issued pursuant to the PAA, or any amendment made by the PAA, would remain in effect until the expiration date of that authorization or directive. Any such authorization or directive would be governed by applicable provisions of the PAA and amendments made by the PAA. Except as provided in subsection 302(c)(4) of the bill, any acquisition pursuant to such authorization or directive would be deemed not to constitute electronic surveillance under section 101(f) of FISA, as construed in accordance with section 105A of FISA as added by the PAA. Section 105A of FISA provided that, “Nothing in the definition of electronic surveillance under section 101(f) shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States.”

H.R. 3773—House Amendment to the Senate Amendment

—Orders in effect:

—Under subsection 404(a)(1) of the House bill, notwithstanding any other provision of law, any order, authorization, or directive issued or made pursuant to 105B of FISA, as added by section 2 of the PAA, shall continue in effect until the expiration of such order, authorization, or directive. Under section 404(a)(7) of the House bill, section 404(a)(1) of the bill shall apply as if it had been enacted on August 5, 2007, when the PAA was enacted.

—Under section 404(b)(1) and (2) of the House bill, notwithstanding any other provision of the House bill or of FISA, any order, authorization, or directive issued or made under title VII of FISA, as amended by section 101(a) of the House bill, in effect on December 31, 2009, shall continue in effect until the date of the expiration of such order, authorization or directive, and title VII of FISA, as amended by section 101(a) of the House bill, shall continue to apply to them until their expiration.

—Authorizations and directives in effect:

—Continued effect of orders, authorizations, directives: Under subsection 404(a)(1) of the House bill, notwithstanding any other provision of law, any order, authorization, or directive issued or made pursuant to 105B of FISA, as added by section 2 of the PAA, shall continue in effect until the expiration of such order, authorization, or directive. Under subsection 404(a)(2) of the House bill, subject to paragraph 404(3) of that bill (dealing with use of information acquired under a PAA order, authorization, or directive), notwithstanding any other provision of this House bill or of FISA, section 105A of such FISA, as added by section 2 of the PAA, shall continue to apply to any acquisition conducted pursuant to an order, authorization, or directive 105B of FISA as added by section 2 of the PAA; and sections 105B and 105C of FISA, as so added, shall continue to apply with respect to any such order, authorization, or directive until the expiration of such order, authorization, or directive. Under section 404(a)(7) of the House bill, subsections 404(a)(1) and (2) of the bill shall apply as if it had been enacted on August 5, 2007, when the PAA was enacted.

H.R. 3773 (S. 2248) as passed by the Senate

—Authorizations and directives in effect on December 31, 2013: Under subsection 302(c)(3)(B), any authorization or directive issued under title VII of FISA, as amended by section 101 of the bill, in effect on December 31, 2013, shall continue in effect until the date of expiration of that authorization or directive. Any such authorization or directive shall be governed by the applicable provisions of FISA, as so amended, and, except as provided in section 707 of FISA, as so amended, any acquisition pursuant to such authorization or directive shall be deemed not to constitute electronic surveillance (as that term is defined in subsection 101(f) of FISA, to the extent that such subsection 101(f) is limited by section 701 of FISA, as so amended).

—Use of information acquired under the PAA: Subsection 302(c)(4) provides that information acquired from an acquisition conducted under the PAA, and amendments made by the PAA, shall be deemed to be information acquired from an electronic surveillance pursuant to title I of FISA, 50 U.S.C. § 1801 *et seq.*, for the purposes of section 106 of FISA, 50 U.S.C. § 1806, except for purposes of subsection 106(j) of FISA. (Subsection 106(j) deals with “notification of emergency employment of electronic surveillance; contents; postponement, suspension or elimination.”)

—New orders: Under subsection 302(c)(5) of the bill, notwithstanding any other provision of the Senate bill or of FISA, the government may file an application for an order under FISA, as in effect on the day before the date of the enactment of the PAA, except as amended by sections 102, 103, 104, 105, 106, 107, 108, 109, and 110 of the bill; and the FISC shall enter an order granting such an application if the application meets the requirements of FISA, as in effect on the day before the date of the enactment of the PAA, except as amended by sections 102, 103, 104, 105, 106, 107, 108, 109, and 110 of the bill.

—Extant Authorizations: Under subsection 302(c)(6) of the bill, at the request of the applicant, the FISC shall extinguish any extant authorization to conduct electronic surveillance or physical search entered pursuant to FISA.

—Applicable provisions: Under subsection 302(c)(7) of the bill, any surveillance conducted pursuant to an order entered pursuant to subsection 302(c) shall be subject to the provisions of FISA as in effect on the day before the date of enactment of the PAA, except as amended by sections 102, 103, 104, 105, 106, 107, 108, 109, and 110 of the bill.

