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National Security Surveillance Act of 2006: S. 3886, Title II (S. 2453 as Reported Out of the Senate Judiciary Committee)

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Summary

In the wake of disclosures related to the National Security Agency's Terrorist Surveillance Program, congressional attention has been focused on issues regarding authorization, review, and oversight of electronic surveillance programs designed to acquire foreign intelligence information or to address international terrorism. S. 3886, the "Terrorist Tracking, Identification, and Prosecution Act of 2006," was introduced by Senator William H. Frist on September 11, 2006. It was placed on the Senate Legislative Calendar under General Orders, Calendar No. 605, the following day. Title II of S. 3886, the "National Security Surveillance Act of 2006," substantively parallels S. 2453 as reported out of the Senate Judiciary Committee. S. 2453 was introduced by Senator Arlen Specter on March 16, 2006, and referred to the Senate Committee on the Judiciary. Committee hearings were held on the latter measure on July 26, 2006, and August 2, 2006. Committee consideration and markup of S. 2453 took place on April 27, August 3, and September 7, 2006. The Committee reported S. 2453 out with an amendment in the nature of a substitute on September 13, 2006, without a written report, and the bill was placed on the Senate Legislative Calendar under General Orders, Calendar No. 609, that day. This report summarizes Title II of S. 3886/S. 2453, as reported out of the Senate Judiciary Committee, and compares its language with the existing provisions of the Foreign Intelligence Surveillance Act (FISA), as amended, 50 U.S.C. §§ 1801 *et seq.*

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Introduction

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Summary of Changes to Current Law²

New Title VII of FISA

Foreign Intelligence Surveillance Court jurisdiction. "The National Security Surveillance Act of 2006," Title II of S. 3886 (S. 2453 as reported out of

¹ The only differences between S. 2453 as reported out of the Senate Judiciary Committee and Title II of S. 3886 as introduced are in the respective bills' section numbers, i.e., Sec. 1 of S. 2453 as reported out is the same as Sec. 201 of S. 3886; Sec. 2 of S. 2453 is the same as Sec. 202 of S. 3886, etc.

² Where new language is the same as that in current law, it will not be addressed in this report. Only those provisions which effect some change to current law are noted.

Senate Judiciary Committee; hereinafter S. 2453) adds a new Title VII³ to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 *et seq.*, which gives the Foreign Intelligence Surveillance Court (FISC) jurisdiction to review, authorize, and reauthorize electronic surveillance programs⁴ to obtain foreign intelligence information,⁵ or to protect against international terrorism. An initial authorization

³ New Sec. 701 of FISA addresses the definitions applicable to the new Title VII of FISA, and includes definitions for “congressional intelligence committees,” “electronic communication,” “electronic tracking,” “electronic surveillance program,” “foreign intelligence information,” “Foreign Intelligence Surveillance Court,” “Foreign Intelligence Surveillance Court of Review,” “intercept,” and “substance.” Sec. 203 of S. 3886, Sec. 3. of S. 2453.

⁴ For purposes of the new Title VII of FISA, “electronic surveillance program” is defined in new Sec. 701(5) of FISA to mean a program to engage in electronic tracking —

- (A) that has as a significant purpose the gathering of foreign intelligence information or protecting against international terrorism;
- (B) where it is not technically feasible to name every person or address every location to be subjected to electronic tracking;
- (C) where effective gathering of foreign intelligence information requires the flexibility to begin electronic surveillance immediately after learning of suspect activity; and
- (D) where effective gathering of foreign intelligence information requires an extended period of electronic surveillance[.]

“Electronic tracking” is defined in new Sec. 701(4) of FISA as “the acquisition by an electronic, mechanical, or other surveillance device of the substance of any electronic communication sent by, received by, or intended to be received by a person who is reasonably believed to be in the United States, through the intentional targeting of that person’s communications, where a person in the United States participating in the communication has a reasonable expectation of privacy[.]”

“Substance” is defined in new Sec. 701(10) of FISA as “any information concerning the symbols, sounds, words, purport, or meaning of a communication, and does not include dialing, routing, addressing, or signaling.”

