

## H.R. 6304, FISA AMENDMENTS ACT OF 2008

## SECTION-BY-SECTION ANALYSIS AND EXPLANATION

Senator John D. Rockefeller IV, Chairman of the Select Committee on Intelligence

The consideration of legislation to amend the Foreign Intelligence Surveillance Act of 1978 ("FISA") in the 110th Congress began with submission by the Director of National Intelligence ("DNI") on April 12, 2007 of a proposed Foreign Intelligence Surveillance Modernization Act of 2007, as Title IV of the Administration's proposed Intelligence Authorization Act for Fiscal Year 2008. The DNI's proposal was the subject of an open hearing on May 1, 2007 and subsequent closed hearings by the Senate Select Committee on Intelligence, but was not formally introduced. It is available on the Committee's website: <http://intelligence.senate.gov/070501/bill.pdf>. In the Senate, the original legislative vehicle for the consideration of FISA amendments in the 110th Congress was S. 2248. It was reported by the Select Committee on Intelligence on October 26, 2007 (S. Rep. No. 110-209 (2007)), and then sequentially reported by the Committee on the Judiciary on November 16, 2007 (S. Rep. No. 110-258 (2008)). In the House, the original legislative vehicle was H.R. 3773. It was reported by the Committee on the Judiciary and the Permanent Select Committee on Intelligence on October 12, 2007 (H. Rep. No. 110-373 (Parts 1 and 2)(2007)). H.R. 3773 passed the House on November 15, 2007. S. 2248 passed the Senate on February 12, 2008, and was sent to the House as an amendment to H.R. 3773. On March 14, 2008, the House returned H.R. 3773 to the Senate with an amendment.

No formal conference was convened to resolve the differences between the two Houses on H.R. 3773. Instead, following an agreement reached without a formal conference, the House passed a new bill, H.R. 6304, which contains a complete compromise of the differences on H.R. 3773.

H.R. 6304 is a direct descendant of H.R. 3773, as well as of the original Senate bill, S. 2248, and the legislative history of those measures constitutes the legislative history of H.R. 6304. The section-by-section analysis and explanation set forth below is based on the analysis and explanation in the report of the Select Committee on Intelligence on S. 2248, at S. Rep. No. 110-209, pp. 12-25, as expanded and edited to reflect the floor amendments to S. 2248 and the negotiations that produced H.R. 6304.

## OVERALL ORGANIZATION OF ACT

The FISA Amendments Act of 2008 ("FISA Amendments Act") contains four titles.

Title I includes, in section 101, a new Title VII of FISA entitled "Additional Procedures Regarding Certain Persons Outside the United States." This new title of FISA (which will sunset in four and a half years) is a successor to the Protect America Act of 2007, [Pub. L. 110-55](#) (August 5, 2007) ("Protect America Act"), with amendments. Sections 102 through 110 of the Act contain a number of amendments to FISA apart from the collection issues addressed in the new Title VII of FISA. These include a provision reaffirming and strengthening the requirement that FISA is the exclusive means for electronic surveillance, important streamlining provisions, and a change in the definitions section of FISA (in section 110 of the bill) to facilitate

foreign intelligence collection against proliferators of weapons of mass destruction.

Title II establishes a new Title VIII of FISA which is entitled "Protection of Persons Assisting the Government." This new title establishes a long-term procedure, in new FISA section 802, for the Government to implement statutory defenses and obtain the dismissal of civil cases against persons, principally electronic communication service providers, who assist elements of the intelligence community in accordance with defined legal documents, namely, orders of the FISA Court or certifications or directives provided for and defined by statute. Section 802 also incorporates a procedure with precise boundaries for liability relief for electronic communication service providers who are defendants in civil cases involving an intelligence activity authorized by the President between September 11, 2001, and January 17, 2007. In addition, Title II provides for the protection, by way of preemption, of the federal government's ability to conduct intelligence activities without interference by state investigations.

Title III directs the Inspectors General of the Department of Justice, the Department of Defense, the Office of National Intelligence, the National Security Agency, and any other element of the intelligence community that participated in the President's Surveillance Program authorized by the President between September 11, 2001, and January 17, 2007, to conduct a comprehensive review of the program. The Inspectors General are required to submit a report to the appropriate committees of Congress, within one year, that addresses, among other things, all of the facts necessary to describe the establishment, implementation, product, and use of the product of the President's Surveillance Program, including the participation of individuals and entities in the private sector related to the program.

Title IV contains important procedures for the transition from the Protect America Act to the new Title VII of FISA. Section 404(a)(7) directs the Attorney General and the DNI, if they seek to replace an authorization under the Protect America Act, to **\*S6130** submit the certification and procedures required in accordance with the new section 702 to the FISA Court at least 30 days before the expiration of such authorizations, to the extent practicable. Title IV explicitly provides for the continued effect of orders, authorizations, and directives issued under the Protect America Act, and of the provisions pertaining to protection from liability, FISA court jurisdiction, the use of information acquired and Executive Branch reporting requirements, past the statutory sunset of that act. Title IV also contains provisions on the continuation of authorizations, directives, and orders under Title VII that are in effect at the time of the December 31, 2012 sunset, until their expiration within the year following the sunset.

## TITLE I. FOREIGN INTELLIGENCE SURVEILLANCE

### Section 101. Targeting the Communications of Persons Outside the United States

Section 101(a) of the FISA Amendments Act establishes a new Title VII of FISA. Entitled "Additional Procedures Regarding Certain Persons Outside the United States," the new title includes, with important modifications, an authority similar to that granted by the Protect America Act as temporary sections 105A, 105B, and 105C of FISA. Those Protect America Act provisions had been placed within FISA's Title I on electronic surveillance. Moving the

amended authority to a title of its own is appropriate because the authority involves not only the acquisition of communications as they are being carried but also while they are stored by electronic communication service providers.