H.R. 3773—House Amendment to the Senate Amendment

—Orders in effect on December 31, 2009: Under section 404(b)(1) and (2) of the House bill, notwithstanding any other provision of the House bill or of FISA, any order, authorization, or directive issued or made under title VII of FISA, as amended by section 101(a) of the House bill, in effect on December 31, 2009, shall continue in effect until the date of the expiration of such order, authorization or directive, and title VII of FISA, as amended by section 101(a) of the House bill, shall continue to apply to them until their expiration.

—Use of information acquired under the PAA: Subsection 404(a)(3) of the House bill provides that information acquired from an acquisition conducted pursuant to an order, authorization, or directive issued or made pursuant to section 105B of FISA, as added by section 2 of the PAA, shall be deemed to be information acquired from an electronic surveillance pursuant to title I of the FISA, 50 U.S.C. 1801 *et seq.*, for purposes of section 106 of FISA, 50 U.S.C. 1806. Under section 404(a)(7) of the House bill, section 404(a)(3) of the bill shall apply as if it had been enacted on August 5, 2007, when the PAA was enacted.

No similar provision.

No similar provision.

No similar provision.

H.R. 3773 (S. 2248) as passed by the Senate**—Transition procedures concerning the targeting of U.S. persons overseas:**

Under subsection 302(c)(8) of the Senate bill, any authorization in effect on the date of enactment of that bill under section 2.5 of E.O. 12333 to intentionally target a U.S. person reasonably believed to be located outside the United States shall remain in effect, and shall constitute a sufficient basis for conducting such an acquisition targeting a U.S. person located outside the United States until the earlier of the date that authorization expires or 90 days after the date of enactment of the bill.

Reporting requirements with respect to the PAA and section 601 of FISA, as amended

No similar provision.

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment**—Transition procedures concerning the targeting of U.S. persons overseas:**

Similar provision, subsection 404(b)(5) of the House bill.

Reporting requirements with respect to the PAA: Under subsection 404(a)(6)(A), notwithstanding any other provision of the House bill, the PAA, or FISA, section 4 of the PAA (dealing with semi-annual reporting by the AG to the congressional intelligence committees and the House and Senate Judiciary Committees on non-compliance with directives issued by the AG and DNI under section 105B of FISA in connection with PAA acquisitions) shall continue to apply until the date that the certification described in subparagraph 404(a)(6)(B) is submitted. The referenced certification by the AG is to be submitted as part of a semi-annual report required by section 4 of the PAA. The certification states that there will be no further acquisitions carried out under section 105B of FISA, as added by section 2 of the PAA, after the date of such certification; and that the information required to be included under section 4 of the PAA relating to any acquisition conducted under such section 105B has been included in a semi-annual report required by such section 4. Under section 404(a)(7) of the House bill, section 404(a)(6) of the bill shall apply as if it had been enacted on August 5, 2007, when the PAA was enacted.

Reporting requirements with respect to Section 601(a) of FISA, 50 U.S.C. § 1871(a), as amended by section 101(c)(2), 702(l), and 707 of the House bill:

Under subsection 404(b)(4) of the House bill, notwithstanding any other provision of the House bill or of FISA, section 601(a) of FISA, 50 U.S.C. § 1871(a), as amended by sections 101(c)(2) of the House bill, 702(l), and 707 of FISA shall continue to apply until the date that the certification described in subsection 404(b)(4)(B) of the House bill is submitted by the AG to the congressional intelligence committees and the House and Senate Judiciary Committees. Such certification states that there will be no further acquisitions carried out under title VII of FISA, as amended by section 101(a) of the House bill, after the date of such certification; and that the information required to be included in a review, assessment, or report under section 601 of FISA, as amended by section 101(c) of the House bill, or section 702(l) or 707 of FISA, as added by section 101(a) of the House bill, relating to any acquisition conducted under title VII of FISA, as amended by section 101(a) of the House bill, has been included in a review, assessment, or report under such section 601, 702(l), or 707.

Applicability of Provisions on Challenge of Directives, Protection from Liability, and Use of Information

No similar provision.

Applicability of FISC petition review pool jurisdiction with respect to challenges to directives issued under new subsection 702(h) of FISA, as added by section 101(a) of the House bill: Under subsection 404(b)(3)(A) of the House bill, notwithstanding any other provision of the House bill or of FISA, subsection 103(a) of FISA, “as amended by section 113” [sic?], shall continue to apply with respect to any directive issued pursuant to subsection 702(h) of FISA, as added by subsection 101(a) of the bill. Note that there appears to be no section 113 in the House bill, nor in FISA. However, subsection 403(a)(1)(B)(ii) of the House bill does amend section 103(a) of FISA, dealing with the jurisdiction of the petition review pool of the FISC, to replace “105B(h) or 501(f)(1)” with inserting “501(f)(1) or 702(h)(4).” Section 702(h)(4) addresses challenges to directives issued under section 702(h) of FISA, as amended by the House bill.