⁵ “Foreign intelligence information” is defined in new Sec. 701(6) of FISA to have the same meaning as in section 101 of FISA [current 50 U.S.C. § 1801(e)], and to include information necessary to protect against international terrorism. Under current 50 U.S.C. § 1801(e) the term means:

- (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against —
 - (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
 - (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
 - (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
- (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to —

(continued...)

of an electronic surveillance program may be for up to 90 days, while a reauthorization may be for a period of time not longer than the FISC determines to be reasonable. If the FISC denies an application for authorization or reauthorization of an electronic surveillance program, the Attorney General may submit an unlimited number of new applications seeking approval of the program or, in the alternative, may appeal the decision of the FISC to the Foreign Intelligence Surveillance Court of Review (FIS Court of Review). New Sec. 702(a) of FISA, Sec. 204 of S. 3886/Sec. 4 of S. 2453.

Mandatory transfer of certain cases to Foreign Intelligence

Surveillance Court of Review. The bills also vest jurisdiction in the FIS Court of Review to receive transfers from any other court of cases involving a challenge to the legality of classified communications intelligence activity relating to a foreign threat, including an electronic surveillance program, or cases in which the legality of any such activity or program is at issue. Such a transfer would be triggered by the filing by the Attorney General of an affidavit under oath that the case should be transferred to the FIS Court of Review, because further proceedings in the originating court would harm the national security of the United States. Under the proposed language, when such an affidavit is filed, the originating court must transfer the case to the FIS Court of Review. When the FIS Court of Review has completed its review, the case is then retransferred to the originating court for further proceedings consistent with the opinion of the FIS Court of Review. All litigation privileges are to be preserved with respect to any case transferred and received under this subsection. The decision of the FIS Court of Review is subject to U.S. Supreme Court review on certiorari. The FIS Court or Review decision is otherwise binding on all courts. New Sec. 702(b) of FISA, Sec. 204 of S. 3886, Sec. 4 of S. 2453.

Applications for FISC approval of electronic surveillance programs.

The bills lay out the requirements for applications for approval of electronic surveillance programs to be made by the Attorney General or his designee in new Sec. 703 of FISA, Sec. 205 of S. 3886, Sec. 5 of S. 2453. New Sec. 704(a) of FISA sets forth the necessary findings which must be made by the FISC for it to enter an ex parte order approving an electronic surveillance program as requested in such an application or as modified.⁶ In part, the court must find that approval of the

⁵ (...continued)

(A) the national defense or the security of the United States; or
(B) the conduct of the foreign affairs of the United States.

⁶ The findings necessary to FISC approval of an application for an order authorizing electronic surveillance include:

- (1) the President has authorized the Attorney General to make the application for electronic surveillance for foreign intelligence information or to protect against international terrorism;
- (2) approval of the electronic surveillance program in the application is consistent with the Constitution of the United States;
- (3) the electronic surveillance program is reasonably designed to ensure that the communications that are intercepted are communications of or with —

(A) a foreign power that is engaged in international terrorism activities or

(continued...)

electronic surveillance program in the application is consistent with the U.S. Constitution. New subsection 704(b) of FISA identifies the factors which the FISC may consider in assessing the constitutionality of the program.⁷ Subsection 704(c) of FISA sets out the contents of an order approving such a program.⁸ Sec. 206 of S. 3886, Sec. 6 of S. 2453.

Congressional oversight of electronic surveillance programs authorized under new Title VII of FISA. Under Sec. 207 of S. 3886, Sec. 7 of S. 2453, new Sec. 705 of FISA addresses congressional oversight. The Attorney General is directed to submit a classified report at least every 180 days to the House

⁶ (...continued)

- in preparation therefor;
- (B) an agent of a foreign power that is engaged in international terrorism activities or in preparation therefor; or
- (C) a person reasonably believed to have communication with or be associated with a foreign power that is engaged in international terrorism activities or in preparation therefor or an agent of a foreign power that is engaged in international terrorism activities or in preparation therefor;
- (4) the proposed minimization procedures meet the definition of minimization procedures under section 101(h); and
- (5) the application contains all statements and certifications required by section 703.

