

Tannenbaum, Andrew

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From: Demers, John
 Sent: Tuesday, April 08, 2008 6:33 PM
 To: [REDACTED] Nichols, Carl (CIV); Eisenberg, John; Gerry, Brett
 Subject: FW: FISA immunity alternative.doc
 Attachments: FISA immunity alternative (2)(1).doc

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Exemption 5

From: [REDACTED]
 Sent: Tuesday, April 08, 2008 5:04 PM
 To: Demers, John
 Subject: RE: FISA immunity alternative.doc

John:

Sorry for the delay, but I wanted to give you back my considered thoughts on this.

I think overall it works well. I have (in the way of lawyers) some ideas to suggest. These are in descending order of importance.

1. Damages Cap. As it stands, the provision limiting damages and attorneys' fees has a \$25M limit [REDACTED]. So I've attempted to revise to ensure that the limit applies only once for an entire family of affiliated companies and persons.
2. "Described In." I have changed the "described in" language to "the subject of".
3. Addressing Possible Future Covered Civil Actions. Under the legislation, the Attorney General could continue to submit applications addressing any follow on suits. But one could imagine new actions being filed after a change in Administration in January 2009. Whether the Attorney General in a new administration would provide the requisite applications—even if there is a basis to do so—is uncertain. To address this concern, I've suggested language to make it mandatory for the Attorney General to file an application if the conditions of § 202 (a)(1)(A) or (B) are satisfied. I have also modified the severability provision to expressly save paragraph 202(a)(2), which requires the Attorney general to file an application.
4. Application vs. Submission. If (a)(1) is found unconstitutional, there will be nothing to "apply" for in the kind of future cases described in 2 immediately above. So I've changed "application" to "submission" so that, in conjunction with the changes described in 2, the damages limitation can remain viable if the worst happens.
5. Evidentiary Concerns. In order to try to avoid evidentiary challenges to the Attorney General's declaration, I permit him to base his assertions on a reasonable inquiry and expressly make his declaration admissible. I have also tried to clarify that the FISC's review will be based only on the facts submitted in an application by the Attorney General.
6. Finality. I am not sure what a "complete and final" decision is . . . is it different than a "final" decision? I have deleted "complete and" but this really is just for your consideration.
7. Court of Review. I have further clarified that its jurisdiction is exclusive.
8. In subsection (g), I think the references to "(b) and (e)" probably should be to "(b) and (f)" since the stay will continue by its own terms.

I am available should you wish to discuss.

Thanks again.'

[REDACTED]

[REDACTED]

PRIVILEGED ATTORNEY WORK PRODUCT
DO NOT FORWARD

From: Demers, John [mailto:[REDACTED]@usdoj.gov]
Sent: Friday, April 04, 2008 7:08 PM
To: [REDACTED]
Subject: FISA immunity alternative.doc

[REDACTED]

Per our discussion. These first thoughts are a very close hold and have not been vetted.

Thanks,
John

<<FISA immunity alternative.doc>>

SEC. 202. LIMITATIONS ON CIVIL ACTIONS FOR ELECTRONIC COMMUNICATION SERVICE PROVIDERS.

(a) Limitations.—

(1) IN GENERAL.—Notwithstanding any other provision of law, a covered civil action shall not lie or be maintained in a Federal or State court, and shall be promptly dismissed, if the Foreign Intelligence Surveillance Court determines, upon review of a submission, by the Attorney General, that—

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(A) the assistance alleged to have been provided by the electronic communication service provider was—

(i) in connection with an intelligence activity involving communications that was—

(I) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(II) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(ii) the subject of, a written request or directive from the Attorney General 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—

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(I) authorized by the President; and

(II) determined to be lawful; or

(B) the electronic communication service provider did not provide the alleged assistance.

(2) ATTORNEY GENERAL SUBMISSION.—If the conditions of § 202(a)(1)(A) or (B) are satisfied, the Attorney General shall promptly submit to the Foreign Intelligence Surveillance Court—

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(A) a declaration by the Attorney General, (pursuant to section 1746 of title 28, United States Code) setting forth, based on reasonable inquiry, any applicable facts described in subsection (a)(1); and

(B) copies of any written request or directive that the Attorney General relies upon in seeking dismissal under subsection (a)(1)(A).

Such information shall be admissible and shall constitute the record to be considered by the Foreign Intelligence Surveillance Court in making its determination under subsection (a)(1).

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(b) Review of Submissions.—A court reviewing, directly or on appeal, a submission pursuant to §202(a)(2), shall—

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(1) review the information provided to the Court by the Attorney General under

subsection (a) in camera and ex parte; and

(2) limit any public disclosure concerning such information, including any public order following such an ex parte review, to a statement that the conditions of subsection (a) have been met, without disclosing the subparagraph of subsection (a)(1) that is the basis for the application or whether written requests or directives were provided pursuant to subsection (a)(2).

(c) Nondelegation.—The authority and duties of the Attorney General under this section shall be performed by the Attorney General (or Acting Attorney General) or a designee in a position not lower than the Deputy Attorney General.

(d) Jurisdiction.—Upon receiving a submission of the Attorney General for any covered civil action, the Foreign Intelligence Surveillance Court shall have exclusive jurisdiction to make the determination in subsection (a) and to hear any challenge in such action to the validity or application of this section. Other than the Foreign Intelligence Surveillance Court, the Foreign Intelligence Surveillance Court of Review and the Supreme Court, no court shall have jurisdiction to hear any challenge brought by any party to the validity or application of this section.

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(e) Stay of Other Proceedings.— Within 10 days of the Attorney General's submission under paragraph (a)(2), the United States shall notify the district court and any appellate court in which the covered civil action is pending, and all proceedings in the action before such courts shall be stayed by those courts. Such stay shall remain in effect until the Foreign Intelligence Surveillance Court renders a final determination in any proceeding under this section for such covered civil action. The stay shall also remain in effect during the pendency of any appeal taken in such action pursuant to subsection (g).

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(f) Participation of Parties.—The plaintiffs and defendants in a covered civil action shall be permitted to participate in the briefing or argument of any legal issue in a Foreign Intelligence Surveillance Court proceeding conducted pursuant to this section, but only to the extent that such participation does not require the disclosure of, or otherwise tend to reveal, classified information to such party. To the extent that classified information is relevant to the proceeding or a determination of an issue, the court shall review such information or make such determination in camera and ex parte.

(g) Appeal.—

(1) APPEAL TO THE COURT OF REVIEW.—The United States or any other party in a covered civil action may file a petition with the Foreign Intelligence Surveillance Court of Review for review of any final determination of the Foreign Intelligence Surveillance Court issued pursuant to this section. The Foreign Intelligence Surveillance Court of Review shall have exclusive jurisdiction to consider such a petition. Subsections (b) and (f) shall apply to any Foreign Intelligence Surveillance Court of Review proceedings.

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(2) CERTIORARI TO THE SUPREME COURT.—The United States or any other party in a covered civil action may file a petition for a writ of certiorari for review of any decision of the Foreign Intelligence Surveillance Court of Review issued under subsection (g)(1). The Supreme Court of the United States shall have jurisdiction to review such decision, and subsections (b) and (f) shall apply to any such proceedings.

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(h) Expedited Review.—The Foreign Intelligence Surveillance Court shall issue a final determination in any proceeding under this section within 180 days of receiving the Attorney General's submission. The Foreign Intelligence Surveillance Court of Review and Supreme Court shall expedite any appeal taken pursuant to subsection (g).

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(i) Further Proceedings.—If, after the Foreign Intelligence Surveillance Court renders a final determination and any appeals taken pursuant to subsection (g) are exhausted, it is determined that the conditions of subsection (a) have been met, then the court in which the action was pending prior to the Attorney General's application shall dismiss the case with prejudice and no other appeals in the action shall be permitted. If, after the Foreign Intelligence Surveillance Court renders a final determination and any appeals taken pursuant to subsection (g) are exhausted, it is determined that the conditions of subsection (a) have not been met, the stay required by subsection (e) shall be lifted and the court in which the action was pending prior to the Attorney General's application shall proceed as it deems appropriate, without prejudice to any available immunity, privilege, or defense available to any party.

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(j) Damages and Attorneys' Fees.—

(1) Notwithstanding any other provision of law, the maximum amount of potential liability of an electronic communications service provider (as defined under § 201(4)(A)-(F)) for claims in covered civil actions in which the Attorney General files a submission under subsection (a)(2) shall be twenty-five million dollars in aggregate for all such actions brought against it or its parents, subsidiaries, affiliates, successors and assignees. Attorneys' fees shall be limited to 10 percent of the damages awarded.

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(2) If any other provision of this section or the application of any provision of this section to any person or circumstances is held invalid, the validity of this subsection and paragraph (a)(2) or the application of any provision of this section to other persons and circumstances, shall not be affected thereby.

(k) Civil Actions in State Court.—A covered civil action 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 section 1441 of title 28, United States Code.

(l) Rule of Construction.—Nothing in this section may be construed to limit any otherwise available immunity, privilege, or defense under any other provision of law.

(m) Effective Date and Application.—This section shall apply to any covered civil action that is pending on or filed after the date of enactment of this Act.

Tannenbaum, Andrew

From: Demers, John
Sent: Tuesday, April 22, 2008 11:57 AM
To: Nichols, Carl (CIV); [REDACTED]
Subject: FW: Proposed Options to Modify Title II

Exemption 6

Attachments: Modification to Title II Proposal No. 1 (4-22-08).DOC; Modification to Title II - Proposal No. 2 (4-22-08).DOC



Modification to Title II Proposal No. 1 (4-22-08).DOC
Modification to Title II - Proposal No. 2 (4-22-08).DOC

-----Original Message-----

From: Burck, William A. [mailto:William_A._Burck@who.eop.gov]
Sent: Tuesday, April 22, 2008 11:51 AM
To: (b)(6); Demers, John; Gerry, Brett
Subject: Fw: Proposed Options to Modify Title II

----- Original Message -----

From: Frech, Christopher W.
To: Burck, William A.
Cc: Kim, Harold H.; Emling, John G.; Meyer, Daniel P.
Sent: Tue Apr 22 11:17:38 2008
Subject: FW: Proposed Options to Modify Title II

Bill here is some language ideas being floated that we have been asked to review. Can you please circulate to the FISA crew for review.

-----Original Message-----

From: [REDACTED]
Sent: Tuesday, April 22, 2008 11:02 AM
To: bjackson@georgewbush.com; Frech, Christopher W.; l_tucker@ssci.senate.gov
Subject: Fw: Proposed Options to Modify Title II

Here are some ideas we are thinking about. I would like your feedback. We are NOT sharing this with anyone else until I/we have come up with an approach to use this.

[REDACTED]

----- Original Message -----

From: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Sent: Tue Apr 22 09:34:08 2008
Subject: Proposed Options to Modify Title II

Attached are two proposals to modify Title II of the Senate bill. The first option is preferred.

* The first option would retain the basic structure of the Senate bill. The Attorney General would submit a certification to the district court that the carrier defendant either did not provide the assistance as alleged, or did so in connection with a counter-terrorism program authorized by the president and pursuant to written assurances of legality.

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[Signature]

* But unlike in the current Senate bill, under which the district court would review the AG's certification for an abuse of discretion, the matter would be transferred to the FISA Court (FISC), which would evaluate whether the AG's conclusions were arbitrary and capricious, an abuse of discretion, or unsupported by substantial evidence. If the FISC were to find that the AG's conclusions were supported, the case would be remanded back to the district court for mandatory dismissal consistent with the other provisions of the title.

* There are a number of benefits to this approach.

* First, the FISC has greater substantive expertise in dealing with matters of national security and the legal framework surrounding private-party assistance with intelligence programs. Better than any other Article III court, the FISC will be able to fully and fairly assess the propriety of the AG's conclusions and certifications.

* Second, having a single court make all of the review decisions will ensure substantive and procedural consistency. Otherwise, later cases that might be filed in disparate courts may receive inconsistent and conflicting treatment in connection with the same basic facts. This would be especially trouble in this national security context.

* Third, because the FISC has established, proven procedures for handling and resolving classified matters, the AG will be comfortable relying on a more expansive record in making his certification decision than he might if forced to deal solely with the district court -- or multiple district courts. In turn, the reviewing court will enjoy a more complete record in determining whether the AG's conclusions were supported.

* Fourth, this framework includes a clear appellate process. (Section 202(a)(4)) Any decision of the FISC could be appealed directly to the FISA Court of Review (FISCOR). A party could then petition for a writ of certiorari to the Supreme Court for review of any FISCOR decision.

* In addition, those who have been opposed to the language in the current Senate bill should see a number of benefits to this revised approach.

* First, the proposal clearly articulates the role of the court in reviewing the AG's certification. The court would be able to apply any one of three normative standards. (Section 202(a)(3)(B)) In addition, the proposal makes unmistakably clear that the reviewing court would be given access to the same information upon which the AG relied in issuing his certification. (Section 202(a)(3)(D)) In short, this puts to rest any notion that the court review under Title II would simply be a rubber-stamp of the AG's certification.

* Second, the proposal should appeal to those (e.g., Sen. Feinstein), who believe that the FISA Court should have a meaningful role in this process. Yet, this formulation would not contain the same defects as proposals offered during the Senate debate that would have led to an adversarial litigation process in the FISC, which is not constituted to handle such proceedings.

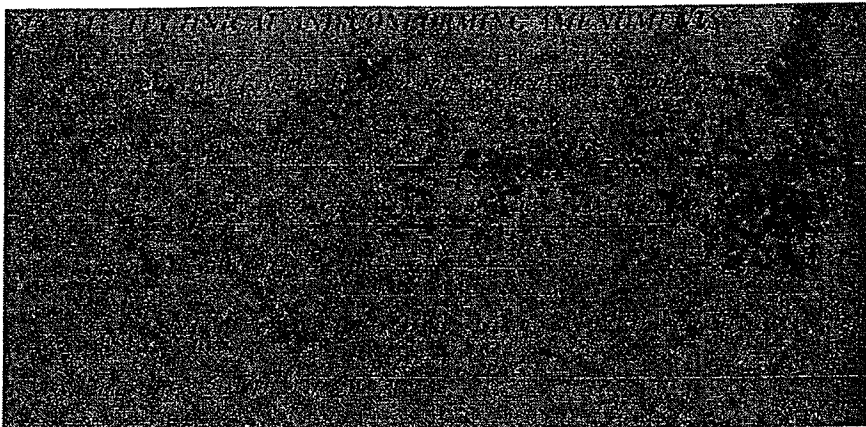
* Third, the proposal would expressly grant the plaintiffs the right to appear before the FISC. (Section 202(a)(3)(E)) While the bill would retain limits such that the FISC would not be able to share classified materials with plaintiffs or defendants (Section 202(b)), the plaintiffs would be able to petition the court and perfect and pursue any appeals of the FISC's or FISCOR's decisions.

* The second proposal is more modest and would not transfer any portion of the case to the FISC. Rather, it would expand Section 202(a)(2) of the current bill to more clearly express the role of the court in reviewing the AG's certification and make it unmistakably clear that the reviewing court would be given access to the same information upon which the AG relied in issuing his certification. That is, it contains a subset of the c <<Modification to Title II Proposal No. 1 (4-22-08).DOC>> han <<Modification to Title II - Proposal No. 2 (4-22-08).DOC>> ges contained in the broader proposal.

<<Modification to Title II Proposal No. 1 (4-22-08).DOC>>
<<Modification to Title II - Proposal No. 2 (4-22-08).DOC>>



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TITLE II--PROTECTIONS FOR ELECTRONIC COMMUNICATION

SERVICE PROVIDERS

SEC. 201. DEFINITIONS.

In this title:

(1) ASSISTANCE. -- The term "assistance" means the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication), facilities, or another form of assistance.

(2) CONTENTS. -- The term "contents" has the meaning given that term in section 101(n) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(n)).

(3) COVERED CIVIL ACTION. -- The term "covered civil action" means a civil action filed in a Federal or State court that --

1 (A) alleges that an electronic communication service
2 provider furnished assistance to an element of the intelligence
3 community; and

4 (B) seeks monetary or other relief from the electronic
5 communication service provider related to the provision of such
6 assistance.

7 (4) ELECTRONIC COMMUNICATION SERVICE PROVIDER

8 -- The term "electronic communication service provider" means --

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

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

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

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

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

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

1 (5) ELEMENT OF THE INTELLIGENCE COMMUNITY. --

2 The term "element of the intelligence community" means an element of
3 the intelligence community specified in or designated under section 3(4)
4 of the National Security Act of 1947 (50 U.S.C. 401a(4)).

5 **SEC. 202. LIMITATIONS ON CIVIL ACTIONS FOR ELECTRONIC**
6 **COMMUNICATION SERVICE PROVIDERS.**

7 (a) LIMITATIONS. --

8 (1) IN GENERAL. -- Notwithstanding any other provision of
9 law, a covered civil action shall not lie or be maintained in a Federal or
10 State court, and shall be promptly dismissed, if the Attorney General
11 certifies to the court that --

12 (A) the assistance alleged to have been provided by the electronic
13 communication service provider was --

14 (i) in connection with an intelligence activity involving
15 communications that was --

16 (I) authorized by the President during the period
17 beginning on September 11, 2001, and ending on January 17,
18 2007; and

19 (II) designed to detect or prevent a terrorist attack,
20 or activities in preparation for a terrorist attack, against the
21 United States; and

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(ii) described in a written request or directive from the Attorney General 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 --

- (I) authorized by the President; and
- (II) determined to be lawful; or

(B) the electronic communication service provider did not provide the alleged assistance.