#### Section 701. Definitions

Section 701 incorporates into Title VII the definition of nine terms that are defined in Title I of FISA and used in Title VII: "agent of a foreign power," "Attorney General," "contents," "electronic surveillance," "foreign intelligence information," "foreign power," "person," "United States," and "United States person." It defines the congressional intelligence committees for the purposes of Title VII. Section 701 defines the two courts established in Title I that are assigned responsibilities under Title VII: the Foreign Intelligence Surveillance Court ("FISA Court") and the Foreign Intelligence Surveillance Court of Review. Section 701 also defines "intelligence community" as found in the National Security Act of 1947. Finally, section 701 defines a term, not previously defined in FISA, which has an important role in setting the parameters of Title VII: "electronic communication service provider." This definition is connected to the objective that the acquisition of foreign intelligence pursuant to this title is meant to encompass the acquisition of stored electronic communications and related data.

#### Section 702. Procedures for Targeting Certain Persons Outside the United States Other than United States Persons

Section 702(a) sets forth the basic authorization in Title VII, replacing section 105B of FISA, as added by the Protect America Act. Unlike the Protect America Act, the collection authority in section 702(a) is to be conducted pursuant to the issuance of an order of the FISA Court, or pursuant to a determination of the Attorney General and the DNI, acting jointly, that exigent circumstances exist, as defined in section 702(c)(2), subject to subsequent and expeditious action by the FISA Court. Authorizations must contain an effective date, and may be valid for a period of up to one year from that date.

Subsequent provisions of the Act implement the prior order and effective date provisions of section 702(a): in addition to section 702(c)(2) which defines exigent circumstances, section 702(i)(1)(B) provides that the court shall complete its review of certifications and procedures within 30 days (unless extended under section 702(j)(2)); section 702(i)(5)(A) provides for the submission of certifications and procedures to the FISA Court at least 30 days before the expiration of authorizations that are being replaced, to the extent practicable; and section 702(i)(5)(B) provides for the continued effectiveness of expiring certifications and procedures until the court issues an order concerning their replacements.

Section 105B and section 702(a) differ in other important respects. Section 105B authorized the acquisition of foreign intelligence information "concerning" persons reasonably believed to be outside the United States. To make clear that all collection under Title VII must be targeted at persons who are reasonably believed to be outside the United States, section 702(a) eliminates the word "concerning" and instead authorizes "the targeting of persons reasonably believed to be located outside the United States to collect

foreign intelligence information."

Section 702(b) establishes five related limitations on the authorization in section 702(a). Overall, the limitations ensure that the new authority is not used for surveillance directed at persons within the United States or at United States persons. The first is a specific prohibition on using the new authority to target intentionally any person within the United States. The second provides that the authority may not be used to conduct "reverse targeting," the intentional targeting of a person reasonably believed to be outside the United States if the purpose of the acquisition is to target a person reasonably believed to be in the United States. If the purpose of the acquisition is to target a person reasonably believed to be in the United States, the acquisition must be conducted in accordance with other titles of FISA. The third bars the intentional targeting of a United States person reasonably believed to be outside the United States. In order to target such United States person, acquisition must be conducted under three subsequent sections of Title VII, which require individual FISA court orders for United States persons: sections 703, 704, and 705. The fourth limitation goes beyond targeting (the object of the first three limitations) and prohibits 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. The fifth is an overarching mandate that an acquisition authorized in section 702(a) shall be conducted in a manner consistent with the Fourth Amendment to the U.S. Constitution, which provides for "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Section 702(c) governs the conduct of acquisitions. Pursuant to section 702(c)(1), acquisitions authorized under section 702(a) may be conducted only in accordance with targeting and minimization procedures approved at least annually by the FISA Court and a certification of the Attorney General and the DNI, upon its submission in accordance with section 702(g). Section 702(c)(2) describes the "exigent circumstances" in which the Attorney General and Director of National Intelligence may authorize targeting for a limited time without a prior court order for purposes of subsection (a). Section 702(c)(2) provides that the Attorney General and the DNI may make a determination that exigent circumstances exist because, without immediate implementation of an authorization under section 702(a), intelligence important to the national security of the United States may be lost or not timely acquired and time does not permit the issuance of an order pursuant to section 702(i)(3) prior to the implementation of such authorization. Section 702(c)(3) provides that the Attorney General and the DNI may make such a determination before the submission of a certification or by amending a certification at any time during which judicial review of such certification is pending before the FISA Court.

Section 702(c)(4) addresses the concern, reflected in section 105A of FISA as added by the Protect America Act, that the definition of electronic surveillance in Title I might prevent use of the new procedures. To address this concern, section 105A redefined the term "electronic surveillance" to exclude "surveillance directed at a person reasonably believed to be located outside of the United States." This redefinition, however, broadly exempted activities from the limitations of FISA's individual order requirements. In contrast, section 702(c)(4) does not change the definition of electronic surveillance, but clarifies the intent of Congress to allow the targeting of foreign targets outside the United States in accordance with section 702 without an application for a court order under Title I of FISA. The addition

of this construction paragraph, as well as the language in section 702(a) that an authorization may occur "notwithstanding any other law," makes clear that nothing in Title I of FISA shall be construed to require a court order under that title for an acquisition that is targeted in accordance with section 702 at a foreign person outside the United States.

Section 702(d) provides, in a manner essentially identical to the Protect America Act, for the adoption by the Attorney General, in consultation with the DNI, of targeting procedures that are reasonably designed to ensure that collection is limited to targeting persons reasonably believed to be outside the United States. As provided in the Protect America Act, the targeting procedures are subject to judicial review and approval. In addition to the requirements of the Protect America Act, however, section 702(d) provides that the targeting procedures also must be reasonably designed to prevent 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. Section 702(d)(2) subjects these targeting procedures to judicial review and approval.

Section 702(e) provides that the Attorney General, in consultation with the DNI, shall adopt, for acquisitions authorized by section 702(a), minimization procedures that are consistent with section 101(h) or 301(4) of FISA, which establish FISA's minimization requirements for electronic surveillance and physical searches. Section 702(e)(2) provides that the minimization procedures, which are essential to the protection of United States citizens and permanent residents, shall be subject to judicial review and approval. This corrects an omission in the Protect America Act which had not provided for judicial review of the adherence of minimization procedures to statutory requirements.