⁷ Such factors include

- (1) whether the electronic surveillance program has been implemented in accordance with the proposal by the Attorney General by comparing —
 - (A) the minimization procedures proposed with the minimization procedures actually implemented;
 - (B) the nature of the information sought with the nature of the information actually obtained; and
 - (C) the means and operational procedures proposed with the means and operational procedures actually implemented; and
- (2) whether foreign intelligence information has been obtained through the electronic surveillance program.

⁸ Under proposed subsection 105(c), an order approving an electronic surveillance program under this section shall direct —

- (1) that the minimization procedures be followed;
- (2) that, upon the request of the applicant, specified communication or other common carriers, landlords, custodians, or other specified person, furnish the applicant forthwith with all information, facilities, or technical assistance necessary to undertake the electronic surveillance program in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carriers, landlords, custodians, or other persons are providing potential targets of the electronic surveillance program;
- (3) that any record concerning the electronic surveillance program or the aid furnished or retained by such carriers, landlords, custodians, or other persons are maintained under security procedures approved by the Attorney General and the Director of National Intelligence; and
- (4) that the applicant compensate, at the prevailing rate, such carriers, landlords, custodians, or other persons for furnishing such aid.

Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence (the “congressional intelligence committees” as defined in new Sec. 701(2) of FISA) on the activities during the previous 180 day period under any electronic surveillance program authorized under new Title VII of FISA.

New Title VIII: Executive Authority

FISA not to be construed to limit President’s constitutional authority to collect foreign intelligence. Sec. 208(a) of S. 3886, Sec. 8(a) of S. 2453, creates a new Title VIII of FISA dealing with “Executive Authority.” New Sec. 801 of FISA provides that “Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers.”

Repeal of wartime authorities under FISA. Sec. 208(b) of S. 3886, Sec. 8(b) of S. 2453, repeals Sections 111, 309, and 404 of FISA, 50 U.S.C. §§ 1811, 1829, and 1844, which respectively permit the President, through the Attorney General, to authorize electronic surveillance, physical searches, and the use of pen register or trap and trace devices, without a court order to obtain foreign intelligence information for up to 15 calendar days following a declaration of war by Congress. Sec. 209(j) of S. 3886, Sec. 9(j) of S. 2453, and Sec. 209(k)(3) of S. 3886, Sec. 9(k)(3) of S. 2453, also strike Sections 111 and 309 of FISA, respectively.

Conforming amendments to 18 U.S.C. §§ 2511(2)(e) and (f) and to criminal provisions in Sec. 109 of FISA. Sec. 208(c) of S. 3886, Sec. 8(c) of S. 2453, makes a series of conforming amendments to 18 U.S.C. §§ 2511(2)(e) and (f), and to the criminal provisions in Sec. 109 of FISA, 50 U.S.C. § 1809. Sec. 209(i) of S. 3886, Sec. 9(i) of S. 2453, also makes somewhat similar, but not identical, amendments to Sec. 109 of FISA, 50 U.S.C. § 1809.

In general, 18 U.S.C. § 2511 prohibits the interception of wire, oral, or electronic communications unless the interception falls within one of a series of specific exceptions. Current 18 U.S.C. §§ 2511(2)(e) and (2)(f) set out two of these exceptions. Current 18 U.S.C. § 2511(2)(e) provides, “Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.” As amended, subsection 2511(2)(e) would read, “Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance under the Constitution or the Foreign Intelligence Surveillance Act of 1978.”

Current 18 U.S.C. § 2511(2)(f), often referred to as the “exclusivity” provision, states:

(f) Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information

from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

Thus, under the current exclusivity provision in 18 U.S.C. § 2511(2)(f), electronic surveillance is prohibited except when carried out under the provisions of FISA; chapter 119, 18 U.S.C. §§ 2510 *et seq.* (which deals with interception of wire, oral, or electronic communications); or chapter 121, 18 U.S.C. §§ 2701 *et seq.* (which deals with stored wire and electronic communications and transactional records access). As amended, 18 U.S.C. § 2511(2)(f) would read, “Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information that is authorized under a Federal statute or the Constitution of the United States.”