(2) SUBMISSION OF CERTIFICATION. -- If the Attorney General submits a certification under paragraph (1), the court to which that certification is submitted shall --

(A) immediately transfer the matter to the Foreign Intelligence Surveillance Court for a determination as described in paragraph (3)(A); and

(B) stay further proceedings in the litigation, pending the determination of the Foreign Intelligence Surveillance Court and the resolution of any appeals pursuant to paragraph (4).

(3) REVIEW OF CERTIFICATION BY THE FOREIGN INTELLIGENCE SURVEILLANCE COURT. --

(A) The Foreign Intelligence Surveillance Court shall, pursuant to subparagraph (B), review the certification by the Attorney General submitted under paragraph (1).

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(B) The Foreign Intelligence Surveillance Court shall set aside and give no force or effect to such certification if it determines that the Attorney General's conclusions are:

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- (i) arbitrary and capricious;
- (ii) an abuse of discretion; or,
- (iii) unsupported by substantial evidence.

(C) If such certification is not set aside under subparagraph (B), the certification shall be deemed valid, and, subject to and following any appeal pursuant to paragraph (4), the case remanded to the district court for dismissal pursuant to subparagraph (a)(1).

(D) In making the determination pursuant to this paragraph, the Foreign Intelligence Surveillance Court shall have the power to review the information upon which the Attorney General relied in issuing the certification.

(E) In reviewing a certification and making a determination under this paragraph, the Foreign Intelligence Surveillance Court shall permit any plaintiff and any defendant in the applicable covered civil action to appear before the Foreign Intelligence Surveillance Court, consistent with the procedures described in section (b).

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(4) APPEAL.

(A) A party to a proceeding described in paragraph (3) may appeal a determination under that paragraph within 30 days to the

1 , Foreign Intelligence Surveillance Court of Review, which shall have
2 exclusive jurisdiction to review such determination.

3 (B) A party to an appeal under subparagraph (A) may file a
4 petition for a writ of certiorari with the Supreme Court of the United
5 States for review of a decision of the Foreign Intelligence Surveillance
6 Court of Review issued under that subparagraph. If the petition is
7 granted, the record for such review shall be transmitted under seal to the
8 Supreme Court of the United States, which shall have jurisdiction to
9 review such decision.

Deleted: shall be subject to review by a court for abuse of discretion.

11 (b) REVIEW OF CERTIFICATIONS. -- If the Attorney General files a
12 declaration under section 1746 of title 28, United States Code, that disclosure of
13 a certification made pursuant to subsection (a) would harm the national security
14 of the United States, all reviewing courts shall --

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15 (1) review such certification in camera and ex parte; and
16 (2) limit any public disclosure concerning such certification,
17 including in any public order following such an ex parte review, to a
18 statement that the standards of subsection (a)(3)(B) have or have not been
19 satisfied.

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20 (c) NONDELEGATION. -- The authority and duties of the Attorney
21 General under this section shall be performed by the Attorney General (or Acting

1 Attorney General) or a designee in a position not lower than the Deputy Attorney
2 General.

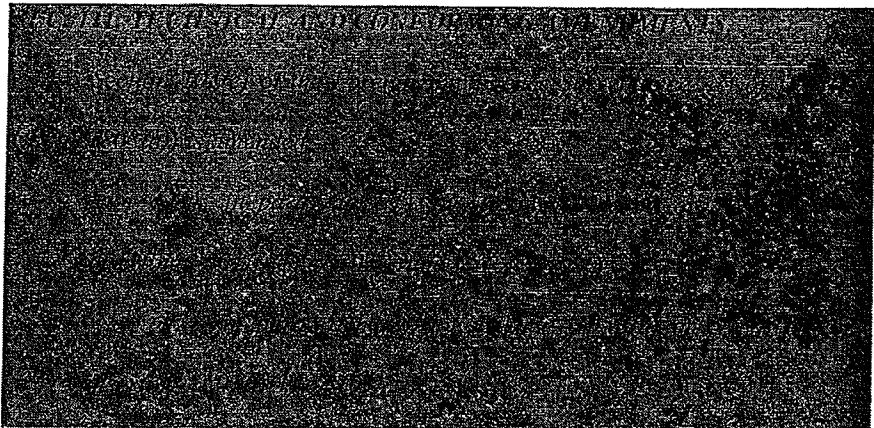
3 (d) CIVIL ACTIONS IN STATE COURT. -- A covered civil action that
4 is brought in a State court shall be deemed to arise under the Constitution and
5 laws of the United States and shall be removable under section 1441 of title 28,
6 United States Code.

7 (e) RULE OF CONSTRUCTION. -- Nothing in this section may be
8 construed to limit any otherwise available immunity, privilege, or defense under
9 any other provision of law.

10 (f) EFFECTIVE DATE AND APPLICATION. -- This section shall
11 apply to any covered civil action that is pending on or filed after the date of
12 enactment of this Act.

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TITLE II—PROTECTIONS FOR ELECTRONIC COMMUNICATION

SERVICE PROVIDERS

SEC. 201. DEFINITIONS.

In this title:

(1) ASSISTANCE. -- The term "assistance" means the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication), facilities, or another form of assistance.

(2) CONTENTS. -- The term "contents" has the meaning given that term in section 101(n) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(n)).

(3) COVERED CIVIL ACTION. -- The term "covered civil action" means a civil action filed in a Federal or State court that --

1 (A) alleges that an electronic communication service
2 provider furnished assistance to an element of the intelligence
3 community; and

4 (B) seeks monetary or other relief from the electronic
5 communication service provider related to the provision of such
6 assistance.

7 (4) ELECTRONIC COMMUNICATION SERVICE PROVIDER

8 -- The term "electronic communication service provider" means --

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

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

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

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

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

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

1 (5) ELEMENT OF THE INTELLIGENCE COMMUNITY. --

2 The term "element of the intelligence community" means an element of
3 the intelligence community specified in or designated under section 3(4)
4 of the National Security Act of 1947 (50 U.S.C. 401a(4)).

5 **SEC. 202. LIMITATIONS ON CIVIL ACTIONS FOR ELECTRONIC**
6 **COMMUNICATION SERVICE PROVIDERS.**

7 (a) LIMITATIONS. --

8 (1) IN GENERAL. -- Notwithstanding any other provision of
9 law, a covered civil action shall not lie or be maintained in a Federal or
10 State court, and shall be promptly dismissed, if the Attorney General
11 certifies to the court that --

12 (A) the assistance alleged to have been provided by the electronic
13 communication service provider was --

14 (i) in connection with an intelligence activity involving
15 communications that was --

16 (I) authorized by the President during the period
17 beginning on September 11, 2001, and ending on January 17,
18 2007; and

19 (II) designed to detect or prevent a terrorist attack,
20 or activities in preparation for a terrorist attack, against the
21 United States; and

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(ii) described in a written request or directive from the Attorney General 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 --

(I) authorized by the President; and

(II) determined to be lawful; or

(B) the electronic communication service provider did not provide the alleged assistance.

(2) REVIEW. -- A certification made pursuant to paragraph (1) shall be subject to review by a court.

(A) The court shall set aside and give no force or effect to such certification if it determines that the Attorney

General's conclusions are:

(i) arbitrary and capricious;

(ii) an abuse of discretion; or,

(iii) unsupported by substantial evidence.

(B) In making the determination pursuant to this subparagraph, the court shall have the power to review, pursuant to appropriate security procedures as determined by the Attorney General, the information upon which the Attorney General relied in issuing the certification.

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1 (b) REVIEW OF CERTIFICATIONS. -- If the Attorney General files a
2 declaration under section 1746 of title 28, United States Code, that disclosure of
3 a certification made pursuant to subsection (a) would harm the national security
4 of the United States, the court shall --

5 (1) review such certification in camera and ex parte; and

6 (2) limit any public disclosure concerning such certification,
7 including any public order following such an ex parte review, to a
8 statement that the conditions of subsection (a) have been met, without
9 disclosing the subparagraph of subsection (a)(1) that is the basis for the
10 certification.

11 (c) NONDELEGATION. -- The authority and duties of the Attorney
12 General under this section shall be performed by the Attorney General (or Acting
13 Attorney General) or a designee in a position not lower than the Deputy Attorney
14 General.

15 (d) CIVIL ACTIONS IN STATE COURT. -- A covered civil action that
16 is brought in a State court shall be deemed to arise under the Constitution and
17 laws of the United States and shall be removable under section 1441 of title 28,
18 United States Code.

19 (e) RULE OF CONSTRUCTION. -- Nothing in this section may be
20 construed to limit any otherwise available immunity, privilege, or defense under
21 any other provision of law.

1 (f) EFFECTIVE DATE AND APPLICATION. -- This section shall
2 apply to any covered civil action that is pending on or filed after the date of
3 enactment of this Act.

4 **SEC. 203. PROCEDURES FOR IMPLEMENTING STATUTORY**
5 **DEFENSES UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE**
6 **ACT OF 1978.**

7 The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et
8 seq.), as amended by section 101, is further amended by adding after title VII the
9 following new title:

10 **"TITLE VIII -- PROTECTION OF PERSONS ASSISTING THE**
11 **GOVERNMENT**

12 **"SEC. 801. DEFINITIONS.**

13 "In this title:

14 "(1) ASSISTANCE. -- The term 'assistance' means the provision
15 of, or the provision of access to, information (including communication
16 contents, communications records, or other information relating to a
17 customer or communication), facilities, or another form of assistance.

18 "(2) ATTORNEY GENERAL. -- The term "Attorney General"
19 has the meaning given that the term in section 101(g).

20 "(3) CONTENTS. -- The term 'contents' has the meaning given
21 that term in section 101(n).

1 “(4) ELECTRONIC COMMUNICATION SERVICE
2 PROVIDER.-- The term ‘electronic communication service provider’
3 means --

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

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

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

10 “(D) any other communication service provider who has
11 access to wire or electronic communications either as such
12 communications are transmitted or as such communications are
13 stored;

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

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

18 “(5) ELEMENT OF THE INTELLIGENCE COMMUNITY. --
19 The term ‘element of the intelligence community’ means an element of
20 the intelligence community as specified or designated under section 3(4)
21 of the National Security Act of 1947 (50 U.S.C. 401a(4)).

22 “(6) PERSON. -- The term ‘person’ means --

1 “(A) an electronic communication service provider; or
2 “(B) a landlord, custodian, or other person who may be
3 authorized or required to furnish assistance pursuant to --

4 “(i) an order of the court established under section
5 103(a) directing such assistance;

6 “(ii) a certification in writing under section
7 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code; or

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

11 “(7) STATE. -- The term ‘State’ means any State, political
12 subdivision of a State, the Commonwealth of Puerto Rico, the District of
13 Columbia, and any territory or possession of the United States, and
14 includes any officer, public utility commission, or other body authorized
15 to regulate an electronic communication service provider.

16 **“SEC. 802. PROCEDURES FOR IMPLEMENTING STATUTORY**
17 **DEFENSES.**

18 “(a) REQUIREMENT FOR CERTIFICATION. --

19 “(1) IN GENERAL. -- Notwithstanding any other provision of
20 law, no civil action may lie or be maintained in a Federal or State court
21 against any person for providing assistance to an element of the

1 intelligence community, and shall be promptly dismissed, if the Attorney

2 General certifies to the court that --

3 “(A) any assistance by that person was provided pursuant
4 to an order of the court established under section 103(a) directing
5 such assistance;

6 “(B) any assistance by that person was provided pursuant
7 to a certification in writing under section 2511(2)(a)(ii)(B) or
8 2709(b) of title 18, United States Code;

9 “(C) any assistance by that person was provided pursuant
10 to a directive under sections 102(a)(4), 105(B)(e), as in effect on
11 the day before the date of the enactment of the FISA Amendments
12 Act of 2008, or 703(h) directing such assistance; or

13 “(D) the person did not provide the alleged assistance.

14 “(2) REVIEW. -- A certification made pursuant to paragraph (1)
15 shall be subject to review by a court for abuse of discretion.

16 “(b) LIMITATIONS ON DISCLOSURE. -- If the Attorney General files
17 a declaration under section 1746 of title 28, United States Code, that disclosure
18 of a certification made pursuant to subsection (a) would harm the national
19 security of the United States, the court shall --

20 “(1) review such certification in camera and ex parte; and

21 “(2) limit any public disclosure concerning such certification,
22 including any public order following such an ex parte review, to a

1 statement that the conditions of subsection (a) have been met, without
2 disclosing the subparagraph of subsection (a)(1) that is the basis for the
3 certification.

4 “(c) REMOVAL. -- A civil action against a person for providing
5 assistance to an element of the intelligence community that is brought in a State
6 court shall be deemed to arise under the Constitution and laws of the United
7 States and shall be removable under section 1441 of title 28, United States Code.

8 “(d) RELATIONSHIP TO OTHER LAWS. -- Nothing in this section
9 may be construed to limit any otherwise available immunity, privilege, or
10 defense under any other provision of law.

11 “(e) APPLICABILITY. -- This section shall apply to a civil action
12 pending on or filed after the date of enactment of the FISA Amendments Act of
13 2008.”

14 **SEC. 204. PREEMPTION OF STATE INVESTIGATIONS.**

15 Title VIII of the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et
16 seq.), as added by section 203 of this Act, is amended by adding at the end the
17 following new section:

18 **“SEC. 803. PREEMPTION.**

19 “(a) IN GENERAL. -- No State shall have authority to --

20 “(1) conduct an investigation into an electronic communication
21 service provider’s alleged assistance to an element of the intelligence
22 community;

1 “(2) require through regulation or any other means the disclosure
2 of information about an electronic communication service provider’s
3 alleged assistance to an element of the intelligence community;

4 “(3) impose any administrative sanction on an electronic
5 communication service provider for assistance to an element of the
6 intelligence community; or

7 “(4) commence or maintain a civil action or other proceeding to
8 enforce a requirement that an electronic communication service provider
9 disclose information concerning alleged assistance to an element of the
10 intelligence community.

11 “(b) SUITS BY THE UNITED STATES. -- The United States may bring
12 suit to enforce the provisions of this section.

13 “(c) JURISDICTION. -- The district courts of the United States shall
14 have jurisdiction over any civil action brought by the United States to enforce the
15 provisions of this section.

16 “(d) APPLICATION. -- This section shall apply to any
17 investigation, action, or proceeding that is pending on or filed after the date of
18 enactment of the FISA Amendments Act of 2008.”.

19 **SEC. 205. TECHNICAL AMENDMENTS.**

20 The table of contents in the first section of the Foreign Intelligence
21 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), as amended by section
22 101(b), is further amended by adding at the end the following:

Demers, John

From: [Redacted]
Sent: Saturday, May 10, 2008 11:15 AM
To: Demers, John
Subject: RE: FISA immunity alternative.doc
Attachments: transfer to DDC.DOC

3

John:

per our conversation, attached is a short para that should transfer all "certification reviews" to the DDC.

Assuming (c)(1) is revived along the lines we discussed, this would be a new (c)(1) and all the rest of (c) would be pushed down a subparagraph.

best

[Redacted]

DP

464

10/6/2008

Demers, John

From: [REDACTED]
Sent: Wednesday, May 14, 2008 10:26 PM
To: Demers, John
Subject: Re: tweaks

Thanks and understood.

Enjoy the time off, if you are getting some. I will bother Carl.

[REDACTED]

----- Original Message -----

From: Demers, John <[REDACTED]@usdoj.gov>
To: [REDACTED]
Sent: Thu May 15 02:19:27 2008
Subject: Re: tweaks

[REDACTED]

I'm out of town for a few days but will pass these along to Carl. As for no. 5, it was dropped because folks felt it created more potential for mischief than it was worth. I think we could argue that the list is not exclusive if we needed to.

John

3

Demers, John

From: [REDACTED]
Sent: Friday, May 16, 2008 11:36 AM
To: Nichols, Carl; [REDACTED]
Cc: Demers, John
Subject: RE: Standard of review?

Exemption 6

I'll take a look

From: Nichols, Carl
Sent: Friday, May 16, 2008 11:27 AM
To: [REDACTED]
Cc: Demers, John
Subject: FW: Standard of review?

does one of you have a second to see what this case held?

From: [REDACTED]
Sent: Friday, May 16, 2008 9:01 AM
To: Nichols, Carl
Subject: Standard of review?

Carl:

If the review of the AG happens in Walker's court, have you considered what you want the standard of review to be in the 9th?

I am concerned that there is some 9th Cir precedent that might box the 9th into abuse of discretion review of walker, which I don't think is best for us.
(See 267 f3d 877, 887).