Section 702(f) provides that the Attorney General, in consultation with the DNI, shall adopt guidelines to ensure compliance with ~~\*S6131~~ the limitations in section 702(b), including the prohibitions on the acquisition of purely domestic communications, on targeting persons within the United States, on targeting United States persons located outside the United States, and on reverse targeting. Such guidelines shall also ensure that an application for a court order is filed as required by FISA. It is intended that these guidelines will be used for training intelligence community personnel so that there are clear requirements and procedures governing the appropriate implementation of the authority under this title of FISA. The Attorney General is to provide these guidelines to the congressional intelligence committees, the judiciary committees of the House of Representatives and the Senate, and the FISA Court. Subsequent provisions implement the guidelines requirement. See section 702(g)(2)(A)(iii)(certification requirements); section 702(l)(1) and 702(l)(2) (assessment of compliance with guidelines); and section 707(b)(1)(G)(ii) (reporting on noncompliance with guidelines).

Section 702(g) requires that the Attorney General and the DNI provide to the FISA Court, prior to implementation of an authorization under subsection (a), a written certification, with any supporting affidavits. In exigent circumstances, the Attorney General and DNI may make a determination that, without immediate implementation, intelligence important to the national security will be lost or not timely acquired prior to the implementation of an authorization. In exigent circumstances, if time does not permit the submission of a certification prior to the implementation of an authorization, the certification must be submitted to the FISA Court no later than seven days

after the determination is made. This seven-day time period for submission of a certification in the case of exigent circumstances is identical to the time period by which the Attorney General must apply for a court order after authorizing an emergency surveillance under other provisions of FISA, as amended by this Act.

Section 702(g)(2) sets forth the requirements that must be contained in the written certification. These elements include: that the targeting and minimization procedures have been approved by the FISA Court or will be submitted to the court with the certification; that guidelines have been adopted to ensure compliance with the limitations of subsection (b) have been adopted; that those procedures and guidelines are consistent with the Fourth Amendment; that the acquisition is targeted at persons reasonably believed to be outside the United States; that a significant purpose of the acquisition is to obtain foreign intelligence information; and an effective date for the authorization that in most cases is at least 30 days after the submission of the written certification. Additionally, as an overall limitation on the method of acquisition permitted under section 702, the certification must attest that the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider.

Requiring an effective date in the certification serves to identify the beginning of the period of authorization (which is likely to be a year) for collection and to alert the FISA Court of when the Attorney General and DNI are seeking to begin collection. Section 702(g)(3) permits the Attorney General and DNI to change the effective date in the certification by amending the certification.

As with the Protect America Act, the certification under section 702(g)(4) is not required to identify the specific facilities, places, premises, or property at which the acquisition under section 702(a) will be directed or conducted. The certification shall be subject to review by the FISA Court.

Section 702(h) authorizes the Attorney General and the DNI to direct, in writing, an electronic communication service provider to furnish the Government with all information, facilities, or assistance necessary to accomplish the acquisition authorized under subsection 702(a). It requires compensation for this assistance and provides that no cause of action shall lie in any court against an electronic communication service provider for its assistance in accordance with a directive. Section 702(h) also establishes expedited procedures in the FISA Court for a provider to challenge the legality of a directive or the Government to enforce it. In either case, the question for the court is whether the directive meets the requirements of section 702 and is otherwise lawful. Whether the proceeding begins as a provider challenge or a Government enforcement petition, if the court upholds the directive as issued or modified, the court shall order the provider to comply. Failure to comply may be punished as a contempt of court. The proceedings shall be expedited and decided within 30 days, unless that time is extended under section 702(j)(2).

Section 702(i) provides for judicial review of any certification required by section 702(g) and the targeting and minimization procedures adopted pursuant to sections 702(d) and 702(e). In accordance with section 702(i)(5), if the Attorney General and the DNI seek to reauthorize or replace an

authorization in effect under the Act, they shall submit, to the extent practicable, the certification and procedures at least 30 days prior to the expiration of such authorization.

The court shall review certifications to determine whether they contain all the required elements. It shall review targeting procedures to assess whether they are reasonably designed to ensure that the acquisition activity is limited to the targeting of persons reasonably believed to be located outside the United States and prevent the intentional acquisition of any communication whose sender and intended recipients are known to be located in the United States. The Protect America Act had limited the review of targeting procedures to a "clearly erroneous" standard; section 702(i) omits that limitation. For minimization procedures, section 702(i) provides that the court shall review them to assess whether they meet the statutory requirements. The court is to review the certifications and procedures and issue its order within 30 days after they were submitted unless that time is extended under section 702(j)(2). The Attorney General and the DNI may also amend the certification or procedures at any time under section 702(i)(1)(C), but those amended certifications or procedures must be submitted to the court in no more than 7 days after amendment. The amended procedures may be used pending the court's review.

If the FISA Court finds that the certification contains all the required elements and that the targeting and minimization procedures are consistent with the requirements of subsections (d) and (e) and with the Fourth Amendment, the court shall enter an order approving their use or continued use for the acquisition authorized by section 702(a). If it does not so find, the court shall order the Government, at its election, to correct any deficiencies or cease, or not begin, the acquisition. If acquisitions have begun, they may continue during any rehearing en banc of an order requiring the correction of deficiencies. If the Government appeals to the Foreign Intelligence Surveillance Court of Review, any collection that has begun may continue at least until that court enters an order, not later than 60 days after filing of the petition for review, which determines whether all or any part of the correction order shall be implemented during the appeal.

Section 702(j)(1) provides that judicial proceedings are to be conducted as expeditiously as possible. Section 702(j)(2) provides that the time limits for judicial review in section 702 (for judicial review of certifications and procedures or in challenges or enforcement proceedings concerning directives) shall apply unless extended, by written order, as necessary for good cause in a manner consistent with national security.

Section 702(k) requires that records of proceedings under section 702 shall be maintained by the FISA Court under security measures adopted by the Chief Justice in consultation with the Attorney General and the DNI. In addition, all petitions are to be filed under seal and the FISA Court, upon the request of the Government, shall consider ex parte and in camera any Government submission or portions of a submission that may include classified information. The Attorney General and the DNI are to retain directives made or orders granted for not less than 10 years.

Section 702(l) provides for oversight of the implementation of Title VII. It has three parts. First, the Attorney General and the DNI shall assess semiannually under subsection (1)(1) compliance with the targeting and

minimization procedures, and the Attorney General guidelines for compliance with limitations under section 702(b), and submit the assessment to the FISA Court and to the congressional intelligence and judiciary committees, consistent with congressional rules.