The conforming amendments to FISA in Sec. 208(c) of S. 3886, Sec. 8(c) of S. 2453, address Sec. 109 of FISA, 50 U.S.C. § 1809, which currently provides criminal sanctions for any person who intentionally “(1) engages in electronic surveillance under color of law except as authorized by statute; or (2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.” As amended by Sec. 208(c)(2)(A) of S. 3886, Sec. 8(c)(2)(A) of S. 2453, a person would face criminal liability if he or she: (1) intentionally engages in electronic surveillance under color of law except as authorized by statute *or under the Constitution*; (2) intentionally discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute *or under the Constitution*; or (3) “*knowingly discloses or uses information obtained under color of law by electronic surveillance in a manner or for a purpose not authorized by law.*” (Italics indicate new language.) Under Sec. 208(c)(2)(B) of S. 3886, Sec. 8(c)(2)(B) of S. 2453, the current penalties provided in Sec. 109(c) of FISA, 50 U.S.C. § 1809(c) would be increased from a fine of up to \$10,000 to a fine of up to \$100,000, while imprisonment would be increased from a term of up to 5 years to imprisonment for up to 15 years.

It is worthy of note that Sec. 209(i) of S. 3886, Sec. 9(i) of S. 2453, also amends Sec. 109 of FISA, 50 U.S.C. § 1809, in a somewhat similar, but not identical manner. Under the latter amendment, subsection 109(a) of FISA, 50 U.S.C. § 1809(a), would be deleted and replaced with a new subsection 109(a) which provides that “[a] person is guilty of an offense if he intentionally — (1) engages in electronic surveillance as defined in section 101(f)[, 50 U.S.C. § 101(f)], under color of law except as *authorized by law*; or (2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not *authorized by law.*” (Emphasis added.)

Other Conforming Amendments to FISA

Sec. 209 of S. 3886, Sec. 9 of S. 2453, makes other conforming amendments to FISA.

Definitions. Section 209(b) of S. 3886, Sec. 9(b) of S. 2453, amends several of the definitions in Sec. 101 of FISA, 50 U.S.C. § 1801.

Agent of a foreign power. Sec. 209(b)(1) of S. 3886, Sec. 9(b)(1) of S. 2453, expands the definition of “agent of a foreign power” under Sec. 101(b)(1) of FISA, 50 U.S.C. § 1801(b)(1), to include a person other than a United States person⁹ who “otherwise possesses or is expected to transmit or receive foreign intelligence information within the United States.”

Electronic surveillance. Sec. 209(b)(2) of S. 3886, Sec. 9(b)(2) of S. 2453, deletes the current definition of “electronic surveillance” under Sec. 101(f) of FISA,

⁹ “United States person” is currently defined in Sec. 101(i) of FISA, 50 U.S.C. § 1801(i), to mean

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

50 U.S.C. § 1801(f),¹⁰ and replaces it with a new definition. Under the new definition, “electronic surveillance” would mean:

- (1) the installation or use of an electronic, mechanical, or other surveillance device for the intentional collection of information concerning a particular known person who is reasonably believed to be in the United States by intentionally targeting that person under circumstances in which that person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes; or
- (2) the intentional acquisition of the contents of any communication under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States.

This appears to be a shorter, but more expansive definition than that under current law.

Attorney General. Sec. 209(b) of S. 3886, Sec. 9(b) of S. 2453, broadens the definition of “Attorney General” under Sec. 101(g) of FISA, 50 U.S.C. § 1801(g) to include, among others, “a person or persons designated by the Attorney General or the Acting Attorney General.” Thus, as amended, the term “Attorney General,” under Sec. 101(g) of FISA, 50 U.S.C. § 1801(g), would mean the “Attorney General of the United States (or Acting Attorney General), the Deputy Attorney General, or, upon the designation of the Attorney General, the Assistant Attorney General designated as the Assistant Attorney General for National Security under section

¹⁰ Under current Sec. 101(f) of FISA, 50 U.S.C. § 1801(f), “electronic surveillance” is defined to mean:

- (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
- (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of Title 18;
- (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or
- (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

507A of title 28, United States Code *or a person or persons designated by the Attorney General or the Acting Attorney General.*” (New language in italics.)