[REDACTED]

420

3

Demers, John

From: Demers, John
Sent: Wednesday, June 11, 2008 2:03 PM
To: [REDACTED]@mail.house.gov; [REDACTED]@mail.house.gov;
[REDACTED]@mail.house.gov
Cc: (b)(6)
Subject: Points re Later Filed Cases.doc
Attachments: Points re Later Filed Cases.doc

Exemption 6

Chris, Sarah and Caroline,

In response to some of the questions raised by members last night, attached is an outline of how later-filed cases would likely be treated.

John



Points re Later Filed
Cases.do...

470

More than 40 cases filed against telecommunications carriers are currently pending before Chief Judge Vaughn Walker in the Northern District of California. Those 40+ cases were filed in various districts around the country and were transferred to Chief Judge Walker by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407, which permits the transfer of multiple similar cases to a single district for coordinated pre-trial proceedings (*e.g.*, discovery, dispositive motions, *etc.*). Such proceedings are often called MDL, or “Multi-District Litigation,” proceedings.

If Chief Judge Walker (or the Ninth Circuit) were to agree with the United States that those 40+ cases must be dismissed as the result of an Attorney General certification under Title II, and thereafter plaintiffs attempted to file new cases in other districts, the following would be likely to occur:

- (1) With respect to cases filed by the same plaintiffs, their claims would be barred by *res judicata*.
- (2) With respect to cases filed by different plaintiffs, the Department or the Defendant Carriers could seek to have them transferred to the Northern District of California under either 28 U.S.C. § 1407 (which permits tag-along cases to be transferred to already pending MDL Proceedings), or 28 U.S.C. § 1404 (which permits the transfer of cases to other districts). We think it very likely that future suits would be transferred to the Northern District of California, where they would be likely to be heard by Chief Judge Walker (and their cases would be governed by whatever rulings were made by the Ninth Circuit).
- (3) In any event, there is a very good chance that many of the claims would be barred by the relevant statutes of limitations.

Demers, John

From: [REDACTED]
Sent: Thursday, May 15, 2008 8:06 PM
To: Nichols, Carl; [REDACTED]
Cc: Demers, John
Subject: RE: tweaks

3

Exemption 6

On 2, we had drafted language for the end of (d)(2) stating "or any other material provided by the Attorney General at his or her discretion." It was then deleted after people expressed concerns about opening the door for unsolicited requests from the court for additional material. Demers knows more about the back and forth on this and can advise whether this is something we can get back in if you feel strongly.

-----Original Message-----

From: Nichols, Carl
Sent: Thursday, May 15, 2008 6:45 PM
To: [REDACTED]
Cc: Demers, John; [REDACTED]
Subject: RE: tweaks

1. In (d)(1), I would add "to that court" in between the words "provided" and "pursuant to."

2. Big-picture issue: are we certain we want to tie our hands w/r/t the record under a preponderance standard? At least if we're in the FISC, and perhaps if we're anywhere, I wonder whether we need to retain the flexibility to submit additional information.

-----Original Message-----

From: [REDACTED]
Sent: Thursday, May 15, 2008 6:04 PM
To: Nichols, Carl
Cc: Demers, John; [REDACTED]
Subject: RE: tweaks

Carl,

Attached is the current draft with the changes below highlighted (except for #1, which is a purely technical change). Please let me know if these changes are acceptable.

Thanks,

-----Original Message-----

From: Nichols, Carl
Sent: Thursday, May 15, 2008 4:47 PM
To: Demers, John; [REDACTED]
Subject: RE: tweaks

No, not yet. Can someone circulate the current draft w/ these changes flagged somehow? That would be the easiest thing for me. Thx.

-----Original Message-----

From: Demers, John
Sent: Thursday, May 15, 2008 4:18 PM
To: [REDACTED] Nichols, Carl
Subject: Re: tweaks

Carl,

471

Have you had chance to review the draft and these?

Thanks,
John

----- Original Message -----

From: [REDACTED]
To: [REDACTED] Demers, John; Nichols, Carl
Sent: Thu May 15 15:41:02 2008
Subject: RE: tweaks

Thanks, [REDACTED] I intend to make these changes in the working draft unless I hear differently from anyone.

-----Original Message-----

From: [REDACTED]
Sent: Thursday, May 15, 2008 3:37 PM
To: Demers, John; Nichols, Carl
Cc: [REDACTED]
Subject: RE: tweaks

All of these look fine to me, with the exception of the first part of comment 5 as Demers notes. The only real substantive issue to consider is whether the appeals must be filed within 30 days, but that seems reasonable to me.

-----Original Message-----

From: Demers, John
Sent: Wednesday, May 14, 2008 10:22 PM
To: Nichols, Carl; [REDACTED]
Cc: [REDACTED]
Subject: Fw: tweaks

See below. I explained why the first part of comment 5 was dropped.

----- Original Message -----

From: [REDACTED]
To: Demers, John
Sent: Wed May 14 17:33:11 2008
Subject: tweaks

John:

Here are a few suggestions on the new Title II. I assume that the old Title VIII is revived?

Happy to talk anytime.

1. Because there is no (2) in 202(a) anymore, renumber § 202(a), dropping the (1) before "In General," and changing the numbering below accordingly. (Also, why have open quotation marks been added in what is currently numbered clauses (i) and (II)?)

2. In § 202(b), delete "Upon receiving the certification of the Attorney general for any covered civil action under this section." This is necessary to ensure that the FISC has exclusive jurisdiction to hear any challenges to the legislation during the period before a certification is filed.

3. In the first sentence of § 202(c), add "immediately" after "such courts shall" and before "stay all proceedings." In the second sentence, change "pending any appeal taken" to "pending final resolution of any appeal or review taken."

4. In § 202(d), change "court" to "Foreign Intelligence Surveillance Court."

5. Paragraph 202(d)(2) currently permits FISC to consider only the written requests or directives. We suggest adding "or any other materials submitted by the Attorney General." Submission of additional materials may well be necessary to undertake the preponderance of the evidence review required by § 202(d)(1) (e.g., so that there is some evidence to support satisfaction of the condition in 202(a)(1)(A)(i)). Note also that it should be "clause (a)(1)(A)(ii)."

7. In § 202(e), drop the word "other" before "party in a covered civil action" in both paragraphs since the United States is not necessarily a party to every covered civil action. In the first sentence of paragraph 1, add the words "~~within 30 days~~ of such determination" to the end of the sentence. In the first sentence of paragraph 2, add an "a" before "covered civil action" and add the words "within 30 days of such decision" to the end of the sentence.

8. In § 202(f), add the word "promptly" before "dismiss the case with prejudice" and change the reference to "subsection (d)" to "subsection (e)."

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AMENDMENT:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.—This Act may be cited as the “Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008” or the “FISA Amendments Act of 2008”.

(b) Table of Contents.—The table of contents for this Act is as follows:

Sec.1.Short title; table of contents.

TITLE I—FOREIGN INTELLIGENCE SURVEILLANCE

Sec.101.Additional procedures regarding certain persons outside the United States.

Sec.102.Statement of exclusive means by which electronic surveillance and interception of domestic communications may be conducted.

Sec.103.Submittal to Congress of certain court orders under the Foreign Intelligence Surveillance Act of 1978.

Sec.104.Applications for court orders.

Sec.105.Issuance of an order.

Sec.106.Use of information.

Sec.107.Amendments for physical searches.

Sec.108.Amendments for emergency pen registers and trap and trace devices.

Sec.109.Foreign Intelligence Surveillance Court.

Sec.110.Weapons of mass destruction.

Sec.111.Technical and conforming amendments.

TITLE II—PROTECTIONS FOR ELECTRONIC COMMUNICATION SERVICE PROVIDERS

Sec.201.Definitions.

Sec.202.Limitations on civil actions for electronic communication service providers.

Sec.203.Procedures for implementing statutory defenses under the Foreign Intelligence Surveillance Act of 1978.

Sec.204.Preemption of State investigations.

Sec.205.Technical amendments.

TITLE III—OTHER PROVISIONS

Sec.301.Severability.

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1 | Sec.302.Effective date.

2 | ~~Sec. 303.Repeal.~~

3 | ~~Sec. 304.Transition procedures.~~

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4 | **TITLE I—FOREIGN INTELLIGENCE SURVEILLANCE**

5 | **SEC. 101. ADDITIONAL PROCEDURES REGARDING**
6 | **CERTAIN PERSONS OUTSIDE THE UNITED STATES.**

7 | (a) In General.—The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is
8 | amended—

9 | (1) by striking title VII; and

10 | (2) by adding after title VI the following new title:

11 | **“TITLE VII—ADDITIONAL PROCEDURES REGARDING**
12 | **CERTAIN PERSONS OUTSIDE THE UNITED STATES**

13 | **“SEC. 701. LIMITATION ON DEFINITION OF**
14 | **ELECTRONIC SURVEILLANCE.**

15 | “Nothing in the definition of electronic surveillance under section 101(f) shall be construed to
16 | encompass surveillance that is targeted in accordance with this title at a person reasonably
17 | believed to be located outside the United States.

18 | **“SEC. 702. DEFINITIONS.**

19 | “(a) In General.—The terms ‘agent of a foreign power’, ‘Attorney General’, ‘contents’,
20 | ‘electronic surveillance’, ‘foreign intelligence information’, ‘foreign power’, ‘person’, ‘United
21 | States’, and ‘United States person’ have the meanings given such terms in section 101, except as
22 | specifically provided in this title.

Deleted: ‘minimization procedures’.

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23 | “(b) Additional Definitions.—

24 | “(1) CONGRESSIONAL INTELLIGENCE COMMITTEES.—The term ‘congressional intelligence
25 | committees’ means—

26 | “(A) the Select Committee on Intelligence of the Senate; and

27 | “(B) the Permanent Select Committee on Intelligence of the House of
28 | Representatives.

29 | “(2) FOREIGN INTELLIGENCE SURVEILLANCE COURT; COURT.—The terms ‘Foreign
30 | Intelligence Surveillance Court’ and ‘Court’ mean the court established by section 103(a).

31 | “(3) FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW; COURT OF REVIEW.—
32 | The terms ‘Foreign Intelligence Surveillance Court of Review’ and ‘Court of Review’ mean
33 | the court established by section 103(b).

34 | “(4) ELECTRONIC COMMUNICATION SERVICE PROVIDER.—The term ‘electronic

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1 communication service provider' means—

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

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

6 "(C) a provider of a remote computing service, as that term is defined in section
7 2711 of title 18, United States Code;

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

11 "(E) an officer, employee, or agent of an entity described in subparagraph (A), (B),
12 (C), or (D).

13 "(5) INTELLIGENCE COMMUNITY.—The term 'intelligence community' has the meaning
14 given the term in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

15 "SEC. 703. PROCEDURES FOR TARGETING CERTAIN
16 PERSONS OUTSIDE THE UNITED STATES OTHER THAN
17 UNITED STATES PERSONS.

18 "(a) Authorization.—Notwithstanding any other law, upon the issuance of an order in
19 accordance with subsection (h)(3) or a determination under subsection (f)(1)(B), the Attorney
20 General and the Director of National Intelligence may authorize jointly, for a period of up to 1
21 year from the effective date of the authorization, the targeting of persons reasonably believed to
22 be located outside the United States to acquire foreign intelligence information.

23 "(b) Limitations.—An acquisition conducted under subsection (a)—

24 "(1) may not intentionally target any person known at the time of acquisition to be
25 located in the United States;

26 "(2) may not intentionally target a person reasonably believed to be located outside the
27 United States if the purpose of such acquisition is to target a particular, known person
28 reasonably believed to be in the United States;

29 "(3) may not intentionally target a United States person reasonably believed to be located
30 outside the United States;

31 "(4) may not intentionally acquire any communication as to which the sender and all
32 intended recipients are known at the time of the acquisition to be located in the United
33 States; and

34 "(5) shall be conducted in a manner consistent with the fourth amendment to the
35 Constitution of the United States.

36 "(c) Conduct of Acquisition.—

37 An acquisition authorized under subsection (a) may be conducted only in accordance
38 with—

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1 "(1) the certification made by the Attorney General and the Director of National
2 Intelligence pursuant to subsection (f) or a determination under paragraph (1)(B) of such
3 subsection; and

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4 "(2) the targeting and minimization procedures required by subsections (d) and (e).

5 "(d) Targeting Procedures.—

6 "(1) REQUIREMENT TO ADOPT.—The Attorney General, in consultation with the Director
7 of National Intelligence, shall adopt targeting procedures that are reasonably designed to
8 ensure that any acquisition authorized under subsection (a) is limited to targeting persons
9 reasonably believed to be located outside the United States and does not result in the
10 intentional acquisition of any communication as to which the sender and all intended
11 recipients are known at the time of the acquisition to be located in the United States.

12 "(2) JUDICIAL REVIEW.—The procedures referred to in paragraph (1) shall be subject to
13 judicial review pursuant to subsection (h).

14 "(e) Minimization Procedures.—

15 "(1) REQUIREMENT TO ADOPT.—The Attorney General, in consultation with the Director
16 of National Intelligence, shall adopt minimization procedures that meet the definition of
17 minimization procedures under section 101(h) or section 301(4), as appropriate, for
18 acquisitions authorized under subsection (a).

Deleted:)
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19 "(2) JUDICIAL REVIEW.—The minimization procedures required by paragraph (1) shall be
20 subject to judicial review pursuant to subsection (h).

21 "(f) Certification.—

22 "(1) IN GENERAL.—

23 "(A) REQUIREMENT.—Subject to subparagraph (B), prior to the initiation of an
24 acquisition under subsection (a), the Attorney General and the Director of National
25 Intelligence shall provide to the Foreign Intelligence Surveillance Court, under oath, a
26 written certification and any supporting affidavit, under seal, in accordance with this
27 subsection.

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28 "(B) EXCEPTION.—

29 "(i) IN GENERAL.— If the Attorney General and the Director of National
30 Intelligence determine that exigent circumstances exist because, without
31 immediate implementation of the acquisition, intelligence important to the
32 national security may be lost or not timely acquired and time does not permit
33 the issuance of an order pursuant to subsection (h)(3) prior to the initiation of
34 an acquisition, the Attorney General and the Director of National Intelligence
35 may authorize the acquisition and, if no certification for such acquisition has
36 been submitted to the Foreign Intelligence Surveillance Court, shall submit to
37 the Court a certification as soon as practicable but in no event more than 7 days
38 after such determination is made.

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39 "(ii) TIMING.— The Attorney General and the Director of National Intelligence
40 may make the determination in clause (i) before the filing of the certification or
41 at any time during which judicial review under subsection (h) is pending.

1 “(2) REQUIREMENTS.—A certification made under this subsection shall—

2 “(A) attest that—

3 “(i) there are reasonable procedures in place ~~that have been approved,~~
4 submitted for approval, or will be submitted with the certification for approval to
5 the Foreign Intelligence Surveillance Court, for determining that the acquisition
6 authorized under subsection (a) —

7 “(I) is targeted at persons reasonably believed to be located outside the
8 United States; and

9 “(II) does not result in the intentional acquisition of any communication as
10 to which the sender and all intended recipients are known at the time of the
11 acquisition to be located in the United States;

12 “(ii) the minimization procedures to be used with respect to such acquisition—

13 “(I) meet the definition of minimization procedures under section 101(h)
14 or section 301(4), as appropriate; and

15 “(II) have been approved by, submitted for approval by, or will be
16 submitted with the certification for approval by, the Foreign Intelligence
17 Surveillance Court;

18 “(iii) the procedures referred to in clauses (i) and (ii) are consistent with the
19 requirements of the fourth amendment to the Constitution of the United States;

20 “(iv) a significant purpose of the acquisition is to obtain foreign intelligence
21 information;“(v) the acquisition involves obtaining the foreign intelligence
22 information from or with the assistance of an electronic communication service
23 provider; and

24 “(vi) the acquisition does not constitute electronic surveillance, as limited by
25 section 701; and

26 “(B) be supported, as appropriate, by the affidavit of any appropriate official in the
27 area of national security who is—

28 “(i) appointed by the President, by and with the consent of the Senate; or

29 “(ii) the head of an element of the intelligence community; and

30 “(C) include—

31 “(i) an effective date for the authorization that is between 30 and 60 days from
32 the submission of the written certification to the court; or

33 “(ii) if the acquisition has begun or the effective date is less than 30 days from
34 the submission of the written certification to the court the date the acquisition
35 began or the effective date for the acquisition.

36 “(3) CHANGE IN EFFECTIVE DATE.—The Attorney General and the Director of National
37 Intelligence may advance or delay the effective date described in paragraph (2)(C) by
38 amending the certification pursuant to subsection (h)(1)(C).

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~~Deleted: pursuant to subsection (b);“(ii) there are reasonable procedures in place~~

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1 “(4) LIMITATION.—A certification made under this subsection is not required to identify
2 the specific facilities, places, premises, or property at which the acquisition authorized
3 under subsection (a) will be directed or conducted.

4 “(5) MAINTENANCE OF CERTIFICATION.—A certification made under this subsection shall
5 be maintained under security measures adopted by the Chief Justice of the United States and
6 the Attorney General, in consultation with the Director of National Intelligence.

7 “(6) REVIEW.—The certification required by this subsection shall be subject to judicial
8 review pursuant to subsection (h).