Second, under subsection (1)(2)(A), the Inspector General of the Department of Justice and the inspector general ("IG") of any intelligence community element authorized to acquire foreign intelligence under section 702(a) are authorized to review compliance of their agency or element with the targeting and minimization procedures adopted in accordance with subsections (d) and (e) and the guidelines adopted in accordance with subsection (f). Subsections (1)(2)(B) and (1)(2)(C) mandate several statistics that the IGs shall review with respect to United States persons, including the number of disseminated intelligence reports that contain references to particular U.S. persons, the number of U.S. persons whose identities were disseminated in response to particular requests, and the number of targets later determined to be located in the United States. Their reports shall be submitted to the Attorney General, the DNI, and the appropriate congressional committees. Section 702(1)(2) provides no statutory schedule for the completion of these IG reviews; the IGs should coordinate with the heads of their agencies about the timing for completion of the IG reviews so that they are done at a time that would be useful for the agency heads to complete their semiannual reviews.

Third, under subsection (1)(3), the head of an intelligence community element that conducts an acquisition under section 702 shall review annually whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition and provide an accounting of information pertaining to United States persons similar to that included in the IG report. Subsection (1)(3) also encourages the \*S6132 head of the element to develop procedures to assess the extent to which the new authority acquires the communications of U.S. persons, and to report the results of such assessment. The review is to be used by the head of the element to evaluate the adequacy of minimization procedures. The annual review is to be submitted to the FISA Court, the Attorney General and the DNI, and to the appropriate congressional committees.

#### Section 703. Certain Acquisition Inside the United States Targeting United States Persons Outside the United States

Section 703 governs the targeting of United States persons who are reasonably believed to be outside the United States when the acquisition of foreign intelligence is conducted inside the United States. The authority and procedures of section 703 apply when the acquisition either constitutes electronic surveillance, as defined in Title I of FISA, or is of stored electronic communications or stored electronic data. If the United States person returns to the United States, acquisition under section 703 must cease. The Government may always, however, obtain an order or authorization under another title of FISA.

The application procedures and provisions for a FISA Court order in sections 703(b) and 703(c) are drawn from Titles I and III of FISA. Key among them is the requirement that the FISA Court determine that there is probable cause to believe that, for the United States person who is the target of the surveillance, the person is reasonably believed to be located outside the United States and is a foreign power or an agent, officer or employee of a



foreign power. The inclusion of United States persons who are officers or employees of a foreign power, as well as those who are agents of a foreign power as that term is used in FISA, is intended to permit the type of collection against United States persons outside the United States that has been allowed under existing Executive Branch guidelines. The FISA Court shall also review and approve minimization procedures that will be applicable to the acquisition, and shall order compliance with such procedures.

As with FISA orders against persons in the United States, FISA orders against United States persons outside of the United States under section 703 may not exceed 90 days and may be renewed for additional 90-day periods upon the submission of renewal applications. Emergency authorizations under section 703 are consistent with the requirements for emergency authorizations in FISA against persons in the United States, as amended by this Act; the Attorney General may authorize an emergency acquisition if an application is submitted to the FISA Court in not more than seven days.

Section 703(g) is a construction provision that clarifies that, if the Government obtains an order and target a particular United States person in accordance with section 703, FISA does not require the Government to seek a court order under any other provision of FISA to target that United States person while that person is reasonably believed to be located outside the United States.

#### Section 704. Other Acquisitions Targeting United States Persons Outside the United States

Section 704 governs other acquisitions that target United States persons who are outside the United States. Sections 702 and 703 address acquisitions that constitute electronic surveillance or the acquisition of stored electronic communications. In contrast, as provided in section 704(a)(2), section 704 addresses any targeting of a United States person outside of the United States under circumstances in which that person has a reasonable expectation of privacy and a warrant would be required if the acquisition occurred within the United States. It thus covers not only communications intelligence, but, if it were to occur, the physical search of a home, office, or business of a United States person by an element of the United States intelligence community, outside of the United States.

Pursuant to section 704(a)(3), if the targeted United States person is reasonably believed to be in the United States while an order under section 704 is in effect, the acquisition against that person shall cease unless authority is obtained under another applicable provision of FISA. Likewise, the Government may not use section 704 to authorize an acquisition of foreign intelligence inside the United States.

Section 704(b) describes the application to the FISA Court that is required. For an order under section 704(c), the FISA Court must determine that there is probable cause to believe that the United States person who is the target of the acquisition is reasonably believed to be located outside the United States and is a foreign power, or an agent, officer or employee of a foreign power. An order is valid for a period not to exceed 90 days, and may be renewed for additional 90-day periods upon submission of renewal

applications meeting application requirements.

Because an acquisition under section 704 is conducted outside the United States, or is otherwise not covered by FISA, the FISA Court is expressly not given jurisdiction to review the means by which an acquisition under this section may be conducted. Although the FISA Court's review is limited to determinations of probable cause, section 704 anticipates that any acquisition conducted pursuant to a section 704 order will in all other respects be conducted in compliance with relevant regulations and Executive Orders governing the acquisition of foreign intelligence outside the United States, including Executive Order 12333 or any successor order.

#### Section 705. Joint Applications and Concurrent Authorizations

Section 705 provides that if an acquisition targeting a United States person under section 703 or 704 is proposed to be conducted both inside and outside the United States, a judge of the FISA Court may issue simultaneously, upon the request of the Government in a joint application meeting the requirements of sections 703 and 704, orders under both sections as appropriate. If an order authorizing electronic surveillance or physical search has been obtained under section 105 or section 304, and that order is still in effect, the Attorney General may authorize, without an order under section 703 or 704, the targeting of that United States person for the purpose of acquiring foreign intelligence information while such person is reasonably believed to be located outside the United States.

#### Section 706. Use of Information Acquired Under Title VII

Section 706 fills a void that has existed under the Protect America Act which had contained no provision governing the use of acquired intelligence. Section 706(a) provides that information acquired from an acquisition conducted under section 702 shall be deemed to be information acquired from an electronic surveillance pursuant to Title I of FISA for the purposes of section 106 of FISA, which is the provision of Title I of FISA that governs public disclosure or use in criminal proceedings. The one exception is for subsection (j) of section 106, as the notice provision in that subsection, while manageable in individual Title I proceedings, would present a difficult national security question when applied to a Title VII acquisition. Section 706(b) also provides that information acquired from an acquisition conducted under section 703 shall be deemed to be information acquired from an electronic surveillance pursuant to Title I of FISA for the purposes of section 106 of FISA; however, the notice provision of subsection (j) applies. Section 706 ensures that a uniform standard for the types of information is acquired under the new title.