Minimization Procedures with respect to electronic surveillance.

Minimization procedures under FISA are designed to minimize the acquisition, retention, and prohibit dissemination of non-publicly available information regarding unconsenting U.S. persons acquired during the course of electronic surveillance or physical search for foreign intelligence purposes, consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information. Such procedures permit retention and dissemination to law enforcement of evidence of criminal activity. Under these procedures, nonpublicly available information which is not foreign intelligence information shall not be disseminated in a manner that identifies any United States person, without such person’s consent, unless such person’s identity is necessary to understand foreign intelligence information or assess its importance. Current Sec. 101(h)(4) of FISA, 50 U.S.C. § 1801(h)(4), also includes minimization procedures applicable to any electronic surveillance without a court order to acquire foreign intelligence information upon Attorney General certification pursuant to Sec. 102(a) of FISA, 50 U.S.C. § 1802. In that context, minimization procedures also encompass procedures requiring that no contents of any communication to which a United States person is a party be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under Sec. 105 of FISA, 50 U.S.C. § 1805, is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person. Subsection 104(h)(4) of FISA, 50 U.S.C. § 1801(h)(4), would be deleted by Sec. 209(b) of S. 3886, Sec. 9(b) of S. 2453.

Sec. 209(b) of S. 3886, Sec. 9(b) of S. 2453, modifies the definition of “minimization procedures” in Sec. 101(f) of FISA, 50 U.S.C. § 1801(h) to delete subsection 101(f)(4), which covers —

Contents. In addition, Sec. 209(b) of S. 3886, Sec. 9(b) of S. 2453, replaces the current definition of “contents” under Sec. 101(n) of FISA, 50 U.S.C. § 1801(n) with a new definition cross-referencing 18 U.S.C. § 2510(8).¹¹

Electronic surveillance without a court order to acquire foreign intelligence information pursuant to Attorney General certification. Sec. 102 of FISA, 50 U.S.C. § 1802, authorizes electronic surveillance without a court order to acquire foreign intelligence information for up to one year upon certification by the Attorney General in writing under oath that certain criteria have been met.¹² As amended by Sec. 209(c) of S. 3886, Sec. 9(c) of S. 2453, the application of Sec. 102 of FISA would be expanded to include, among other things, the acquisition of

¹¹ Under 18 U.S.C. § 2510(8) “‘contents,’ when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication.”

¹² Current Sec. 102(a)(1) requires that the Attorney General certify in writing under oath that “the electronic surveillance is solely directed at” the acquisition of the types of information specified. This clause is omitted in the amended language in Sec. 209(c) of S. 3886, Sec. 9(c) of S. 2453.

the contents of communications of foreign powers, as defined in section 101(a) of FISA, 50 U.S.C. § 1801(a), or an agent of a foreign powers other than a U.S. person, as defined under Sec. 101(b)(1) of FISA, 50 U.S.C. § 1801(b)(1).¹³ The amendment also deletes a requirement in current Sec. 102(a)(1)(B) of FISA, 50 U.S.C. § 1801(a)(1)(B), that the Attorney General certify that “there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a U.S. person is a party.”

As amended, a new subsection (b) would be added to Sec. 102 of FISA, authorizing the Attorney General to require any provider of electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) who has access to electronic communications as transmitted or while stored, or to equipment that is being or may be used to transmit or store such communications, to furnish any information, facilities, or technical assistance to an official authorized by the President to engage in electronic surveillance for foreign intelligence purposes for periods of up to one year, if the Attorney General certifies in writing under oath to the carrier that such provision of information, facilities, or technical assistance does not constitute electronic surveillance under Sec. 101(f) of FISA (which was amended earlier in Sec. 209(b)(2) of S. 3886, Sec. 9(b)(2) of S. 2453.