9 “(g) Directives and Judicial Review of Directives.—

10 “(1) AUTHORITY.—With respect to an acquisition authorized under subsection (a), the
11 Attorney General and the Director of National Intelligence may direct, in writing, an
12 electronic communication service provider to—

13 “(A) immediately provide the Government with all information, facilities, or
14 assistance necessary to accomplish the acquisition authorized in accordance with this
15 section in a manner that will protect the secrecy of the acquisition and produce a
16 minimum of interference with the services that such electronic communication service
17 provider is providing to the target of the acquisition; and

18 “(B) maintain under security procedures approved by the Attorney General and the
19 Director of National Intelligence any records concerning the acquisition or the aid
20 furnished that such electronic communication service provider wishes to maintain.

21 “(2) COMPENSATION.—The Government shall compensate, at the prevailing rate, an
22 electronic communication service provider for providing information, facilities, or
23 assistance pursuant to paragraph (1).

24 “(3) RELEASE FROM LIABILITY.—No cause of action shall lie in any court against any
25 electronic communication service provider for providing any information, facilities, or
26 assistance in accordance with a directive issued pursuant to paragraph (1).

27 “(4) CHALLENGING OF DIRECTIVES.—

28 “(A) AUTHORITY TO CHALLENGE.—An electronic communication service provider
29 receiving a directive issued pursuant to paragraph (1) may challenge the directive by
30 filing a petition with the Foreign Intelligence Surveillance Court, which shall have
31 jurisdiction to review such a petition.

32 “(B) ASSIGNMENT.—The presiding judge of the Court shall assign the petition filed
33 under subparagraph (A) to 1 of the judges of the Court serving in the pool established
34 by section 103(e)(1) not later than 24 hours after the filing of the petition.

35 “(C) STANDARDS FOR REVIEW.—A judge considering a petition to modify or set
36 aside a directive may grant such petition only if the judge finds that the directive does
37 not meet the requirements of this section, or is otherwise unlawful.

38 “(D) PROCEDURES FOR INITIAL REVIEW.—A judge shall conduct an initial review of a
39 petition filed under subparagraph (A) not later than 5 days after being assigned such
40 petition. If the judge determines that the petition does not consist of claims, defenses,
41 or other legal contentions that are warranted by existing law or by a nonfrivolous

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1 argument for extending, modifying, or reversing existing law or for establishing new
2 law, the judge shall immediately deny the petition and affirm the directive or any part
3 of the directive that is the subject of the petition and order the recipient to comply with
4 the directive or any part of it. Upon making such a determination or promptly
5 thereafter, the judge shall provide a written statement for the record of the reasons for a
6 determination under this subparagraph.

7
8 ~~“(E) PROCEDURES FOR PLENARY REVIEW.—If a judge determines that a petition filed
under subparagraph (A) requires plenary review, the judge shall affirm, modify, or set
9 aside the directive that is the subject of that petition not later than 30 days after being
10 assigned the petition. If the Court does not set aside the directive, the judge shall
11 immediately affirm or affirm with modifications the directive, and order the recipient
12 to comply with the directive in its entirety or as modified. The judge shall provide a
13 written statement for the record of the reasons for a determination under this
14 subparagraph.~~

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stated, extends that time as necessary to
comport with the due process clause of
the fifth amendment to the Constitution
of the United States. Unless the judge sets
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15 ~~“(F) CONTINUED EFFECT.—Any directive not explicitly modified or set aside under
16 this paragraph shall remain in full effect.~~

17 ~~“(G) CONTEMPT OF COURT.—Failure to obey an order of the Court issued under this
18 paragraph may be punished by the Court as contempt of court.~~

19 ~~“(5) ENFORCEMENT OF DIRECTIVES.—~~

20 ~~“(A) ORDER TO COMPEL.—If an electronic communication service provider fails to
21 comply with a directive issued pursuant to paragraph (1), the Attorney General may
22 file a petition for an order to compel the electronic communication service provider to
23 comply with the directive with the Foreign Intelligence Surveillance Court, which shall
24 have jurisdiction to review such a petition.~~

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25 ~~“(B) ASSIGNMENT.—The presiding judge of the Court shall assign a petition filed
26 under subparagraph (A) to 1 of the judges serving in the pool established by section
27 103(e)(1) not later than 24 hours after the filing of the petition.~~

28 ~~“(C) PROCEDURES FOR REVIEW.—A judge considering a petition filed under
29 subparagraph (A) shall issue an order requiring the electronic communication service
30 provider to comply with the directive or any part of it, as issued or as modified, not
31 later than 30 days after being assigned a petition if the judge finds that the directive
32 meets the requirements of this section, and is otherwise lawful. The judge shall provide
33 a written statement for the record of the reasons for a determination under this
34 paragraph.~~

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“(D) 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.

35 ~~“(D) CONTEMPT OF COURT.—Failure to obey an order of the Court issued under this
36 paragraph may be punished by the Court as contempt of court.~~

37 ~~“(E) PROCESS.—Any process under this paragraph may be served in any judicial
38 district in which the electronic communication service provider may be found.~~

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39 ~~“(6) APPEAL.—~~

40 ~~“(A) APPEAL TO THE COURT OF REVIEW.—The Government or an electronic
41 communication service provider receiving a directive issued pursuant to paragraph (1)
42 may file a petition with the Foreign Intelligence Surveillance Court of Review for~~

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1 review of a decision issued pursuant to paragraph (4) or (5). The Court of Review shall
2 have jurisdiction to consider such a petition and shall provide a written statement for
3 the record of the reasons for a decision under this paragraph.

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4 "(B) CERTIORARI TO THE SUPREME COURT.—The Government or an electronic
5 communication service provider receiving a directive issued pursuant to paragraph (1)
6 may file a petition for a writ of certiorari for review of the decision of the Court of
7 Review issued under subparagraph (A). The record for such review shall be
8 transmitted under seal to the Supreme Court of the United States, which shall have
9 jurisdiction to review such decision.

10 "(h) Judicial Review of Certifications and Procedures.—

11 "(1) IN GENERAL.—

12 "(A) REVIEW BY THE FOREIGN INTELLIGENCE SURVEILLANCE COURT.—The Foreign
13 Intelligence Surveillance Court shall have jurisdiction to review any certification
14 submitted in accordance with subsection (f) and the targeting and minimization
15 procedures adopted pursuant to subsections (d) and (e), and any amendments to such
16 certification or procedures.

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"(B) SUBMISSION

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General shall submit to the Court any

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later than 5 days after making or
amending the certification or adopting or
amending the procedure

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Court shall review a certification
provided under

17 "(B) TIME PERIOD FOR REVIEW.—The Court shall review the certification submitted
18 in accordance with subsection (f) and the targeting and minimization procedures
19 submitted in accordance with subsections (d) and (e) and shall approve or disapprove
20 such certification and procedures not later than 30 days after the date on which such
21 certification and procedures are submitted.

22 "(C) AMENDMENTS.—The Attorney General and the Director of National
23 Intelligence may amend a certification submitted in accordance with subsection (f) or
24 the targeting and minimization procedures submitted in accordance with subsections
25 (d) and (e) as necessary after such certification or procedures have been submitted for
26 review to the Foreign Intelligence Surveillance Court or after such certification or
27 procedures have been approved by the Court. The Court shall review any such
28 amendment under the procedures set forth in this subsection. The Attorney General
29 and the Director of National Intelligence may authorize the use of an amended
30 certification or amended procedures pending the Court's review of such amended
31 certification or amended procedures.

32 "(2) REVIEW.—The Court shall review the following:

33 "(A) CERTIFICATION.—A certification submitted in accordance with subsection (f) to
34 determine whether the certification contains all the required elements.

35 "(B) TARGETING PROCEDURES.—The targeting procedures required by subsection (d)
36 to assess whether the procedures are reasonably designed to ensure that the acquisition
37 authorized under subsection (a) is limited to the targeting of persons reasonably believed
38 to be located outside the United States and does not result in the intentional acquisition of
39 any communication as to which the sender and all intended recipients are known at the
40 time of the acquisition to be located in the United States.

41 "(C) MINIMIZATION PROCEDURES.—The minimization procedures submitted in
42 accordance with subsection (e) to assess whether such procedures meet the definition of

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1 minimization procedures under section 101(h) or section 301(4), as appropriate.

2 **"(3) ORDERS.—**

3 **"(A) APPROVAL.—**If the Court finds that a certification submitted in accordance
4 with subsection (f) contains all of the required elements and that the targeting and
5 minimization procedures submitted in accordance with subsections (d) and (e) are
6 consistent with the requirements of those subsections and with the fourth amendment
7 to the Constitution of the United States, the Court shall enter an order approving the
8 certification and the use, or continued use in the case of an acquisition under
9 subsection (f)(1)(B), of the procedures for the acquisition.

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10 **"(B) CORRECTION OF DEFICIENCIES.—**If the Court finds that a certification submitted
11 in accordance with subsection (f) does not contain all of the required elements, or that
12 the procedures submitted in accordance with subsections (d) and (e) are not consistent
13 with the requirements of those subsections or the fourth amendment to the Constitution
14 of the United States, the Court shall issue an order directing the Government to, at the
15 Government's election and to the extent required by the Court's order—

16 **"(i)** correct any deficiency identified by the Court not later than 30 days after
17 the date the Court issues the order; or

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18 **"(ii)** cease, or not begin, the acquisition authorized under subsection (a).

19 **"(C) REQUIREMENT FOR WRITTEN STATEMENT.—**In support of its orders under this
20 subsection, the Court shall provide, simultaneously with the orders, for the record a
21 written statement of its reasons.

22 **"(4) APPEAL.—**

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23 **"(A) APPEAL TO THE COURT OF REVIEW.—**The Government may appeal any order
24 under this section to the Foreign Intelligence Surveillance Court of Review, which
25 shall have jurisdiction to review such order. For any decision affirming, reversing, or
26 modifying an order of the Foreign Intelligence Surveillance Court, the Court of
27 Review shall provide for the record a written statement of its reasons.

28 **"(B) CONTINUATION OF ACQUISITION PENDING REHEARING OR APPEAL.—**Any
29 acquisition affected by an order under paragraph (3)(B) may continue—

30 **"(i)** during the pendency of any rehearing of the order by the Court en banc;
31 and

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32 **"(ii)** if the Government appeals an order under this section, until the Court of
33 Review enters an order under subparagraph (C).

34 **"(C) IMPLEMENTATION PENDING APPEAL.—**Not later than 60 days after the filing of
35 an appeal of an order issued under paragraph (3)(B) directing the correction of a
36 deficiency, the Court of Review shall determine, and enter a corresponding order
37 regarding, whether all or any part of the correction order, as issued or modified, shall
38 be implemented during the pendency of the appeal.

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39 **"(D) CERTIORARI TO THE SUPREME COURT.—**The Government may file a petition for
40 a writ of certiorari for review of a decision of the Court of Review issued under
41 subparagraph (A). The record for such review shall be transmitted under seal to the

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1 Supreme Court of the United States, which shall have jurisdiction to review such
2 decision.

3 “(5) SCHEDULE.—

4 “(A) REPLACEMENT OF AUTHORIZATIONS IN EFFECT.— If the Attorney General and
5 the Director of National Intelligence replace an authorization issued pursuant to section
6 105B of the Foreign Intelligence Surveillance Act of 1978, as added by section 2 of the
7 Protect America Act of 2007 (Public Law 110-55) with an authorization under this
8 section, the Attorney General and the Director of National Intelligence shall, to the
9 extent practicable, submit to the Court the certification prepared in accordance with
10 subsection (f) and the procedures adopted in accordance with subsections (d) and (e) at
11 least 30 days before the expiration of such authorization.

12 “(B) REAUTHORIZATION OF AUTHORIZATIONS IN EFFECT.— If the Attorney General
13 and the Director of National Intelligence seek to reauthorize or replace an authorization
14 issued pursuant to this section, the Attorney General and the Director of National
15 Intelligence shall, to the extent practicable, submit to the Court the certification
16 prepared in accordance with subsection (f) and the procedures adopted in accordance
17 with subsections (d) and (e) at least 30 days prior to the expiration of such
18 authorization.

19 “(C) CONSTRUCTION.— Nothing in this Act shall be construed to preclude the
20 Attorney General and the Director of National Intelligence from submitting
21 certifications for additional authorizations, amended certifications, or amended
22 procedures for existing authorizations at other times during the year as necessary.

23 “(i) Judicial Proceedings.—

24 “(1) EXPEDITED JUDICIAL PROCEEDINGS.—Judicial proceedings under this section shall
25 be conducted as expeditiously as possible.

26 “(2) TIME LIMITS.—A time limit for a judicial decision in this section shall apply unless
27 the Court, the Court of Review, or any judge of either the Court or the Court of Review, by
28 order for reasons stated, extends that time as necessary to comport with due process of the
29 fifth amendment to the Constitution of the United States.

30 “(j) Maintenance and Security of Records and Proceedings.—

31 “(1) STANDARDS.— The Foreign Intelligence Surveillance Court shall maintain a record
32 of a proceeding under this section, including petitions filed, orders granted, and statements
33 of reasons for decision, under security measures adopted by the Chief Justice of the United
34 States, in consultation with the Attorney General and the Director of National Intelligence.

35 “(2) FILING AND REVIEW.—All petitions under this section shall be filed under seal. In
36 any proceedings under this section, the court shall, upon request of the Government, review
37 ex parte and in camera any Government submission, or portions of a submission, which
38 may include classified information.

39 “(3) RETENTION OF RECORDS.— The Attorney General and the Director of National
40 Intelligence shall retain a directive made or an order granted under this section for a period
41 of not less than 10 years from the date on which such directive or such order is made.

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1 "(k) Assessments and Reviews.—

2 "(1) SEMIANNUAL ASSESSMENT.—Not less frequently than once every 6 months, the
3 Attorney General and Director of National Intelligence shall assess compliance with the
4 targeting and minimization procedures required by subsections (d) and (e) and shall submit
5 each such assessment to—

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6 "(A) the Foreign Intelligence Surveillance Court; and

7 "(B) the congressional intelligence committees.

8 "(2) AGENCY ASSESSMENT.—The Inspectors General of the Department of Justice and
9 each agency or element of the intelligence community authorized to acquire foreign
10 intelligence information under subsection (a) with respect to the department, agency, or
11 element of such Inspector General—

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12 "(A) are authorized to review the compliance with the targeting and minimization
13 procedures required by subsections (d) and (e);

14 "(B) with respect to acquisitions authorized under subsection (a), shall review the
15 number of disseminated intelligence reports containing a reference to a United States
16 person identity and the number of United States person identities subsequently
17 disseminated by the element concerned in response to requests for identities that were
18 not referred to by name or title in the original reporting;

19 "(C) with respect to acquisitions authorized under subsection (a), shall review the
20 number of targets that were later determined to be located in the United States and, to
21 the extent possible, whether their communications were reviewed; and

22 "(D) shall provide each such review to—

23 "(i) the Attorney General;

24 "(ii) the Director of National Intelligence; and

25 "(iii) the congressional intelligence committees.

26 "(3) ANNUAL REVIEW.—

27 "(A) REQUIREMENT TO CONDUCT.—The head of each element of the intelligence
28 community conducting an acquisition authorized under subsection (a) shall conduct an
29 annual review to determine whether there is reason to believe that foreign intelligence
30 information has been or will be obtained from the acquisition. The annual review shall
31 provide, with respect to such acquisitions authorized under subsection (a)—

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32 "(i) an accounting of the number of disseminated intelligence reports
33 containing a reference to a United States person identity;

34 "(ii) an accounting of the number of United States person identities
35 subsequently disseminated by that element in response to requests for identities
36 that were not referred to by name or title in the original reporting;

37 "(iii) the number of targets that were later determined to be located in the
38 United States and, to the extent possible, whether their communications were
39 reviewed; and

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1 (iv) a description of any procedures developed by the head of such element of
2 the intelligence community and approved by the Director of National Intelligence
3 to assess, in a manner consistent with national security, operational requirements
4 and the privacy interests of United States persons, the extent to which the
5 acquisitions authorized under subsection (a) acquire the communications of
6 United States persons, and the results of any such assessment.

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7 (B) USE OF REVIEW.—The head of each element of the intelligence community that
8 conducts an annual review under subparagraph (A) shall use each such review to
9 evaluate the adequacy of the minimization procedures utilized by such element or the
10 application of the minimization procedures to a particular acquisition authorized under
11 subsection (a).

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12 (C) PROVISION OF REVIEW.—The head of each element of the intelligence
13 community that conducts an annual review under subparagraph (A) shall provide such
14 review to—

15 (i) the Foreign Intelligence Surveillance Court;

16 (ii) the Attorney General;

17 (iii) the Director of National Intelligence; and

18 (iv) the congressional intelligence committees.

19 **“SEC. 704. CERTAIN ACQUISITIONS INSIDE THE**
20 **UNITED STATES OF UNITED STATES PERSONS**
21 **OUTSIDE THE UNITED STATES.**

22 (a) Jurisdiction of the Foreign Intelligence Surveillance Court.—

23 (1) IN GENERAL.—The Foreign Intelligence Surveillance Court shall have jurisdiction to
24 enter an order approving the targeting of a United States person reasonably believed to be
25 located outside the United States to acquire foreign intelligence information, if the
26 acquisition constitutes electronic surveillance (as defined in section 101(f), regardless of the
27 limitation of section 701) or the acquisition of stored electronic communications or stored
28 electronic data that requires an order under this Act, and such acquisition is conducted
29 within the United States.