#### Section 707. Congressional Oversight

Section 707 provides for additional congressional oversight of the implementation of Title VII. The Attorney General is to fully inform "in a manner consistent with national security" the congressional intelligence and judiciary committees about implementation of the Act at least semiannually. Each report is to include any certifications made under section 702, the

reasons for any determinations made under section 702(c)(2), any directives issued during the reporting period, a description of the judicial review during the reporting period to include a copy of any order or pleading that contains a significant legal interpretation of section 702, incidents of noncompliance and procedures to implement the section. With respect to sections 703 and 704, the report must contain the number of applications made for orders under each section and the number of such orders granted, modified and denied, as well as the number of emergency authorizations made pursuant to each section and the subsequent orders approving or denying the relevant application. In keeping the congressional intelligence committees fully informed, the Attorney General should provide no less information than has been provided in the past in keeping the committees fully and currently informed.

#### Section 708. Savings Provision

Section 708 provides that nothing in Title VII shall be construed to limit the authority of the Government to seek an order or authorization under, or otherwise engage in any activity that is authorized under, any other title of FISA. This language is designed to ensure that Title VII cannot be interpreted to prevent the Government from submitting applications and seeking orders under other titles of FISA.

#### Section 101(b). Table of Contents

Section 101(b) of the bill amends the table of contents in the first section of FISA.

#### Subsection 101(c). Technical and Conforming Amendments

Section 101(c) of the bill provides for technical and conforming amendments in Title 18 of the United States Code and in FISA.

#### Section 102. Statement of Exclusive Means by which Electronic Surveillance and Interception of Certain Communications May Be Conducted

Section 102(a) amends Title I of FISA by adding a new Section 112 of FISA. Under the heading of "Statement of Exclusive Means by which Electronic Surveillance and Interception of Certain Communications May Be Conducted," the new section 112(a) states: "Except as provided in subsection (b), the procedures of chapters 119, 121 and 126 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 communication may be conducted." New section 112(b) of FISA provides that only an express statutory authorization for electronic surveillance or the interception of domestic wire, oral, or electronic communications, other than as an amendment to FISA or chapters 119, 121, or 206 of Title 18 shall constitute an additional exclusive means for the \*S6133 purpose of subsection (a). The new section 112 is based on a provision which Congress enacted in 1978 as part of the original FISA that is codified in [section 2511\(2\)\(f\) of Title 18, United States Code](#), and which will remain in the U.S. Code.

Section 102(a) strengthens the statutory provisions pertaining to electronic surveillance and interception of certain communications to clarify the express intent of Congress that these statutory provisions are the exclusive means for conducting electronic surveillance and interception of certain communications. With the absence of reference to the Authorization for Use of Military Force, [Pub. L. 107-40](#), (September 18, 2001) ("AUMF"), Congress makes clear that this AUMF or any other existing statute cannot be used in the future as the statutory basis for circumventing FISA. Section 102(a) is intended to ensure that additional exclusive means for surveillance or interceptions shall be express statutory authorizations.

In accord with section 102(b) of the bill, section 109 of FISA that provides for criminal penalties for violations of FISA, is amended to implement the exclusivity requirement added in section 112 by making clear that the safe harbor to FISA's criminal offense provision is limited to statutory authorizations for electronic surveillance or the interception of domestic wire, oral, or electronic communications which are pursuant to a provision of FISA, one of the enumerated chapters of the criminal code, or a statutory authorization that expressly provides an additional exclusive means for conducting the electronic surveillance. By virtue of the cross-reference in section 110 of FISA to section 109, that limitation on the safe harbor in section 109 applies equally to section 110 on civil liability for conducting unlawful electronic surveillance.

Section 102(c) requires that when a certification for assistance to obtain foreign intelligence is based on statutory authority, the certification provided to an electronic communication service provider is to include the specific statutory authorization for the request for assistance and certify that the statutory requirements have been met. This provision is designed to assist electronic communication service providers in understanding the legal basis for any government requests for assistance.

In the section-by-section analysis of S. 2248, the report of the Select Committee on Intelligence (S. Rep. No. 110-209, at 18) described and incorporated the discussion of exclusivity in the 1978 conference report on the original Foreign Intelligence Surveillance Act, in particular the conferees' description of the [Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 \(1952\)](#) and the application of the principles described there to the current legislation. That full discussion should be deemed incorporated in this section-by-section analysis.

Section 103. Submittal to Congress of Certain Court Orders under the Foreign Intelligence Surveillance Act of 1978

Section 6002 of the Intelligence Reform Act and Terrorism Prevention Act of 2004 ([Pub. L. 108-458](#)), added a Title VI to FISA that augments the semiannual reporting obligations of the Attorney General to the intelligence and judiciary committees of the Senate and House of Representatives. Under section 6002, the Attorney General shall report a summary of significant legal interpretations of FISA in matters before the FISA Court or Foreign Intelligence Surveillance Court of Review. The requirement extends to interpretations presented in applications or pleadings filed with either court

by the Department of Justice. In addition to the semiannual summary, the Department of Justice is required to provide copies of court decisions, but not orders, which include significant interpretations of FISA. The importance of the reporting requirement is that, because the two courts conduct their business in secret, Congress needs the reports to know how the law it has enacted is being interpreted.

Section 103 improves the Title VI reporting requirements in three ways. First, as significant legal interpretations may be included in orders as well as opinions, section 103 requires that orders also be provided to the committees. Second, as the semiannual report often takes many months after the end of the semiannual period to prepare, section 103 accelerates provision of information about significant legal interpretations by requiring the submission of such decisions, orders, or opinions within 45 days. Finally, section 103 requires that the Attorney General shall submit a copy of any such decision, order, or opinion, and any pleadings, applications, or memoranda of law associated with such decision, order, or opinion, from the period five years preceding enactment of the bill that has not previously been submitted to the congressional intelligence and judiciary committees.