Under current Sec.102(a)(4), 50 U.S.C. § 102(a)(4), the Attorney General may direct a specified common carrier to provide any information, facilities, or technical assistance necessary to accomplish an electronic surveillance authorized under subsection 102(a) in a manner which will protect its secrecy and produce a minimum of interference with the services such carrier is providing to its customers, and to maintain any records the carrier wishes to retain concerning such surveillance or the aid furnished with respect thereto under security procedures approved by the Attorney General and the Director of National Security. As amended, the Attorney General could so direct a provider of any electronic communication service, landlord, custodian or other person (including any officer, employee, agent, or other specified person thereof) who has access to electronic communications, either as they are transmitted or while they are being stored or equipment that is being or may be used to transmit or store such communications. As in current law, the Government is required to compensate the provider at the prevailing rate for furnishing such aid.

¹³ Current law does not include the acquisition of the contents of communications of agents of foreign powers, and covers only “foreign powers” as defined in Sec. 101(a)(1), (2), or (3) of FISA. These subsections include a foreign government or any component thereof; a faction of a foreign nation or nations, not substantially composed of United States persons; or an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments. As amended, this provision would also cover the acquisition of the contents of communications of a group engaged in international terrorism or activities in preparation therefor; a foreign-based political organization, not substantially composed of United States persons; or an entity that is directed and controlled by a foreign government or governments. Under current law, the contents of communications acquired must be transmitted by means of communications used exclusively between or among such foreign powers.

A new subsection 102(d) of FISA, new 50 U.S.C. § 102(d), would provide that “electronic surveillance directed solely at the collection of international radio communications of diplomatically immune persons in the United States may be authorized by an official authorized by the President to engage in electronic surveillance for foreign intelligence purposes in accordance with procedures approved by the Attorney General.”

Designation of FISC judges. Under Sec. 209(d) of S. 3886, Sec. 9(d) of S. 2453, Sec. 103(a) of FISA is amended to authorize the Chief Justice of the United States to publicly designate 11 district court judges from *at least* seven of the U.S. judicial circuits¹⁴ to be FISC judges, of whom no fewer than three shall reside within 20 miles of the District of Columbia.

Applications for FISC orders under Sec. 104 of FISA. Sec. 209(e) of S. 3886, Sec. 9(e) of S. 2453, makes a series of amendments to Sec. 104 of FISA, 50 U.S.C. § 1804. Current subsections 104(a)(6) through (11) are deleted from FISA and replaced by new subsections 104(a)(6) and (7). An application for a court order to authorize electronic surveillance under FISA must contain, among other things, a certification that certain requirements are met. Under current law, such certification or certifications are made by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate. As amended, the certification would be made by “the Assistant to the President for National Security Affairs or an executive branch official authorized by the President to conduct electronic surveillance for foreign intelligence purposes.”¹⁵

¹⁴ The amendment indicates that “at least” should be inserted into Sec. 103(a) of FISA before “seven of the United States Judiciary.” It seems likely that “Judiciary” was intended to be “judicial circuits” as in the current language of the subsection.

¹⁵ As amended, such official must certify:

- (A) that the certifying official deems the information sought to be foreign intelligence information;
- (B) that a significant purpose of the surveillance is to obtain foreign intelligence information;
- (C) that such information cannot reasonably be obtained by normal investigative techniques; and
- (D) including a statement of the basis for the certification that —
 - (i) the information sought is the type of foreign intelligence information designated; and
 - (ii) such information cannot reasonably be obtained by normal investigative techniques[.]

With respect to the matters that must be certified by this official, new subsections 104(a)(6)(A)-(C) are the same as current subsections 104(a)(7)(A)-(C). The new language deletes a requirement in current subsection 104(a)(7)(D) that the application include a certification from such an official that designates the type of foreign intelligence information being sought according to the categories described in Sec. 101(e) of FISA. New subsection 104(a)(6)(D) is the same as the current 104(a)(7)(E).

(continued...)