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30 (2) LIMITATION.—In the event that a United States person targeted under this subsection
31 is reasonably believed to be located in the United States during the pendency of an order
32 issued pursuant to subsection (c), such acquisition shall cease until authority, other than
33 under this section, is obtained pursuant to this Act or the targeted United States person is
34 again reasonably believed to be located outside the United States during the pendency of an
35 order issued pursuant to subsection (c).

36 (b) Application.—

37 (1) IN GENERAL.—Each application for an order under this section shall be made by a
38 Federal officer in writing upon oath or affirmation to a judge having jurisdiction under
39 subsection (a)(1). Each application shall require the approval of the Attorney General based
40 upon the Attorney General’s finding that it satisfies the criteria and requirements of such

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1 application, as set forth in this section, and shall include—

2 “(A) the identity of the Federal officer making the application;

3 “(B) the identity, if known, or a description of the United States person who is the
4 target of the acquisition;

5 “(C) a statement of the facts and circumstances relied upon to justify the applicant’s
6 belief that the United States person who is the target of the acquisition is—

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

8 “(ii) a foreign power, an agent of a foreign power, or an officer or employee of
9 a foreign power;

10 “(D) a statement of proposed minimization procedures that meet the definition of
11 minimization procedures in section 101(h) or section 301(4), as appropriate;

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

14 “(F) a certification made by the Attorney General or an official specified in section
15 104(a)(6) that—

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

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

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

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

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

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

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

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

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

35 “(I) a statement of the facts concerning any previous applications that have been
36 made to any judge of the Foreign Intelligence Surveillance Court involving the United
37 States person specified in the application and the action taken on each previous
38 application; and

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

3 “(2) OTHER REQUIREMENTS OF THE ATTORNEY GENERAL.—The Attorney General may
4 require any other affidavit or certification from any other officer in connection with the
5 application.

6 “(3) OTHER REQUIREMENTS OF THE JUDGE.—The judge may require the applicant to
7 furnish such other information as may be necessary to make the findings required by
8 subsection (c)(1).

9 “(c) Order.—

10 “(1) FINDINGS.—Upon an application made pursuant to subsection (b), the Foreign
11 Intelligence Surveillance Court shall enter an ex parte order as requested or as modified
12 approving the acquisition if the Court finds that—

13 “(A) the application has been made by a Federal officer and approved by the
14 Attorney General;

15 “(B) on the basis of the facts submitted by the applicant, for the United States person
16 who is the target of the acquisition, there is probable cause to believe that the target
17 is—

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

19 “(ii) a foreign power, an agent of a foreign power, or an officer or employee of
20 a foreign power;

21 “(C) the proposed minimization procedures meet the definition of minimization
22 procedures under section 101(h) or section 301(4), as appropriate; and

23 “(D) the application that has been filed contains all statements and certifications
24 required by subsection (b) and the certification or certifications are not clearly
25 erroneous on the basis of the statement made under subsection (b)(1)(F)(v) and any
26 other information furnished under subsection (b)(3).

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27 “(2) PROBABLE CAUSE.—In determining whether or not probable cause exists for
28 purposes of paragraph (1)(B), a judge having jurisdiction under subsection (a)(1) may
29 consider past activities of the target, and facts and circumstances relating to current or
30 future activities of the target. No United States person may be considered a foreign power,
31 agent of a foreign power, or officer or employee of a foreign power solely upon the basis of
32 activities protected by the first amendment to the Constitution of the United States.

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33 “(3) REVIEW.—

34 “(A) LIMITATION ON REVIEW.—Review by a judge having jurisdiction under
35 subsection (a)(1) shall be limited to that required to make the findings described in
36 paragraph (1).

37 “(B) REVIEW OF PROBABLE CAUSE.—If the judge determines that the facts submitted
38 under subsection (b) are insufficient to establish probable cause to issue an order under
39 paragraph (1), the judge shall enter an order so stating and provide a written statement
40 for the record of the reasons for such determination. The Government may appeal an

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1 | order under this subparagraph pursuant to subsection (f).

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2 | “(C) REVIEW OF MINIMIZATION PROCEDURES.—If the judge determines that the
3 | proposed minimization procedures referred to in paragraph (1)(C) do not meet the
4 | definition of minimization procedures under section 101(h) or section 301(4), as
5 | appropriate, the judge shall enter an order so stating and provide a written statement
6 | for the record of the reasons for such determination. The Government may appeal an
7 | order under this subparagraph pursuant to subsection (f).

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8 | “(D) REVIEW OF CERTIFICATION.—If the judge determines that an application
9 | required by subsection (b) does not contain all of the required elements, or that the
10 | certification or certifications are clearly erroneous on the basis of the statement made
11 | under subsection (b)(1)(F)(v) and any other information furnished under subsection
12 | (b)(3), the judge shall enter an order so stating and provide a written statement for the
13 | record of the reasons for such determination. The Government may appeal an order
14 | under this subparagraph pursuant to subsection (f).

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15 | “(4) SPECIFICATIONS.—An order approving an acquisition under this subsection shall
16 | specify—

17 | “(A) the identity, if known, or a description of the United States person who is the
18 | target of the acquisition identified or described in the application pursuant to
19 | subsection (b)(1)(B);

20 | “(B) if provided in the application pursuant to subsection (b)(1)(H), the nature and
21 | location of each of the facilities or places at which the acquisition will be directed;

22 | “(C) the nature of the information sought to be acquired and the type of
23 | communications or activities to be subjected to acquisition;

24 | “(D) the means by which the acquisition will be conducted and whether physical
25 | entry is required to effect the acquisition; and

26 | “(E) the period of time during which the acquisition is approved.

27 | “(5) DIRECTIONS.—An order approving an acquisition under this subsection shall
28 | direct—

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29 | “(A) that the minimization procedures referred to in paragraph (1)(C), be followed;

30 | “(B) an electronic communication service provider to provide to the Government
31 | forthwith all information, facilities, or assistance necessary to accomplish the
32 | acquisition authorized under this subsection in a manner that will protect the secrecy of
33 | the acquisition and produce a minimum of interference with the services that such
34 | electronic communication service provider is providing to the target of the acquisition;

35 | “(C) an electronic communication service provider to maintain under security
36 | procedures approved by the Attorney General any records concerning the acquisition
37 | or the aid furnished that such electronic communication service provider wishes to
38 | maintain; and

39 | “(D) that the Government compensate, at the prevailing rate, such electronic
40 | communication service provider for providing such information, facilities, or
41 | assistance.

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1 "(6) DURATION.—An order approved under this subsection shall be effective for a period
2 not to exceed 90 days and such order may be renewed for additional 90-day periods upon
3 submission of renewal applications meeting the requirements of subsection (b).

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4 "(7) COMPLIANCE.—At or prior to the end of the period of time for which an acquisition
5 is approved by an order or extension under this section, the judge may assess compliance
6 with the minimization procedures referred to in paragraph (1)(C) by reviewing the
7 circumstances under which information concerning United States persons was acquired,
8 retained, or disseminated.

9 "(d) Emergency Authorization.—

10 "(1) AUTHORITY FOR EMERGENCY AUTHORIZATION.—Notwithstanding any other
11 provision of this Act, if the Attorney General reasonably determines that—

12 "(A) an emergency situation exists with respect to the acquisition of foreign
13 intelligence information for which an order may be obtained under subsection (c)
14 before an order authorizing such acquisition can with due diligence be obtained, and

15 "(B) the factual basis for the issuance of an order under this subsection to approve
16 such acquisition exists,

17 the Attorney General may authorize such emergency acquisition if a judge having
18 jurisdiction under subsection (a)(1) is informed by the Attorney General, or a designee of
19 the Attorney General, at the time of such authorization that the decision has been made to
20 conduct such acquisition and if an application in accordance with this subsection is made to
21 a judge of the Foreign Intelligence Surveillance Court as soon as practicable, but not more
22 than 7 days after the Attorney General authorizes such acquisition.

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23 "(2) MINIMIZATION PROCEDURES.—If the Attorney General authorizes an emergency
24 acquisition under paragraph (1), the Attorney General shall require that the minimization
25 procedures referred to in subsection (c)(1)(C) required by this section for the issuance of a
26 judicial order be followed.

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27 "(3) TERMINATION OF EMERGENCY AUTHORIZATION.—In the absence of a judicial order
28 approving an acquisition under paragraph (1), such acquisition shall terminate when the
29 information sought is obtained, if the application for the order is denied, or after the
30 expiration of 7 days from the time of authorization by the Attorney General, whichever is
31 earliest.

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32 "(4) USE OF INFORMATION.—If an application for approval is denied, or in any other case
33 where the acquisition is terminated and no order is issued approving the acquisition, no
34 information obtained or evidence derived from such acquisition, except under
35 circumstances in which the target of the acquisition is determined not to be a United States
36 person shall be received in evidence or otherwise disclosed in any trial, hearing, or other
37 proceeding in or before any court, grand jury, department, office, agency, regulatory body,
38 legislative committee, or other authority of the United States, a State, or political
39 subdivision thereof, and no information concerning any United States person acquired from
40 such acquisition shall subsequently be used or disclosed in any other manner by Federal
41 officers or employees without the consent of such person, except with the approval of the
42 Attorney General if the information indicates a threat of death or serious bodily harm to any
43 person.

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of the 7-day emergency acquisition
period,

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1 “(e) Release From Liability.—No, cause of action shall lie in any court against any electronic
2 communication service provider for providing any information, facilities, or assistance in
3 accordance with an order or request for emergency assistance issued pursuant to subsections (c)
4 or (d).

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5 “(f) Appeal.—

6 “(1) APPEAL TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW.—The
7 Government may file an appeal with the Foreign Intelligence Surveillance Court of Review
8 for review of an order issued pursuant to subsection (c). The Court of Review shall have
9 jurisdiction to consider such appeal and shall provide a written statement for the record of
10 the reasons for a decision under this paragraph.

11 “(2) CERTIORARI TO THE SUPREME COURT.—The Government may file a petition for a
12 writ of certiorari for review of a decision of the Court of Review issued under paragraph
13 (1). The record for such review shall be transmitted under seal to the Supreme Court of the
14 United States, which shall have jurisdiction to review such decision.

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15 “SEC. 705. OTHER ACQUISITIONS TARGETING UNITED 16 STATES PERSONS OUTSIDE THE UNITED STATES.

17 “(a) Jurisdiction and Scope.—

18 “(1) JURISDICTION.—The Foreign Intelligence Surveillance Court shall have jurisdiction
19 to enter an order pursuant to subsection (c).

20 “(2) SCOPE.—No element of the intelligence community may intentionally target, for the
21 purpose of acquiring foreign intelligence information, a United States person reasonably
22 believed to be located outside the United States under circumstances in which the targeted
23 United States person has a reasonable expectation of privacy and a warrant would be
24 required if the acquisition were conducted inside the United States for law enforcement
25 purposes, unless a judge of the Foreign Intelligence Surveillance Court has entered an order
26 or the Attorney General has authorized an emergency acquisition pursuant to subsections (c)
27 or (d) or any other provision of this Act.

28 “(3) LIMITATIONS.—

29 “(A) MOVING OR MISIDENTIFIED TARGETS.—In the event that the targeted United
30 States person is reasonably believed to be in the United States during the pendency of
31 an order issued pursuant to subsection (c), such acquisition shall cease until authority is
32 obtained pursuant to this Act or the targeted United States person is again reasonably
33 believed to be located outside the United States during the pendency of an order issued
34 pursuant to subsection (c).

35 “(B) APPLICABILITY.—If an acquisition is to be conducted inside the United States
36 and could be authorized under section 704, the procedures of section 704 shall apply,
37 unless an order or emergency acquisition authority has been obtained under a provision
38 of this Act other than under this section.

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39 “(b) Application.—Each application for an order under this section shall be made by a Federal
40 officer in writing upon oath or affirmation to a judge having jurisdiction under subsection (a)(1).
41 Each application shall require the approval of the Attorney General based upon the Attorney

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1 General's finding that it satisfies the criteria and requirements of such application as set forth in
2 this section and shall include—

3 “(1) the identity, if known, or a description of the specific United States person who is the
4 target of the acquisition;

5 “(2) a statement of the facts and circumstances relied upon to justify the applicant's belief
6 that the United States person who is the target of the acquisition is—

7 “(A) a person reasonably believed to be located outside the United States; and

8 “(B) a foreign power, an agent of a foreign power, or an officer or employee of a
9 foreign power;

10 “(3) a statement of proposed minimization procedures that meet the definition of
11 minimization procedures under section 101(h) or section 301(4), as appropriate;

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12 “(4) a certification made by the Attorney General, an official specified in section
13 104(a)(6), or the head of an element of the intelligence community that—

14 “(A) the certifying official deems the information sought to be foreign intelligence
15 information; and

16 “(B) a significant purpose of the acquisition is to obtain foreign intelligence
17 information;

18 “(5) a statement of the facts concerning any previous applications that have been made to
19 any judge of the Foreign Intelligence Surveillance Court involving the United States person
20 specified in the application and the action taken on each previous application; and

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

23 “(c) Order.—

24 “(1) FINDINGS.—Upon an application made pursuant to subsection (b), the Foreign
25 Intelligence Surveillance Court shall enter an ex parte order as requested or as modified by
26 the Court if the Court finds that—

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27 “(A) on the basis of the facts submitted by the applicant, for the United States person
28 who is the target of the acquisition, there is probable cause to believe that the target
29 is—

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under subsection (a)

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

31 “(ii) a foreign power, an agent of a foreign power, or an officer or employee of
32 a foreign power;

33 “(B) the proposed minimization procedures, with respect to their dissemination
34 provisions, meet the definition of minimization procedures under section 101(h) or
35 section 301(4), as appropriate; and

36 “(C) the application that has been filed contains all statements and certifications
37 required by subsection (b) and the certification provided under subsection (b)(4) is not
38 clearly erroneous on the basis of the information furnished under subsection (b).

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the Court shall issue an ex parte order so
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1 “(2) PROBABLE CAUSE.—In determining whether or not probable cause exists for
2 purposes of an order under paragraph (1)(A), a judge having jurisdiction under subsection
3 (a)(1) may consider past activities of the target, and facts and circumstances relating to
4 current or future activities of the target. ~~No United States person may be considered a~~
5 ~~foreign power, agent of a foreign power, or officer or employee of a foreign power solely~~
6 upon the basis of activities protected by the first amendment to the Constitution of the
7 United States.

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8 “(3) REVIEW.—

9 “(A) LIMITATIONS ON REVIEW.—Review by a judge having jurisdiction under
10 subsection (a)(1) shall be limited to that required to make the findings described in
11 paragraph (1). The judge shall not have jurisdiction to review the means by which an
12 acquisition under this section may be conducted.

13 “(B) REVIEW OF PROBABLE CAUSE.—If the judge determines that the facts submitted
14 under subsection (b) are insufficient to establish probable cause to issue an order under
15 this subsection, the judge shall enter an order so stating and provide a written statement
16 for the record of the reasons for such determination. The Government may appeal an
17 order under this clause pursuant to subsection (e).

18 “(C) REVIEW OF MINIMIZATION PROCEDURES.—If the judge determines that the
19 minimization procedures applicable to dissemination of information obtained through
20 an acquisition under this subsection do not meet the definition of minimization
21 procedures under section 101(h) or section 301(4), as appropriate, the judge shall enter
22 an order so stating and provide a written statement for the record of the reasons for
23 such determination. The Government may appeal an order under this clause pursuant
24 to subsection (e).

25 “(D) SCOPE OF REVIEW OF CERTIFICATION.—If the judge determines that the
26 certification provided under subsection (b)(4) is clearly erroneous on the basis of the
27 information furnished under subsection (b), the judge shall enter an order so stating
28 and provide a written statement for the record of the reasons for such determination.
29 The Government may appeal an order under this subparagraph pursuant to subsection
30 (e).

31 “(4) DURATION.—An order under this paragraph shall be effective for a period not to
32 exceed 90 days and such order may be renewed for additional 90-day periods upon
33 submission of renewal applications meeting the requirements of subsection (b).

34 “(5) COMPLIANCE.—At or prior to the end of the period of time for which an order or
35 extension is granted under this section, the judge may assess compliance with the
36 minimization procedures referred to in paragraph (1)(C) by reviewing the circumstances
37 under which information concerning United States persons was disseminated, provided that
38 the judge may not inquire into the circumstances relating to the conduct of the acquisition.

39 “(d) Emergency Authorization.—

40 “(1) AUTHORITY FOR EMERGENCY AUTHORIZATION.—Notwithstanding any other
41 provision in this subsection, if the Attorney General reasonably determines that—

42 “(A) an emergency situation exists with respect to the acquisition of foreign

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1 intelligence information for which an order may be obtained under subsection (c)
2 before an order under that subsection can with due diligence, be obtained, and

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3 "(B) the factual basis for the issuance of an order under this section exists,

4 the Attorney General may authorize the emergency acquisition if a judge having jurisdiction
5 under subsection (a)(1) is informed by the Attorney General or a designee of the Attorney
6 General at the time of such authorization that the decision has been made to conduct such
7 acquisition and if an application in accordance with this section is made to a judge of the
8 Foreign Intelligence Surveillance Court as soon as practicable, but not more than 7 days
9 after the Attorney General authorizes such acquisition.