#### OVERVIEW OF SECTIONS 104 THROUGH SECTION 109. FISA STREAMLINING

Sections 104 through 109 amend various sections of FISA for such purposes as reducing a paperwork requirement, modifying time requirements, or providing additional flexibility in terms of the range of Government officials who may authorize FISA actions. Collectively, these amendments are described as streamlining amendments. In general, they are intended to increase the efficiency of the FISA process without depriving the FISA Court of the information it needs to make findings required under FISA.

#### Section 104. Applications for Court Orders

Section 104 of the bill strikes two of the eleven paragraphs on standard information in an application for a surveillance order under section 104 of FISA, either because the information is provided elsewhere in the application process or is not needed.

In various places, FISA has required the submission of "detailed" information, as in section 104 of FISA, "a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance." The DNI requested legislation that asked that "summary" be substituted for "detailed" for this and other application requirements, in order to reduce the length of FISA applications. In general, the bill approaches this by eliminating the mandate for "detailed" descriptions, leaving it to the FISA Court and the Government to work out the level of specificity needed by the FISA Court to perform its statutory responsibilities. With respect to one item of information, "a statement of the means by which the surveillance will be effected," the bill modifies the requirement by allowing for "a summary statement."

In aid of flexibility, section 104 increases the number of individuals who may make FISA applications by allowing the President to designate the Deputy Director of the Federal Bureau of Investigation ("FBI") as one of those

individuals. This should enable the Government to move more expeditiously to obtain certifications when the Director of the FBI is away from Washington or otherwise unavailable.

Subsection (b) of section 104 of FISA is eliminated as obsolete in light of current applications. The Director of the Central Intelligence Agency is added to the list of officials who may make a written request to the Attorney General to personally review a FISA application as the head of the CIA had this authority prior to the establishment of the Office of the Director of National Intelligence.

#### Section 105. Issuance of an Order

Section 105 strikes from Section 105 of FISA several unnecessary or obsolete provisions. Section 105 strikes subsection (c)(1)(F) of Section 105 of FISA which requires minimization procedures applicable to each surveillance device employed because Section 105(c)(2)(A) requires each order approving electronic surveillance to direct the minimization procedures to be followed.

Subsection (a)(6) reorganizes, in more readable form, the emergency surveillance provision of section 105(f), now redesignated section 105(e), with a substantive change of extending from 3 to 7 days the time by which the Attorney General must apply for and obtain a court order after authorizing an emergency surveillance. The purpose of the change is to help make emergency authority a more practical tool while keeping it within the parameters of FISA.

Subsection (a)(7) adds a new paragraph to section 105 of FISA to require the FISA Court, on the Government's request, when granting an application for electronic surveillance, to authorize at the same time the installation and use of pen registers and trap and trace devices. This will save the paperwork that had been involved in making two applications.

#### Section 106. Use of Information

Section 106 amends section 106(i) of FISA with regard to the limitations on the use of unintentionally acquired information. Currently, section 106(i) of FISA provides that unintentionally acquired radio communication between persons located in the United States must be destroyed unless the Attorney General determines that the contents of the communications indicates a threat of death or serious bodily harm to any person. Section 106 of the bill amends subsection 106(i) of FISA by making it technology neutral on the principle that the same rule for the use of information indicating threats of death or serious harm should apply no matter how the communication is transmitted.

#### Section 107. Amendments for Physical Searches

Section 107 makes changes to Title III of FISA: changing applications and orders for physical searches to correspond to changes in sections 104 and 105 on reduction of some application paperwork; providing the FBI with

administrative flexibility in enabling its Deputy Director to be a certifying officer; and extending the time, from 3 days to 7 days, for applying for and obtaining a court order after authorization of an emergency search.

Section 303(a)(4)(C), which will be redesignated section 303(a)(3)(C), requires that each application for physical search authority state the applicant's belief that the property is "owned, used, possessed by, or is in transit to or from" a foreign power or an agent of a foreign power. In order to provide needed flexibility and to make the provision consistent with electronic surveillance provisions, section 107(a)(1)(D) of the bill allows the FBI to apply for authority to search property that also is "about to be" owned, used, or possessed by a foreign power or agent of a foreign power, or in transit to or from one.

#### Section 108. Amendments for Emergency Pen Registers and Trap and Trace Devices

Section 108 amends section 403 of FISA to extend from 2 days to 7 days the time for applying for and obtaining a court order after an emergency installation of a pen register or trap and trace device. This change harmonizes among FISA's provisions for electronic surveillance, search, and pen register/\*S6134 trap and trace authority the time requirements that follow the Attorney General's decision to take emergency action.

#### Section 109. Foreign Intelligence Surveillance Court

Section 109 contains four amendments to section 103 of FISA, which establishes the FISA Court and the Foreign Intelligence Surveillance Court of Review.

Section 109(a) amends section 103 to provide that judges on the FISA Court shall be drawn from "at least seven" of the United States judicial circuits. The current requirement—that the eleven judges be drawn from seven judicial circuits (with the number appearing to be a ceiling rather than a floor) has proven unnecessarily restrictive or complicated for the designation of the judges to the FISA Court.

Section 109(b) amends section 103 to allow the FISA Court to hold a hearing or rehearing of a matter en banc, which is by all the judges who constitute the FISA Court sitting together. The Court may determine to do this on its own initiative, at the request of the Government in any proceeding under FISA, or at the request of a party in the few proceedings in which a private entity or person may be a party, i.e., challenges to document production orders under Title V, or proceedings on the legality or enforcement of directives to electronic communication service providers under Title VII.

Under section 109(b), en banc review may be ordered by a majority of the judges who constitute the FISA Court upon a determination that it is necessary to secure or maintain uniformity of the court's decisions or that a particular proceeding involves a question of exceptional importance. En banc proceedings should be rare and in the interest of the general objective of fostering expeditious consideration of matters before the FISA Court.

Section 109(c) provides authority for the entry of stays, or the entry of orders modifying orders entered by the FISA Court or the Foreign Intelligence Surveillance Court of Review, pending appeal or review in the Supreme Court. This authority is supplemental to, and does not supersede, the specific provision in section 702(i)(4)(B) that acquisitions under Title VII may continue during the pendency of any rehearing en banc and appeal to the Court of Review subject to the requirement for a determination within 60 days under section 702(i)(4)(C).