No similar provision.

Applicability of release from liability for electronic communication service providers furnishing aid to the government in accordance with a directive issued pursuant to new subsection 702(h)(1) of FISA, as added by subsection 101(a) of the House bill: Under subsection 404(b)(3)(B) of the House bill, notwithstanding any other provision of the House bill or of FISA, subsection 702(h)(3) of FISA, as added by section 101(a) of the House bill, shall continue to apply with respect to any directive issued pursuant to new subsection 702(h) of FISA. Subsection 703(h) of FISA provides that, notwithstanding any other provision of law, no cause of action shall lie in any court against any electronic communication service provider for providing any information, facilities, or assistance in accordance with a directive issued under new subsection 702(h)(1).

No similar provision.

Applicability of release from liability for electronic communication service providers furnishing aid to the government pursuant to an order or request for emergency assistance issued pursuant to new subsection 703(d) or (e) of FISA: Under subsection 404(b)(3)(C) of the House bill, notwithstanding any other provision of the House bill or of FISA, the release from liability under new subsection 703(e) of FISA shall continue to apply with respect to an order or request for emergency assistance under section 703 of FISA, as added by the House bill.

No similar provision.

Applicability of section 706 of FISA dealing with use of information acquired under new sections 702 or 703 of FISA: Notwithstanding any other provision of the House bill or of FISA, under subsection 404(b)(3)(D) of the House bill, new section 706 of FISA (which provides that information acquired under new section 702 or 703 of FISA shall be considered information acquired from an electronic surveillance pursuant to title I of FISA for purposes of section 106 of FISA) shall continue to apply with respect to an acquisition conducted under section 702 or 703 of FISA.

H.R. 3773 (S. 2248) as passed by the Senate

No similar provision.

H.R. 3773—House Amendment to the Senate Amendment

Applicability of 18 U.S.C. § 2511(2)(a)(ii)(A) of FISA, as amended by section 101(c)(1) of the House bill: Section 404(b)(3)(E) of the House bill provides that, notwithstanding any other provision of the House bill or of FISA, 18 U.S.C. § 2511(2)(a)(ii)(A) of FISA, as amended by section 101(c)(1) of the House bill, shall continue to apply to an order issued pursuant to section 704 of FISA (dealing with emergency authorizations), as added by section 101(a) of the House bill. [18 U.S.C. § 2511(2)(a)(ii)(A) would be amended by section 101(c)(1) of the House bill to provide that, “[n]otwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other person, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of [FISA], if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with a court order directing such assistance or a court order pursuant to section 704 of [FISA] signed by the authorizing judge.” [Emphasis added.]]

No Rights Under the FISA Amendments Act of 2008 for Undocumented Aliens

No similar provision.

Section 405 of the House bill provides that, “This Act and the amendments made by this Act shall not be construed to prohibit surveillance of, or grant any rights to, an alien not permitted to be in or remain in the United States.”

Surveillance to Protect the United States

No similar provision.

Section 406 of the House bill provides that the bill, and the amendments made by it, shall not be construed to prohibit the intelligence community (as defined in section 3(4) of the National Security Act of 1947, 50 U.S.C. § 401a(4)) from conducting lawful surveillance that is necessary to:

- prevent Osama Bin Laden, al Qaeda, or any other terrorist or terrorist organization from attacking the United States, any U.S. person, or any ally of the United States;
 - ensure the safety and security of members of the United States Armed Forces or any other officer or employee of the federal government involved in protecting the national security of the United States; or
 - protect the United States, any U.S. person, or any ally of the United States from threats posed by weapons of mass destruction or other threats to national security.
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Glossary of FISA Terms from 50 U.S.C. § 1801

As used in title I of FISA, 50 U.S.C. § 1801 *et seq.*:

(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).

(c) “International terrorism” means activities that—

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended—

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) “Sabotage” means activities that involve a violation of chapter 105 of title 18, or that would involve such a violation if committed against the United States.

(e) “Foreign intelligence information” means—

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

(f) “Electronic surveillance” means—

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of title 18;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

(g) “Attorney General” means the Attorney General of the United States (or Acting Attorney General), the Deputy Attorney General, or, upon the designation of the Attorney General, the Assistant Attorney General designated as the Assistant Attorney General for National Security under section 507A of title 28, United States Code.

(h) “Minimization procedures,” with respect to electronic surveillance, means—

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person’s consent, unless such person’s identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805

of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

(i) “United States person” means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

(j) “United States,” when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

(k) “Aggrieved person” means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

(l) “Wire communication” means any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

(m) “Person” means any individual, including any officer or employee of the federal government, or any group, entity, association, corporation, or foreign power.

(n) “Contents,” when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

(o) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

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