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10 "(2) MINIMIZATION PROCEDURES.—If the Attorney General authorizes such emergency
11 acquisition under paragraph (1), the Attorney General shall require that the minimization
12 procedures referred to in subsection (c)(1)(C) be followed.

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13 "(3) TERMINATION OF EMERGENCY AUTHORIZATION.—In the absence of an order under
14 subsection (c), such acquisition shall terminate when the information sought is obtained, if
15 the application for the order is denied, or after the expiration of 7 days from the time of
16 authorization by the Attorney General, whichever is earliest.

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17 "(4) USE OF INFORMATION.—If an application submitted to the Court pursuant to
18 paragraph (1) is denied, or in any other case where the acquisition is terminated and no
19 order is issued under subsection (c), no information obtained or evidence derived from such
20 acquisition, except under circumstances in which the target of the acquisition is determined
21 not to be a United States person, shall be received in evidence or otherwise disclosed in any
22 trial, hearing, or other proceeding in or before any court, grand jury, department, office,
23 agency, regulatory body, legislative committee, or other authority of the United States, a
24 State, or political subdivision thereof, and no information concerning any United States
25 person acquired from such acquisition shall subsequently be used or disclosed in any other
26 manner by Federal officers or employees without the consent of such person, except with
27 the approval of the Attorney General if the information indicates a threat of death or serious
28 bodily harm to any person.

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day emergency acquisition period.

29 "(e) APPEAL.—

30 "(1) APPEAL TO THE COURT OF REVIEW.—The Government may file an appeal with the
31 Foreign Intelligence Surveillance Court of Review for review of an order issued pursuant to
32 subsection (c). The Court of Review shall have jurisdiction to consider such appeal and
33 shall provide a written statement for the record of the reasons for a decision under this
34 paragraph.

35 "(2) CERTIORARI TO THE SUPREME COURT.—The Government may file a petition for a
36 writ of certiorari for review of a decision of the Court of Review issued under paragraph
37 (1). The record for such review shall be transmitted under seal to the Supreme Court of the
38 United States, which shall have jurisdiction to review such decision.

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39 "SEC. 706. JOINT APPLICATIONS AND CONCURRENT 40 AUTHORIZATIONS.

41 "(a) Joint Applications and Orders.—If an acquisition targeting a United States person under

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1 section 704 or section 705 is proposed to be conducted both inside and outside the United States,
2 a judge having jurisdiction under section 704(a)(1) or section 705(a)(1) may issue
3 simultaneously, upon the request of the Government in a joint application complying with the
4 requirements of section 704(b) and section 705(b), orders under section 704(c) and section
5 705(c), as appropriate.

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6 “(b) Concurrent Authorization.—If an order authorizing electronic surveillance or physical
7 search has been obtained under section 105 or section 304 and that order is still in effect, the
8 Attorney General may authorize, without an order under section 704 or section 705, an
9 acquisition of foreign intelligence information targeting that United States person while such
10 person is reasonably believed to be located outside the United States.

11 “SEC. 707. USE OF INFORMATION ACQUIRED UNDER
12 TITLE VII.

13 “(a) Information Acquired Under Section 703.—Information acquired from an acquisition
14 conducted under section 703 shall be deemed to be information acquired from an electronic
15 surveillance pursuant to title I for purposes of section 106, except for the purposes of subsection
16 (j) of such section.

17 “(b) Information Acquired Under Section 704.—Information acquired from an acquisition
18 conducted under section 704 shall be deemed to be information acquired from an electronic
19 surveillance pursuant to title I for purposes of section 106.

20 “SEC. 708. CONGRESSIONAL OVERSIGHT.

21 “(a) Semiannual Report.—Not less frequently than once every 6 months, the Attorney General
22 shall fully inform, in a manner consistent with national security, the congressional intelligence
23 committees, and the Committees on the Judiciary of the Senate and the House of
24 Representatives, concerning the implementation of this title.

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Judiciary of
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25 “(b) Content.—Each report made under subsection (a) shall include—

26 “(1) with respect to section 703—

27 “(A) any certifications made under subsection 703(f) during the reporting period;

28 “(B) any directives issued under subsection 703(g) during the reporting period;

29 “(C) a description of the judicial review during the reporting period of any such
30 certifications and targeting and minimization procedures utilized with respect to such
31 acquisition, including a copy of any order or pleading in connection with such review
32 that contains a significant legal interpretation of the provisions of section 703;

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33 “(D) any actions taken to challenge or enforce a directive under paragraphs (4) or (5)
34 of section 703(g);

35 “(E) any compliance reviews conducted by the Department of Justice or the Office
36 of the Director of National Intelligence of acquisitions authorized under subsection
37 703(a);

38 “(F) a description of any incidents of noncompliance with a directive issued by the
39 Attorney General and the Director of National Intelligence under subsection 703(g),

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1 including—

2 “(i) incidents of noncompliance by an element of the intelligence community
3 with procedures adopted pursuant to subsections (d) and (e) of section 703; and

4 “(ii) incidents of noncompliance by a specified person to whom the Attorney
5 General and Director of National Intelligence issued a directive under subsection
6 703(g); and

7 “(G) any procedures implementing this section;

8 “(2) with respect to section 704—

9 “(A) the total number of applications made for orders under section 704(b);

10 “(B) the total number of such orders, _____ Deleted: either

11 (i) granted; _____ Deleted: ,

12 (ii) modified; _____ Deleted: , or

13 (iii) denied; and _____ Deleted: , or

14 “(C) the total number of emergency acquisitions authorized by the Attorney General
15 under section 704(d) and the total number of subsequent orders approving or denying
16 such acquisitions; and

17 “(3) with respect to section 705—

18 “(A) the total number of applications made for orders under 705(b);

19 “(B) the total number of such orders, _____ Deleted: either

20 (i) granted; _____ Deleted: ,

21 (ii) modified; _____ Deleted: , or

22 (iii) denied; and _____ Deleted: , or

23 “(C) the total number of emergency acquisitions authorized by the Attorney General
24 under subsection 705(d) and the total number of subsequent orders approving or
25 denying such applications.”

26 (b) Table of Contents.—The table of contents in the first section of the Foreign Intelligence
27 Surveillance Act of 1978 (50 U.S.C. 1801 et. seq.) is amended—

28 (1) by striking the item relating to title VII;

29 (2) by striking the item relating to section 701; and

30 (3) by adding at the end the following:

31 **“TITLE VII—ADDITIONAL PROCEDURES REGARDING**
32 **CERTAIN PERSONS OUTSIDE THE UNITED STATES**

33 “Sec. 701. Limitation on definition of electronic surveillance.

34 “Sec. 702. Definitions.

35 “Sec. 703. Procedures for targeting certain persons outside the United States other than United

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- 1 States persons.
- 2 "Sec.704.Certain acquisitions inside the United States of United States persons outside the
- 3 United States.
- 4 "Sec.705.Other acquisitions targeting United States persons outside the United States.
- 5 "Sec.706.Joint applications and concurrent authorizations.
- 6 "Sec.707.Use of information acquired under title VII.
- 7 "Sec.708.Congressional oversight."

8 (c) Technical and Conforming Amendments.—

9 (1) Title 18, United States code.—

10 (A) SECTION 2232.—Section 2232(e) of title 18, United States Code, is amended by
 11 inserting "(as defined in section 101(f) of the Foreign Intelligence Surveillance Act of
 12 1978, regardless of the limitation of section 701 of that Act)" after "electronic
 13 surveillance".

14 (B) SECTION 2511.—Section 2511(2)(a)(ii)(A) of title 18, United States Code, is
 15 amended by inserting "or a court order pursuant to section 705 of the Foreign
 16 Intelligence Surveillance Act of 1978" after "assistance".

17 (2) Foreign intelligence surveillance act of 1978.—

18 (A) SECTION 109.—Section 109 of the Foreign Intelligence Surveillance Act of 1978
 19 (50 U.S.C. 1809) is amended by adding at the end the following:

20 "(e) Definition.—For the purpose of this section, the term 'electronic surveillance' means
 21 electronic surveillance as defined in section 101(f) of this Act regardless of the limitation of
 22 section 701 of this Act."

23 (B) SECTION 110.—Section 110 of the Foreign Intelligence Surveillance Act of 1978
 24 (50 U.S.C. 1810) is amended by—

25 (i) adding an "(a)" before "Civil Action",

26 (ii) redesignating subsections (a) through (c) as paragraphs (1) through (3),
 27 respectively; and

28 (iii) adding at the end the following:

29 "(b) Definition.—For the purpose of this section, the term 'electronic surveillance' means
 30 electronic surveillance as defined in section 101(f) of this Act regardless of the limitation of
 31 section 701 of this Act."

32 (C) SECTION 601.—Section 601(a)(1) of the Foreign Intelligence Surveillance Act of
 33 1978 (50 U.S.C. 1871(a)(1)) is amended by inserting the following:

34 "(E) acquisitions under section 704; and

35 "(F) acquisitions under section 705;"

36 SEC. 102. STATEMENT OF EXCLUSIVE MEANS BY

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 and (D) and

Deleted: "(C) pen registers under
 section 402.1
 "(D) access to records under section 501.1

Deleted: (d) Termination of
 Authority.—
 (1) In general.—Except as provided in
 paragraph (2), the amendments made by
 subsections (a)(2), (b), and (c) shall cease
 to have effect on December 31, 2013.
 (2) Continuing applicability.—Section
 703(g)(3) of the Foreign Intelligence
 Surveillance Act of 1978 (as amended by
 subsection (a)) shall remain in effect with
 respect to any directive issued pursuant to
 section 703(g) of that Act (as so
 amended) for information, facilities, or
 assistance provided during the period
 such directive was or is in effect. Section
 704(e) of the Foreign Intelligence
 Surveillance Act of 1978 (as amended by
 subsection (a)) shall remain in effect with
 respect to an order or request for
 emergency assistance under that section.
 The use of information acquired by an
 acquisition conducted under section 703
 of that Act (as so amended) shall continue
 to be governed by the provisions of
 section 707 of that Act (as so amended).1

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1 WHICH ELECTRONIC SURVEILLANCE AND
2 INTERCEPTION OF DOMESTIC COMMUNICATIONS
3 MAY BE CONDUCTED.

4 (a) Statement of Exclusive Means.—Title I of the Foreign Intelligence Surveillance Act of
5 1978 (50 U.S.C. 1801 et seq.) is amended by adding at the end the following new section:

6 ~~“Statement of exclusive means by which electronic surveillance and interception of domestic~~
7 ~~communications may be conducted~~

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8 “Sec. 112. The procedures of chapters 119, 121, and 206 of title 18, United States Code, and
9 this Act shall be the exclusive means by which electronic surveillance (as defined in section
10 101(f), regardless of the limitation of section 701) and the interception of domestic wire, oral, or
11 electronic communications may be conducted.”

12 (2) Table of Contents.—The table of contents in the first section of the Foreign Intelligence
13 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended by inserting after the item relating
14 to section 111, the following new item:

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15 “Sec. 112. Statement of exclusive means by which electronic surveillance and interception of
16 domestic communications may be conducted.”

17 (c) Conforming Amendments.—Section 2511(2) of title 18, United States Code, is amended in
18 paragraph (f), by striking “, as defined in section 101 of such Act,” and inserting “(as defined in
19 section 101(f) of such Act regardless of the limitation of section 701 of such Act)”.

20 SEC. 103. SUBMITTAL TO CONGRESS OF CERTAIN
21 COURT ORDERS UNDER THE FOREIGN INTELLIGENCE
22 SURVEILLANCE ACT OF 1978.

23 (a) Inclusion of Certain Orders in Semiannual Reports of Attorney General.—Subsection
24 (a)(5) of section 601 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1871) is
25 amended by striking “(not including orders)” and inserting “, orders,”.

26 (b) Reports by Attorney General on Certain Other Orders.—Such section 601 is further
27 amended by adding at the end the following:

28 “(c) Submissions to Congress.—The Attorney General shall submit to the committees of
29 Congress referred to in subsection (a)—

30 “(1) a copy of any decision, order, or opinion issued by the Foreign Intelligence
31 Surveillance Court or the Foreign Intelligence Surveillance Court of Review that includes
32 significant construction or interpretation of any provision of this Act, and any pleadings,
33 applications, or memoranda of law associated with such decision, order, or opinion, not
34 later than 45 days after such decision, order, or opinion is issued; and

35 “(2) a copy of any such decision, order, or opinion, and any pleadings, applications, or
36 memoranda of law associated with such decision, order, or opinion, that was issued during
37 the 5-year period ending on the date of the enactment of the FISA Amendments Act of 2008
38 and not previously submitted in a report under subsection (a).

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1 “(d) Protection of National Security.—The Attorney General, in consultation with the Director
2 of National Intelligence, may authorize redactions of materials described in subsection (c) that
3 are provided to the committees of Congress referred to in subsection (a), if such redactions are
4 necessary to protect the national security of the United States and are limited to sensitive sources
5 and methods information or the identities of targets.”

6 (c) Definitions.—Such section 601, as amended by subsections (a) and (b), is further amended
7 by adding at the end the following:

8 “(e) Definitions.—In this section:

9 “(1) FOREIGN INTELLIGENCE SURVEILLANCE COURT; COURT.—The term “‘Foreign
10 Intelligence Surveillance Court’” means the court established by section 103(a).

11 “(2) FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW; COURT OF REVIEW.—The
12 term ‘Foreign Intelligence Surveillance Court of Review’ means the court established by
13 section 103(b).”

14 SEC. 104. APPLICATIONS FOR COURT ORDERS.

15 Section 104 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804) is
16 amended—

17 (1) in subsection (a)—

18 (A) by striking paragraphs (2) and (11);

19 (B) by redesignating paragraphs (3) through (10) as paragraphs (2) through (9),
20 respectively;

21 (C) in paragraph (5), as redesignated by subparagraph (B) of this paragraph, by
22 striking “detailed”;

23 (D) in paragraph (6), as redesignated by subparagraph (B) of this paragraph, in the
24 matter preceding subparagraph (A)—

25 (i) by striking “Affairs or” and inserting “Affairs,”; and

26 (ii) by striking “Senate—” and inserting “Senate, or the Deputy Director of the
27 Federal Bureau of Investigation, if designated by the President as a certifying
28 official—”;

29 (E) in paragraph (7), as redesignated by subparagraph (B) of this paragraph, by
30 striking “statement of” and inserting “summary statement of”;

31 (F) in paragraph (8), as redesignated by subparagraph (B) of this paragraph, by
32 adding “and” at the end; and

33 (G) in paragraph (9), as redesignated by subparagraph (B) of this paragraph, by
34 striking “; and” and inserting a period;

35 (2) by striking subsection (b);

36 (3) by redesignating subsections (c) through (e) as subsections (b) through (d),
37 respectively; and

38 (4) in paragraph (1)(A) of subsection (d), as redesignated by paragraph (3) of this

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1 subsection, by striking "or the Director of National Intelligence" and inserting "the Director
2 of National Intelligence, or the Director of the Central Intelligence Agency".

3 SEC. 105. ISSUANCE OF AN ORDER.

4 Section 105 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805) is
5 amended—

6 (1) in subsection (a)—

7 (A) by striking paragraph (1); and

8 (B) by redesignating paragraphs (2) through (5) as paragraphs (1) through (4),
9 respectively;

10 (2) in subsection (b), by striking "(a)(3)" and inserting "(a)(2)";

11 (3) in subsection (c)(1)—

12 (A) in subparagraph (D), by adding "and" at the end;

13 (B) in subparagraph (E), by striking "; and" and inserting a period; and

14 (C) by striking subparagraph (F);

15 (4) by striking subsection (d);

16 (5) by redesignating subsections (e) through (i) as subsections (d) through (h),
17 respectively;

18 (6) by amending subsection (e), as redesignated by paragraph (5) of this section, to read
19 as follows:

20 "(e)(1) Notwithstanding any other provision of this title, the Attorney General may authorize
21 the emergency employment of electronic surveillance if the Attorney General—

22 "(A) reasonably determines that an emergency situation exists with respect to the
23 employment of electronic surveillance to obtain foreign intelligence information before an
24 order authorizing such surveillance can with due diligence be obtained;

25 "(B) reasonably determines that the factual basis for the issuance of an order under this
26 title to approve such electronic surveillance exists;

27 "(C) informs, either personally or through a designee, a judge having jurisdiction under
28 section 103 at the time of such authorization that the decision has been made to employ
29 emergency electronic surveillance; and

30 "(D) makes an application in accordance with this title to a judge having jurisdiction
31 under section 103 as soon as practicable, but not later than 7 days after the Attorney General
32 authorizes such surveillance.

33 "(2) If the Attorney General authorizes the emergency employment of electronic surveillance
34 under paragraph (1), the Attorney General shall require that the minimization procedures
35 required by this title for the issuance of a judicial order be followed.