Section 109(d) provides that nothing in FISA shall be construed to reduce or contravene the inherent authority of the FISA Court to determine or enforce compliance with any order of that court or with a procedure approved by it.

#### Section 110. Weapons of Mass Destruction

Section 110 amends the definitions in FISA of foreign power and agent of a foreign power to include individuals who are not United States persons and entities not substantially composed of United States persons that are engaged in the international proliferation of weapons of mass destruction. Section 110 also adds a definition of weapon of mass destruction to the Act that defines weapons of mass destruction to cover explosive, incendiary, or poison gas devices that are designed, intended to, or have the capability to cause a mass casualty incident or death, and biological, chemical and nuclear weapons that are designed, intended to, or have the capability to cause illness or serious bodily injury to a significant number of persons. Section 110 also makes corresponding, technical and conforming changes to FISA.

#### Title II. Protections for Electronic Communication Service Providers

This title establishes a new Title VIII of FISA. The title addresses liability relief for electronic communication service providers who have been alleged in various civil actions to have assisted the U.S. Government between September 11, 2001, and January 17, 2007, when the Attorney General announced the termination of the Terrorist Surveillance Program. In addition, Title VIII contains provisions of law intended to implement statutory defenses for electronic communication service providers and others who assist the Government in accordance with precise, existing legal requirements, and for providing for federal preemption of state investigations. The liability protection provisions of Title VIII are not subject to sunset.

#### Section 801. Definitions

Section 801 establishes definitions for Title VIII. Several are of particular importance.

The term "assistance" is defined to mean the provision of, or the provision of access to, information, facilities, or another form of assistance. The word "information" is itself described in a parenthetical to include communication contents, communication records, or other information relating to a customer



or communications. "Contents" is defined by reference to its meaning in Title I of FISA. By that reference, it includes any information concerning the identity of the parties to a communication or the existence, substance, purport, or meaning of it.

The term "civil action" is defined to include a "covered civil action." Thus, "covered civil actions" are a subset of civil actions, and everything in new Title VIII that is applicable generally to civil actions is also applicable to "covered civil actions." A "covered civil action" has two key elements. It is defined as a civil action filed in a federal or state court which (1) alleges that an electronic communication service provider (a defined term) furnished assistance to an element of the intelligence community and (2) seeks monetary or other relief from the electronic communication service provider related to the provision of the assistance. Both elements must be present for the lawsuit to be a covered civil action.

The term "person" (the full universe of those protected by section 802) is necessarily broader than the definition of electronic communication service provider. The aspects of Title VIII that apply to those who assist the Government in accordance with precise, existing legal requirements apply to all who may be ordered to provide assistance under FISA, such as custodians of records who may be directed to produce records by the FISA Court under Title V of FISA or landlords who may be required to provide access under Title I or III of FISA, not just to electronic communication service providers.

#### Section 802. Procedures for Implementing Statutory Defenses

Section 802 establishes procedures for implementing statutory defenses. Notwithstanding any other provision of law, no civil action may lie or be maintained in a federal or state court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General makes a certification to the district court in which the action is pending. (If an action had been commenced in state court, it would have to be removed, pursuant to section 802(g) to a district court, where a certification under section 802 could be filed.) The certification must state either that the assistance was not provided (section 802(a)(5)) or, if furnished, that it was provided pursuant to specific statutory requirements (sections 802(a)(1-4)). Three of these underlying requirements, which are specifically described in section 802 (sections 802(a)(1-3)), come from existing law. They include: an order of the FISA Court directing assistance, a certification in writing under [sections 2511\(2\)\(a\)\(ii\)\(B\)](#) or [2709\(b\) of Title 18](#), or directives to electronic communication service providers under particular sections of FISA or the Protect America Act.

The Attorney General may only make a certification under the fourth statutory requirement, section 802(a)(4), if the civil action is a covered civil action (as defined in section 801(5)). To satisfy the requirements of section 802(a)(4), the Attorney General must certify first that the assistance alleged to have been provided by the electronic communication service provider was in connection with an intelligence activity involving communications that was (1) authorized by the President between September 11, 2001 and January 17, 2007 and (2) designed to detect or prevent a terrorist attack or preparations for one against the United States. In addition, the Attorney General must also certify that the assistance was the subject of a written request or directive,

or a series of written requests or directives, from the Attorney General or the head (or deputy to the head) of an element of the intelligence community to the electronic communication service provider indicating that the activity was (1) authorized by the President and (2) determined to be lawful. The report of the Select Committee on Intelligence contained a description of the relevant correspondence provided to electronic communication service providers (S. Rep. No. 110-209, at 9).

The district court must give effect to the Attorney General's certification unless the court finds it is not supported by substantial evidence provided to the court pursuant to this section. In its review, the court may examine any relevant court order, certification, written request or directive submitted by the Attorney General pursuant to subsection (b)(2) or by the parties pursuant to subsection (d). Section 802 is silent on the nature of any additional materials that the Attorney General may submit beyond those listed in subsection (b)(2) if the Attorney General determines they are necessary to provide substantial evidence to support the certification, such as if the Attorney General certifies that a person did not provide the alleged assistance.

If the Attorney General files a declaration that disclosure of a certification or supplemental materials would harm national security, the court shall review the certification and supplemental materials in camera and ex parte, which means with only the Government present. A public order following that review shall be limited to a statement as to whether the case is dismissed and a description of the legal standards that govern the order, without disclosing the basis for the certification of the Attorney General. The purpose of this requirement is to protect the classified national security information involved in the identification of providers who assist the Government. A public order shall not disclose whether the certification was based on an order, certification, or directive, or on the ground that the electronic communication service provider furnished no assistance. Because the district court must find that the certification-including a certification that states that a party did not provide the alleged assistance-is supported by substantial evidence in order to dismiss a case, an order failing to dismiss a case is only a conclusion that the substantial evidence test has not been met. It does not indicate whether a particular provider assisted the government.