36 "(3) In the absence of a judicial order approving such electronic surveillance, the surveillance
37 shall terminate when the information sought is obtained, when the application for the order is

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1 denied, or after the expiration of 7 days from the time of authorization by the Attorney General,
2 whichever is earliest.

3 "(4) A denial of the application made under this subsection may be reviewed as provided in
4 section 103.

5 "(5) In the event that such application for approval is denied, or in any other case where the
6 electronic surveillance is terminated and no order is issued approving the surveillance, no
7 information obtained or evidence derived from such surveillance shall be received in evidence or
8 otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury,
9 department, office, agency, regulatory body, legislative committee, or other authority of the
10 United States, a State, or political subdivision thereof, and no information concerning any United
11 States person acquired from such surveillance shall subsequently be used or disclosed in any
12 other manner by Federal officers or employees without the consent of such person, except with
13 the approval of the Attorney General if the information indicates a threat of death or serious
14 bodily harm to any person.

15 "(6) The Attorney General shall assess compliance with the requirements of paragraph (5).";
16 and

17 (7) by adding at the end the following:

18 "(i) In any case in which the Government makes an application to a judge under this title to
19 conduct electronic surveillance involving communications and the judge grants such application,
20 upon the request of the applicant, the judge shall also authorize the installation and use of pen
21 registers and trap and trace devices, and direct the disclosure of the information set forth in
22 section 402(d)(2).".

23 SEC. 106. USE OF INFORMATION.

24 Subsection (i) of section 106 of the Foreign Intelligence Surveillance Act of 1978 (8 U.S.C.
25 1806) is amended by striking "radio communication" and inserting "communication".

26 SEC. 107. AMENDMENTS FOR PHYSICAL SEARCHES.

27 (a) Applications.—Section 303 of the Foreign Intelligence Surveillance Act of 1978 (50
28 U.S.C. 1823) is amended—

29 (1) in subsection (a)—

30 (A) by striking paragraph (2);

31 (B) by redesignating paragraphs (3) through (9) as paragraphs (2) through (8),
32 respectively;

33 (C) in paragraph (2), as redesignated by subparagraph (B) of this paragraph, by
34 striking "detailed";

35 (D) in paragraph (3)(C), as redesignated by subparagraph (B) of this paragraph, by
36 inserting "or is about to be" before "owned"; and

37 (E) in paragraph (6), as redesignated by subparagraph (B) of this paragraph, in the
38 matter preceding subparagraph (A)—

39 (i) by striking "Affairs or" and inserting "Affairs,"; and

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1 (ii) by striking "Senate—" and inserting "Senate, or the Deputy Director of the
2 Federal Bureau of Investigation, if designated by the President as a certifying
3 official—"; and

4 (2) in subsection (d)(1)(A), by striking "or the Director of National Intelligence" and
5 inserting "the Director of National Intelligence, or the Director of the Central Intelligence
6 Agency".

7 (b) Orders.—Section 304 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.
8 1824) is amended—

9 (1) in subsection (a)—

10 (A) by striking paragraph (1); and

11 (B) by redesignating paragraphs (2) through (5) as paragraphs (1) through (4),
12 respectively; and

13 ~~“(C) in paragraph (2)(B), as redesignated by subparagraph (B) of this paragraph, by~~
14 ~~inserting “or is about to be” before “owned”;~~ and

15 (2) by amending subsection (e) to read as follows:

16 “(e)(1) Notwithstanding any other provision of this title, the Attorney General may authorize
17 the emergency employment of a physical search if the Attorney General—

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18 “(A) reasonably determines that an emergency situation exists with respect to the
19 employment of a physical search to obtain foreign intelligence information before an order
20 authorizing such physical search can with due diligence be obtained;

21 “(B) reasonably determines that the factual basis for issuance of an order under this title
22 to approve such physical search exists;

23 “(C) informs, either personally or through a designee, a judge of the Foreign Intelligence
24 Surveillance Court at the time of such authorization that the decision has been made to
25 employ an emergency physical search; and

26 “(D) makes an application in accordance with this title to a judge of the Foreign
27 Intelligence Surveillance Court as soon as practicable, but not more than 7 days after the
28 Attorney General authorizes such physical search.

29 “(2) If the Attorney General authorizes the emergency employment of a physical search under
30 paragraph (1), the Attorney General shall require that the minimization procedures required by
31 this title for the issuance of a judicial order be followed.

32 “(3) In the absence of a judicial order approving such physical search, the physical search shall
33 terminate when the information sought is obtained, when the application for the order is denied,
34 or after the expiration of 7 days from the time of authorization by the Attorney General,
35 whichever is earliest.

36 “(4) A denial of the application made under this subsection may be reviewed as provided in
37 section 103.

38 “(5)(A) In the event that such application for approval is denied, or in any other case where the
39 physical search is terminated and no order is issued approving the physical search, no
40 information obtained or evidence derived from such physical search shall be received in

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1 evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court,
2 grand jury, department, office, agency, regulatory body, legislative committee, or other authority
3 of the United States, a State, or political subdivision thereof, and no information concerning any
4 United States person acquired from such physical search shall subsequently be used or disclosed
5 in any other manner by Federal officers or employees without the consent of such person, except
6 with the approval of the Attorney General if the information indicates a threat of death or serious
7 bodily harm to any person.

8 “(B) The Attorney General shall assess compliance with the requirements of subparagraph
9 (A).”.

10 (c) Conforming Amendments.—The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.
11 1801 et seq.) is amended—

12 (1) in section 304(a)(4), as redesignated by subsection (b) of this section, by striking
13 “303(a)(7)(E)” and inserting “303(a)(6)(E)”; and

14 (2) in section 305(k)(2), by striking “303(a)(7)” and inserting “303(a)(6)”.

15 SEC. 108. AMENDMENTS FOR EMERGENCY PEN 16 REGISTERS AND TRAP AND TRACE DEVICES.

17 Section 403 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1843) is
18 amended—

19 (1) in subsection (a)(2), by striking “48 hours” and inserting “7 days”; and

20 (2) in subsection (c)(1)(C), by striking “48 hours” and inserting “7 days”.

21 SEC. 109. FOREIGN INTELLIGENCE SURVEILLANCE 22 COURT.

23 (a) Designation of Judges.—Subsection (a) of section 103 of the Foreign Intelligence
24 Surveillance Act of 1978 (50 U.S.C. 1803) is amended by inserting “at least” before “seven of
25 the United States judicial circuits”.

26 (b) En Banc Authority.—

27 (1) In general.—Subsection (a) of section 103 of the Foreign Intelligence Surveillance
28 Act of 1978, as amended by subsection (a) of this section, is further amended—

29 (A) by inserting “(1)” after “(a)”; and

30 (B) by adding at the end the following new paragraph:

31 “(2)(A) The court established under this subsection, on its own initiative, or upon the request
32 of the Government in any proceeding or a party under section 501(f) or paragraph (4) or (5) of
33 section 703(h), may hold a hearing or rehearing, en banc, when ordered by a majority of the
34 judges that constitute such court upon a determination that—

35 “(i) en banc consideration is necessary to secure or maintain uniformity of the court’s
36 decisions; or

37 “(ii) the proceeding involves a question of exceptional importance.

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1 “(B) Any authority granted by this Act to a judge of the court established under this subsection
2 may be exercised by the court en banc. When exercising such authority, the court en banc shall
3 comply with any requirements of this Act on the exercise of such authority.

4 “(C) For purposes of this paragraph, the court en banc shall consist of all judges who
5 constitute the court established under this subsection.”.

6 (2) Conforming amendments.—The Foreign Intelligence Surveillance Act of 1978 is
7 further amended—

8 (A) in subsection (a) of section 103, as amended by this subsection, by inserting
9 “(except when sitting en banc under paragraph (2))” after “no judge designated under
10 this subsection”; and

11 (B) in section 302(c) (50 U.S.C. 1822(c)), by inserting “(except when sitting en
12 banc)” after “except that no judge”.

13 (c) Stay or Modification During an Appeal.—Section 103 of the Foreign Intelligence
14 Surveillance Act of 1978 (50 U.S.C. 1803) is amended—

15 (1) by redesignating subsection (f) as subsection (g); and

16 (2) by inserting after subsection (e) the following new subsection:

17 “(f)(1) A judge of the court established under subsection (a), the court established under
18 subsection (b) or a judge of that court, or the Supreme Court of the United States or a justice of
19 that court, may, in accordance with the rules of their respective courts, enter a stay of an order or
20 an order modifying an order of the court established under subsection (a) or the court established
21 under subsection (b) entered under any title of this Act, while the court established under
22 subsection (a) conducts a rehearing, while an appeal is pending to the court established under
23 subsection (b), or while a petition of certiorari is pending in the Supreme Court of the United
24 States, or during the pendency of any review by that court.

25 “(2) The authority described in paragraph (1) shall apply to an order entered under any
26 provision of this Act.”.

27 (d) Authority of Foreign Intelligence Surveillance Court.—Section 103 of the Foreign
28 Intelligence Surveillance Act of 1978 (50 U.S.C. 1803), as amended by this Act, is amended by
29 adding at the end the following:

30 “(h)(1) Nothing in this Act shall be construed to reduce or contravene the inherent authority of
31 the court established by subsection (a) to determine, or enforce, compliance with an order or a
32 rule of such Court or with a procedure approved by such court.

33 “(2) In this subsection, the terms ‘Foreign Intelligence Surveillance Court’ and ‘Court’ mean
34 the court established by subsection (a).”.

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35 SEC. 110. WEAPONS OF MASS DESTRUCTION.

36 (a) Definitions.—

37 (1) FOREIGN POWER.—Subsection (a)(4) of section 101 of the Foreign Intelligence
38 Surveillance Act of 1978 (50 U.S.C. 1801(a)(4)) is amended by inserting “, the international
39 proliferation of weapons of mass destruction,” after “international terrorism”.

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1 (2) AGENT OF A FOREIGN POWER.—Subsection (b)(1) of such section 101 is amended—

2 (A) in subparagraph (B), by striking “or” at the end

3 (B) in subparagraph (C), by striking “or” at the end; and

4 (C) by adding at the end the following new subparagraphs:

5 “(D) engages in the international proliferation of weapons of mass destruction, or
6 activities in preparation therefor; or

7 “(E) engages in the international proliferation of weapons of mass destruction, or
8 activities in preparation therefor, for or on behalf of a foreign power; or”.

9 (3) FOREIGN INTELLIGENCE INFORMATION.—Subsection (e)(1)(B) of such section 101 is
10 amended by striking “sabotage or international terrorism” and inserting “sabotage,
11 international terrorism, or the international proliferation of weapons of mass destruction”.

12 (4) WEAPON OF MASS DESTRUCTION.—Such section 101 is amended by adding at the end
13 the following new subsection:

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14 “(p) ‘Weapon of mass destruction’ means—

15 “(1) any destructive device described in section 921(a)(4)(A) of title 18, United States
16 Code, that is intended or has the capability to cause death or serious bodily injury to a
17 significant number of people;

18 “(2) any weapon that is designed or intended to cause death or serious bodily injury
19 through the release, dissemination, or impact of toxic or poisonous chemicals or their
20 precursors;

21 “(3) any weapon involving a biological agent, toxin, or vector (as such terms are defined
22 in section 178 of title 18, United States Code); or

23 “(4) any weapon that is designed to release radiation or radioactivity at a level dangerous
24 to human life.”.

25 (b) Use of Information.—

26 (1) In general.—Section 106(k)(1)(B) of the Foreign Intelligence Surveillance Act of
27 1978 (50 U.S.C. 1806(k)(1)(B)) is amended by striking “sabotage or international
28 terrorism” and inserting “sabotage, international terrorism, or the international proliferation
29 of weapons of mass destruction”.

30 (2) Physical searches.—Section 305(k)(1)(B) of such Act (50 U.S.C. 1825(k)(1)(B)) is
31 amended by striking “sabotage or international terrorism” and inserting “sabotage,
32 international terrorism, or the international proliferation of weapons of mass destruction”.

33 (c) Technical and Conforming Amendment.—Section 301(1) of the Foreign Intelligence
34 Surveillance Act of 1978 (50 U.S.C. 1821(1)) is amended by inserting “‘weapon of mass
35 destruction’,” after “‘person’,”.

36 SEC. 111. TECHNICAL AND CONFORMING 37 AMENDMENTS.

38 Section 103(e) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(e)) is

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1 amended—

2 (1) in paragraph (1), by striking “105B(h) or 501(f)(1)” and inserting “501(f)(1) or 703”;
3 and

4 (2) in paragraph (2), by striking “105B(h) or 501(f)(1)” and inserting “501(f)(1) or 703”.

5 **TITLE II—PROTECTIONS FOR ELECTRONIC**
6 **COMMUNICATION SERVICE PROVIDERS**

7 **SEC. 201. DEFINITIONS.**

8 In this title:

9 (1) Assistance.—The term “assistance” means the provision of, or the provision of access
10 to, information (including communication contents, communications records, or other
11 information relating to a customer or communication), facilities, or another form of
12 assistance.

13 (2) Contents.—The term “contents” has the meaning given that term in section 101(n) of
14 the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(n)).

15 (3) Covered civil action.—The term “covered civil action” means a civil action filed in a
16 Federal or State court that—

17 (A) alleges that an electronic communication service provider furnished assistance
18 to an element of the intelligence community; and

19 (B) seeks monetary or other relief from the electronic communication service
20 provider related to the provision of such assistance.

21 (4) Electronic communication service provider.—The term “electronic communication
22 service provider” means—

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

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

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

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

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

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

36 (5) Element of the intelligence community.—The term “element of the intelligence
37 community” means an element of the intelligence community specified in or designated

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1 under section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

2 **SEC. 202. LIMITATIONS ON CIVIL ACTIONS FOR**
3 **ELECTRONIC COMMUNICATION SERVICE PROVIDERS.**

4 (a) Limitations.—

5 Notwithstanding any other law, a covered civil action shall not lie or be maintained in a
6 Federal or State court, and shall be promptly dismissed, if the Attorney General certifies to
7 the Foreign Intelligence Surveillance Court that—

8 (1) the assistance alleged to have been provided by the electronic communication
9 service provider was—

10 (A) in connection with an intelligence activity involving communications that
11 was—

12 (i) authorized by the President during the period beginning on September
13 11, 2001, and ending on January 17, 2007; and

14 (ii) designed to detect or prevent a terrorist attack, or activities in
15 preparation for a terrorist attack, against the United States; and

16 (B) the subject of a written request or directive, or a series of such requests or
17 directives, from the Attorney General or the head of an element of the intelligence
18 community (or the deputy of such person) to the electronic communication
19 service provider indicating that the activity was—

20 (i) authorized by the President; and

21 (ii) determined to be lawful; or

22 (2) the electronic communication service provider did not provide the alleged
23 assistance.

24 (b) Jurisdiction.—The Foreign Intelligence Surveillance Court shall have exclusive
25 jurisdiction to conduct the review authorized by subsection (d) and to hear any challenge to the
26 validity or application of this section. Other than the Foreign Intelligence Surveillance Court of
27 Review and the Supreme Court of the United States in an appeal under subsection (e), no other
28 court shall have such jurisdiction.

29 (c) Stay of Other Proceedings.—Within 10 days of the Attorney General's submission of a
30 certification under this section, the United States shall notify the district court and any appellate
31 court in which the covered civil action is pending, and such courts immediately shall stay all
32 proceedings before them in the covered civil action. Such stay shall remain in effect pending the
33 final determination of the Foreign Intelligence Surveillance Court in any proceeding under this
34 section for such covered civil action and pending final resolution of any appeal or review taken
35 in such action pursuant to subsection (e).

36 (d) Judicial Review.—

37 (1) REVIEW OF CERTIFICATIONS.—A certification made pursuant to subsection (a) shall be
38 given effect unless the Foreign Intelligence Surveillance Court finds that such certification
39 is not supported by a preponderance of the evidence provided pursuant to subsection (a).

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(b) Review of Certifications.

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1 paragraph (2), and subsection (h).

2 (2) SUPPLEMENTAL MATERIALS.—In its review of a certification made pursuant to
3 subsection (a), the Foreign Intelligence Surveillance Court may examine the written request
4 or directives, or series of such requests or directives, described in subparagraph (a)(1)(B) or
5 submitted pursuant to subsection (h).

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6 (e) Appeal.—

7 (1) APPEAL TO THE COURT OF REVIEW.—The United States or any party in a covered civil
8 action may file a petition with the Foreign Intelligence Surveillance Court of Review for
9 review of any final determination of the Foreign Intelligence Surveillance Court issued in such
10 action pursuant to this section within 30 days of such determination. The Court of Review
11 shall have exclusive jurisdiction to consider such a petition. Subsections (g) and (h) shall
12 apply to any such Court of Review proceedings.

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13 (2) CERTIORARI TO THE SUPREME COURT.—The United States or any party in a covered
14 civil action may file a petition for a writ of certiorari for review of any decision of the Court of
15 Review issued in such action under paragraph (1) within 30 days of such decision. The
16 Supreme Court of the United States shall have jurisdiction to review such decision, and
17 subsections (g) and (h) shall apply to any such proceedings.

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18 (f) Further Proceedings.—If, after the Foreign Intelligence Surveillance Court renders a final
19 determination and any appeals taken pursuant to subsection (e) are exhausted, it is determined
20 that the conditions for dismissal under subsection (a) have been met, then the court in which the
21 action was pending prior to the Attorney General's certification shall promptly dismiss the case
22 with prejudice and no court shall have jurisdiction to hear an appeal from the order of dismissal.
23 If, after the Foreign Intelligence Surveillance Court renders a final determination and any appeals
24 taken pursuant to subsection (e) are exhausted, it is determined that the conditions for dismissal
25 under subsection (a) have not been met, the stay required by subsection (c) shall be lifted and the
26 court in which the action was pending prior to the Attorney General's certification shall proceed
27 as it deems appropriate, without prejudice to any applicable immunity, privilege, or defense
28 available to any party.

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29 (g) Limitations on Disclosure.—If the Attorney General files a declaration under section 1746
30 of title 28, United States Code, that disclosure of a certification made pursuant to subsection (a),
31 or supplemental materials submitted pursuant to subsection (d) or (h), would harm the national
32 security of the United States, the court shall—

33 (1) review such certification and supplemental materials in camera and ex parte; and

34 (2) limit any public disclosure concerning such certification and supplemental materials,
35 including any public order following such in camera and an ex parte review, to a statement
36 that the conditions for dismissal under this section have been met and a description of the
37 legal standards that govern the order, without disclosing the paragraph of subsection (a) that
38 is the basis for the order.

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39 (h) Role of the Parties.— Any plaintiff or defendant in a civil action may submit any relevant
40 written request or directive to the court for review and shall be permitted to participate in the
41 briefing or argument of any legal issue in a judicial proceeding conducted pursuant to this
42 section, but only to the extent that such participation does not require the disclosure of, or
43 otherwise tend to reveal, classified information to such party. To the extent that classified

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1 information is relevant to the proceeding or would be revealed in the determination of an issue,
2 the court shall review such information, or make any part of the determination that would tend to
3 reveal the classified information, in camera and ex parte.

4 (j) Nondelegation.—The authority and duties of the Attorney General under this section shall
5 be performed by the Attorney General (or Acting Attorney General) or a designee in a position
6 not lower than the Deputy Attorney General.

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7 (i) Civil Actions in State Court.—A covered civil action that is brought in a State court shall
8 be deemed to arise under the Constitution and laws of the United States and shall be removable
9 under section 1441 of title 28, United States Code.

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10 (k) Relationship to Other Laws.—Nothing in this section may be construed to limit any
11 otherwise available immunity, privilege, or defense under any other provision of law.

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12 (f) Applicability.—This section shall apply to any covered civil action that is pending on or
13 filed after the date of enactment of this Act.

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14 **SEC. 203. PROCEDURES FOR IMPLEMENTING**
15 **STATUTORY DEFENSES UNDER THE FOREIGN**
16 **INTELLIGENCE SURVEILLANCE ACT OF 1978.**

17 The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), as amended by
18 section 101, is further amended by adding after title VII the following new title:

19 **“TITLE VIII—PROTECTION OF PERSONS ASSISTING**
20 **THE GOVERNMENT**

21 **“SEC. 801. DEFINITIONS.**

22 “In this title:

23 “(1) **ASSISTANCE.**—The term ‘assistance’ means the provision of, or the provision of
24 access to, information (including communication contents, communications records, or
25 other information relating to a customer or communication), facilities, or another form of
26 assistance.

27 “(2) **ATTORNEY GENERAL.**—The term ‘Attorney General’ has the meaning give that term
28 in section 101(g).

29 “(3) **CONTENTS.**—The term ‘contents’ has the meaning given that term in section 101(n).

30 “(4) **ELECTRONIC COMMUNICATION SERVICE PROVIDER.**—The term ‘electronic
31 communication service provider’ means—

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

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

36 “(C) a provider of a remote computing service, as that term is defined in section
37 2711 of title 18, United States Code;

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

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

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

8 “(5) ELEMENT OF THE INTELLIGENCE COMMUNITY.—The term ‘element of the intelligence
9 community’ means an element of the intelligence community as specified or designated
10 under section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

11 “(6) PERSON.—The term ‘person’ means—

12 “(A) an electronic communication service provider; or

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

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

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

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

21 “(7) STATE.—The term ‘State’ means any State, political subdivision of a State, the
22 Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of
23 the United States, and includes any officer, public utility commission, or other body
24 authorized to regulate an electronic communication service provider.

25 “SEC. 802. PROCEDURES FOR IMPLEMENTING 26 STATUTORY DEFENSES.

27 “(a) Requirement for Certification.—

28 “(1) In general.—Notwithstanding any other provision of law, no civil action may lie or
29 be maintained in a Federal or State court against any person for providing assistance to an
30 element of the intelligence community, and shall be promptly dismissed, if the Attorney
31 General certifies to the court that—

32 “(A) any assistance by that person was provided pursuant to an order of the court
33 established under section 103(a) directing such assistance;

34 “(B) any assistance by that person was provided pursuant to a certification in writing
35 under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code;

36 “(C) any assistance by that person was provided pursuant to a directive under
37 sections 102(a)(4), 105B(e), as in effect on the day before the date of the enactment of
38 the FISA Amendments Act of 2008, or 703(h) directing such assistance; or

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1 “(D) the person did not provide the alleged assistance.

2 “(2) Review.—A certification made pursuant to paragraph (1) shall be subject to review
3 by a court for abuse of discretion.

4 “(b) Limitations on Disclosure.—If the Attorney General files a declaration under section
5 1746 of title 28, United States Code, that disclosure of a certification made pursuant to
6 subsection (a) would harm the national security of the United States, the court shall—

7 “(1) review such certification in camera and ex parte; and

8 “(2) limit any public disclosure concerning such certification, including any public order
9 following such an ex parte review, to a statement that the conditions of subsection (a) have
10 been met, without disclosing the subparagraph of subsection (a)(1) that is the basis for the
11 certification.

12 “(c) Removal.—A civil action against a person for providing assistance to an element of the
13 intelligence community that is brought in a State court shall be deemed to arise under the
14 Constitution and laws of the United States and shall be removable under section 1441 of title 28,
15 United States Code.

16 “(d) Relationship to Other Laws.—Nothing in this section may be construed to limit any
17 otherwise available immunity, privilege, or defense under any other provision of law.

18 “(e) Applicability.—This section shall apply to a civil action pending on or filed after the date
19 of enactment of the FISA Amendments Act of 2008.”.

20 SEC. 204. PREEMPTION OF STATE INVESTIGATIONS.

21 Title VIII of the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et seq.), as added by
22 section 203 of this Act, is amended by adding at the end the following new section:

23 “SEC. 803. PREEMPTION.

24 “(a) In General.—No State shall have authority to—

25 “(1) conduct an investigation into an electronic communication service provider’s alleged
26 assistance to an element of the intelligence community;

27 “(2) require through regulation or any other means the disclosure of information about an
28 electronic communication service provider’s alleged assistance to an element of the
29 intelligence community;

30 “(3) impose any administrative sanction on an electronic communication service provider
31 for assistance to an element of the intelligence community; or

32 “(4) commence or maintain a civil action or other proceeding to enforce a requirement
33 that an electronic communication service provider disclose information concerning alleged
34 assistance to an element of the intelligence community.

35 “(b) Suits by the United States.—The United States may bring suit to enforce the provisions of
36 this section.

37 “(c) Jurisdiction.—The district courts of the United States shall have jurisdiction over any civil
38 action brought by the United States to enforce the provisions of this section.

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1 “(d) Application.—This section shall apply to any investigation, action, or proceeding that is
2 pending on or filed after the date of enactment of the FISA Amendments Act of 2008.”

3 **SEC. 205. TECHNICAL AMENDMENTS.**

4 The table of contents in the first section of the Foreign Intelligence Surveillance Act of 1978
5 (50 U.S.C. 1801 et seq.), as amended by section 101(b), is further amended by adding at the end
6 the following:

7 **“TITLE VIII—PROTECTION OF PERSONS ASSISTING**
8 **THE GOVERNMENT**

9 “Sec.801.Definitions.

10 “Sec.802.Procedures for implementing statutory defenses.

11 “Sec.803.Preemption.”

12 **TITLE III—OTHER PROVISIONS**

13 **SEC. 301. SEVERABILITY.**

14 If any provision of this Act, any amendment made by this Act, or the application thereof to
15 any person or circumstances is held invalid, the validity of the remainder of the Act, any such
16 amendments, and of the application of such provisions to other persons and circumstances shall
17 not be affected thereby.

18 **SEC. 302. EFFECTIVE DATE.**

19 Except as provided in section 304, the amendments made by this Act shall take effect on the
20 date of the enactment of this Act.

21 **SEC. 303. REPEALS.—**

22 **(a) PROTECT AMERICA ACT.—**

23 **(1) IN GENERAL.—**Except as provided in section 304, sections 105A, 105B, and 105C of
24 the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805a, 1805b, and 1805c)
25 are repealed.

26 **(2) TABLE OF CONTENTS.—**The table of contents in the first section of the Foreign
27 Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended by striking the
28 items relating to sections 105A, 105B, and 105C.

29
30 **(b) FISA Amendments Act of 2008.—**

31 **(1) IN GENERAL.—**Except as provided in paragraph (2), the amendments made by sections
32 101(a)(2), 101(b), and 101(c) of this Act shall cease to have effect on December 31, 2013.

33 **(2) CONTINUING APPLICABILITY.—**Section 703(g)(3) of the Foreign Intelligence Surveillance
34 Act of 1978 (as amended by subsection (a)) shall remain in effect with respect to any directive
35 issued pursuant to section 703(g) of that Act (as so amended) for information, facilities, or

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Deleted: (j) REPORTING REQUIREMENTS.—Except as provided in section 304, section 4 of the Protect America Act of 2007 (Public Law 110-55; 121 Stat. 555) is repealed.¶

Deleted: (j) TRANSITION PROCEDURES.—Except as provided in section 04, subsection (b) of section 6 of the Protect America Act of 2007 (Public Law 110-55; 121 Stat. 556) is repealed.

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1 assistance provided during the period such directive was or is in effect. Section 704(e) of the
2 Foreign Intelligence Surveillance Act of 1978 (as amended by subsection (a)) shall remain in
3 effect with respect to an order or request for emergency assistance under that section. The use of
4 information acquired by an acquisition conducted under section 703 of that Act (as so amended)
5 shall continue to be governed by the provisions of section 707 of that Act (as so amended).
6

7 SEC. 304 TRANSITION PROCEDURES.

8 (a) Protection from liability.—Notwithstanding subsection (b)(1), subsection (l) of
9 section 105B of the Foreign Intelligence Surveillance Act of 1978 shall remain in effect
10 with respect to any directives issued pursuant to such section 105B for information,
11 facilities, or assistance provided during the period such directive was or is in effect. (b)
12 Orders in effect.—

13 (1) ORDERS IN EFFECT ON DATE OF ENACTMENT.—Notwithstanding any other
14 provision of this Act or of the Foreign Intelligence Surveillance Act of 1978—

15 (A) any order in effect on the date of enactment of this Act issued pursuant to
16 the Foreign Intelligence Surveillance Act of 1978 or section 6(b) of the Protect
17 America Act of 2007 (Public Law 110-55; 121 Stat. 556) shall remain in effect
18 until the date of expiration of such order, subject to subsection (c)(1)(B); and

19 (B) at the request of the applicant, the court established under section 103(a) of
20 the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(a)) shall
21 reauthorize such order if the facts and circumstances continue to justify issuance
22 of such order under the provisions of such Act, as in effect on the day before the
23 date of the enactment of the Protect America Act of 2007, except as amended by
24 sections 102, 103, 104, 105, 106, 107, 108, 109, and 110 of this Act.

25 (2) ORDERS IN EFFECT ON DECEMBER 31, 2013.—Any order issued under title VII of
26 the Foreign Intelligence Surveillance Act of 1978, as amended by section 101 of this
27 Act, in effect on December 31, 2013, shall continue in effect until the date of the
28 expiration of such order. Any such order shall be governed by the applicable
29 provisions of the Foreign Intelligence Surveillance Act of 1978, as so amended.

30 (c) Authorizations and directives in effect.—

31 (1) AUTHORIZATIONS AND DIRECTIVES IN EFFECT ON DATE OF ENACTMENT.—

32 (A) IN GENERAL.—Notwithstanding any other provision of this Act or of the
33 Foreign Intelligence Surveillance Act of 1978, any authorization or directive in effect
34 on the date of the enactment of this Act issued pursuant to the Protect America Act of
35 2007, or any amendment made by that Act, shall remain in effect until the date of
36 expiration of such authorization or directive. Any such authorization or directive shall
37 be governed by the applicable provisions of the Protect America Act of 2007 (121 Stat.
38 552), and the amendment made by that Act, and, except as provided in paragraph (4) of
39 this subsection, any acquisition pursuant to such authorization or directive shall be
40 deemed not to constitute electronic surveillance (as that term is defined in section
41 101(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(f)), as
42 construed in accordance with section 105A of the Foreign Intelligence Surveillance

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1 Act of 1978 (50 U.S.C. 1805a)).

2 (B) TIMING. —Notwithstanding paragraph (A), if the Attorney General and the
3 Director of National Intelligence seek to replace an authorization made pursuant to
4 section 105B of the Act, as added by section 2 of the Protect America Act of 2007
5 (Public Law 110-55; 121 Stat. 522), by filing a certification pursuant to section
6 703(h)(5)(A), that authorization, and any directives issued thereunder and any order
7 related thereto, shall remain in effect until the Court issues an order with respect to that
8 certification under section 703(h)(3), at which time the provision of that subsection and
9 of section 703(h)(4) shall apply.

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10 (C) AUTHORIZATIONS AND DIRECTIVES IN EFFECT ON DECEMBER 31, 2013.—Any
11 authorization or directive issued under title VII of the Foreign Intelligence Surveillance
12 Act of 1978, as amended by section 101 of this Act, in effect on December 31, 2013,
13 shall continue in effect until the date of the expiration of such authorization or
14 directive. Any such authorization or directive shall be governed by the applicable
15 provisions of the Foreign Intelligence Surveillance Act of 1978, as so amended, and,
16 except as provided in section 707 of the Foreign Intelligence Surveillance Act of 1978,
17 as so amended, any acquisition pursuant to such authorization or directive shall be
18 deemed not to constitute electronic surveillance (as that term is defined in section
19 101(f) of the Foreign Intelligence Surveillance Act of 1978, to the extent that such
20 section 101(f) is limited by section 701 of the Foreign Intelligence Surveillance Act of
21 1978, as so amended).

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22 (d) USE OF INFORMATION ACQUIRED UNDER PROTECT AMERICA ACT.—Information
23 acquired from an acquisition conducted under the Protect America Act of 2007, and the
24 amendments made by that Act, shall be deemed to be information acquired from an
25 electronic surveillance pursuant to title I of the Foreign Intelligence Surveillance Act of
26 1978 (50 U.S.C. 1801 et seq.) for purposes of section 106 of that Act (50 U.S.C. 1806),
27 except for purposes of subsection (j) of such section.

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28 (e) NEW ORDERS.—Notwithstanding any other provision of this Act or of the Foreign
29 Intelligence Surveillance Act of 1978—

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30 (1) the government may file an application for an order under the Foreign
31 Intelligence Surveillance Act of 1978, as in effect on the day before the date of the
32 enactment of the Protect America Act of 2007, except as amended by sections 102,
33 103, 104, 105, 106, 107, 108, 109, and 110 of this Act; and

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34 (2) the court established under section 103(a) of the Foreign Intelligence
35 Surveillance Act of 1978 shall enter an order granting such an application if the
36 application meets the requirements of such Act, as in effect on the day before the date
37 of the enactment of the Protect America Act of 2007, except as amended by sections
38 102, 103, 104, 105, 106, 107, 108, 109, and 110 of this Act.

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39 (f) EXTANT AUTHORIZATIONS.—At the request of the applicant, the court established
40 under section 103(a) of the Foreign Intelligence Surveillance Act of 1978 shall extinguish
41 any extant authorization to conduct electronic surveillance or physical search entered
42 pursuant to such Act.

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43 (g) Applicable provisions.—Any surveillance conducted pursuant to an order entered

1 pursuant to this subsection shall be subject to the provisions of the Foreign Intelligence
2 Surveillance Act of 1978, as in effect on the day before the date of the enactment of the
3 Protect America Act of 2007, except as amended by sections 102, 103, 104, 105, 106, 107,
4 108, 109, and 110 of this Act.

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5 (h) **TRANSITION PROCEDURES CONCERNING THE TARGETING OF UNITED STATES PERSONS**
6 **OVERSEAS.**—Any authorization in effect on the date of enactment of this Act under section
7 2.5 of Executive Order 12333 to intentionally target a United States person reasonably
8 believed to be located outside the United States shall remain in effect, and shall constitute a
9 sufficient basis for conducting such an acquisition targeting a United States person located
10 outside the United States until the earlier of—

- 11 (A) the date that authorization expires; or
- 12 (B) the date that is 90 days after the date of the enactment of this Act.

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110th CONGRESS¶
2d Session¶
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