Subsection (d) makes clear that any plaintiff or defendant in a civil action may submit any relevant court order, certification, written request, or directive to the district court for review and be permitted to participate in the briefing or argument of any legal **\*S6135** issue in a judicial proceeding conducted pursuant to this section, to the extent that such participation does not require the disclosure of classified information to such party. The authorities of the Attorney General under section 802 are to be performed only by the Attorney General, the Acting Attorney General, or the Deputy Attorney General.

In adopting the portions of section 802 that allow for liability protection for those electronic communication service providers who may have participated in the program of intelligence activity involving communications authorized by the President between September 11, 2001, and January 17, 2007, the Congress makes no statement on the legality of the program. This is in accord with the statement in the report of the Senate Intelligence Committee that "Section 202 <as the immunity provision was then numbered> makes no assessment about the legality of the President's program." S. Rep. No. 110-209, at 9.

## Section 803. Preemption of State Investigations

Section 803 addresses actions taken by a number of state regulatory commissions to force disclosure of information concerning cooperation by state regulated electronic communication service providers with U.S. intelligence agencies. Section 803 preempts these state actions and authorizes the United States to bring suit to enforce the prohibition.

## Section 804. Reporting

Section 804 provides for oversight of the implementation of Title VIII. On a semiannual basis, the Attorney General is to provide to the appropriate congressional committees a report on any certifications made under section 802, a description of the judicial review of the certifications made under section 802, and any actions taken to enforce the provisions of section 803.

## Section 202. Technical Amendments

Section 202 amends the table of contents of the first section of FISA.

## TITLE III. REVIEW OF PREVIOUS ACTIONS

Title III directs the Inspectors General of the Department of Justice, the Office of the Director of National Intelligence, the Department of Defense, the National Security Agency, and any other element of the intelligence community that participated in the President's surveillance program, defined in the title to 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, to complete a comprehensive review of the program with respect to the oversight authority and responsibility of each such inspector general.

The review is to include: all of the facts necessary to describe the establishment, implementation, product, and use of the product of the program; access to legal reviews of the program and information about the program; communications with, and participation of, individuals and entities in the private sector related to the program; interaction with the FISA Court and transition to court orders related to the program; and any other matters identified by any such inspector general that would enable that inspector general complete a review of the program with respect to the inspector general's department or element.

The inspectors general are directed to work in conjunction, to the extent practicable, with other inspectors general required to conduct a review, and not unnecessarily duplicate or delay any reviews or audits that have already been completed or are being undertaken with respect to the program. In addition, the Counsel of the Office of Professional Responsibility of the Department of Justice is directed to provide the report of any investigation of that office relating to the program, including any investigation of the

process through which the legal reviews of the program were conducted and the substance of such reviews, to the Inspector General of the Department of Justice, who shall integrate the factual findings and conclusions of such investigation into its review.

The inspectors general shall designate one of the Senate confirmed inspectors general required to conduct a review to coordinate the conduct of the reviews and the preparation of the reports. The inspectors general are to submit an interim report within sixty days to the appropriate congressional committees on their planned scope of review. The final report is to be completed no later than one year after enactment and shall be submitted in unclassified form, but may include a classified annex.

The Congress is aware that the Inspector General of the Department of Justice has undertaken a review of the program. This review should serve as a significant part of the basis for meeting the requirements of this title. In no event is this title intended to delay or duplicate the investigation completed to date or the issuance of any report by the Inspector General of the Department of Justice.

#### TITLE IV. OTHER PROVISIONS

##### Section 401. Severability

Section 401 provides that if any provision of this bill or its application is held invalid, the validity of the remainder of the Act and its application to other persons or circumstances is unaffected.

##### Section 402. Effective Date

Section 402 provides that except as provided in the transition procedures (section 404 of the title), the amendments made by the bill shall take effect immediately.

##### Section 403. Repeals

Section 403(a) provides for the repeal of those sections of FISA enacted as amendments to FISA by the Protect America Act, except as provided otherwise in the transition procedures of section 404, and makes technical and conforming amendments.

Section 403(b) provides for the sunset of the FISA Amendments Act on December 31, 2012, except as provided in section 404 of the bill. This date ensures that the amendments by the Act will be reviewed during the next presidential administration. The subsection also makes technical and conforming amendments.

##### Section 404. Transition Procedures

Section 404 establishes transition procedures for the Protect America Act and the Foreign Intelligence Surveillance Act Amendments of 2008.

Subsection (a)(1) continues in effect orders, authorizations, and directives issued under FISA, as amended by section 2 of the Protect America Act, until the expiration of such order, authorization or directive.

Subsection (a)(2) sets forth the provisions of FISA and the Protect America Act that continue to apply to any acquisition conducted under such Protect America Act order, authorization or directive. In addition, subsection (a) clarifies the following provisions of the Protect America Act: the protection from liability provision of subsection (1) of Section 105B of FISA as added by section 2 of the Protect America Act; jurisdiction of the FISA Court with respect to a directive issued pursuant to the Protect America Act, and the Protect America Act reporting requirements of the Attorney General and the DNI. Subsection (a) is made effective as of the date of enactment of the Protect America Act (August 5, 2007). The purpose of these clarifications and the effective date for them is to ensure that there are no gaps in the legal protections contained in that act, including for authorized collection following the sunset of the Protect America Act, notwithstanding that its sunset provision was only extended once until February 16, 2008. Additionally, subsection (a)(3) fills a void in the Protect America Act and applies the use provisions of section 106 of FISA to collection under the Protect America Act, in the same manner that section 706 does for collection under Title VII.

In addition, subsection (a)(7) makes clear that if the Attorney General and the DNI seek to replace an authorization made pursuant to the Protect America Act with an authorization made under section 702, as added by this bill, they are, to the extent practicable, to submit a certification to the FISA Court at least 30 days in advance of the expiration of such authorization. The authorizations, and any directives issued pursuant to the authorization, are to remain in effect until the FISA Court issues an order with respect to that certification.

Subsection (b) provides similar treatment for any order of the FISA Court issued under Title VII of this bill in effect on December 31, 2012.

Subsection (c) provides transition procedures for the authorizations in effect under section 2.5 of Executive Order 12333. Those authorizations shall continue in effect until the earlier of the date that authorization expires or the date that is 90 days after the enactment of this Act. This transition provision is particularly applicable to the transition to FISA Court orders that will occur as a result of sections 703 and 704 of FISA, as added by this bill.