Under current law, subsection 104(b) of FISA, 50 U.S.C. § 1804(b) deals with the exclusion of certain information from an application for a FISC order authorizing electronic surveillance where the target is a foreign power as defined in subsection 101(a)(1), (2), or (3), and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power. In such circumstances, the application currently is required to include a statement as to whether physical entry is required to effect the surveillance, and to contain such information about the surveillance techniques and communications or other information concerning U.S. persons likely to be obtained as may be necessary to assess the proposed minimization procedures. Sec. 209(e)(2) and (3) of S. 3886, Sec. 9(e)(2) and (3) of S. 2453, would strike current Sec. 104(b) of FISA, 50 U.S.C. § 1804(b), and redesignate subsections 104(c)-(e) as 104(b)-(d) of FISA.

Issuance of FISC order under Sec. 105 of FISA. Sec. 209(f) of S. 3886, Sec. 9(f) of S. 2453, would amend Sec. 105 of FISA, 50 U.S.C. § 1805, in a number of respects. Current subsection 105(a)(1) provides that, upon an application under Sec. 104 of FISA, the FISC judge shall enter an ex parte order as requested or as modified approving the electronic surveillance in the application if he finds that “the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information.” As amended, this subsection would be stricken and subsections 105(a)(2) through (a)(5) of FISA, 50 U.S.C. §§ 1805(a)(2) through (a)(5), would be redesignated subsections 105(a)(1) through (a)(4), 50 U.S.C. §§ 1805(a)(1) through (a)(4).

Specifications to be included in a FISC order for electronic surveillance. Current subsection 105(c)(1) of FISA, 50 U.S.C. § 1805(c)(1), which deals with specifications to be included in an order approving electronic surveillance under Sec. 105 of FISA, would also be deleted and replaced with a new subsection 105(c)(1), which includes the current subsections 105(c)(1)(A), (B), and (E), and deletes current requirements in subsections 105(c)(1)(C),(D), and (F). The new subsection 105(c)(1) would read: “(1) An order approving an electronic surveillance under this section shall specify — (A) the identity, if known, or a description of the specific target of the electronic surveillance identified or described in the application pursuant to section 104(a)(3); (B) the nature and location of each of the facilities or places at which the electronic surveillance will be directed, if known; and (C) the period of time during which the electronic surveillance is approved.”

Current subsection 105(d) deals with the exclusion of certain information from applications for court orders authorizing electronic surveillance where the target of

¹⁵ (...continued)

As amended, subsection 104(a)(7) requires that, an application for a court order authorizing electronic surveillance must include “a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this title should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter.” This language is the same as the current subsection 104(a)(10).

the surveillance is a foreign power as defined in Sec. 101(a)(1), (2), or (3), and each facility or place to be surveilled is owned, leased, or exclusively used by that foreign power. It also requires description of information sought, the communications to be subject to surveillance, and the type of electronic surveillance involved, including whether physical entry would be required. As amended, the current language would be stricken and replaced with a requirement that, “Each order under this section specify the type of electronic surveillance involved, including whether physical entry is required.”

Duration and extension of FISC orders under Sec. 105 of FISA.

Current subsections 105(e)(1) and (2) of FISA, 50 U.S.C. § 1805(e)(1) and (2), deal with duration and extension of orders under Sec. 105 of FISA. Current law provides generally for electronic surveillance for the period specified in the application or for up to 90 days, whichever is less; for the period specified in the application or for up to 120 days, whichever is less, where the target is an agent of a foreign power who is not a U.S. person; and for the period specified in the application or for up to one year, for foreign power targets who are foreign governments or components thereof; foreign nation or nations or factions thereof, not substantially composed of United States persons; or entities openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments. This language would be deleted and replaced by a new subsection 105(e)(1) and (2). Under the new language, orders for electronic surveillance may be approved for up to one year. If emergency electronic surveillance is authorized, the official authorizing it must require compliance with the same minimization procedures as are required for electronic surveillance pursuant to FISC orders under this title.¹⁶ Extensions for up to one year may be granted by the FISC on the same basis as the original order, upon an application for an extension filed and new findings made in the same manner as required for the original order.

Emergency authorization of electronic surveillance without a court order. Current subsection 105(f), 50 U.S.C. § 1805(f), provides for emergency authorization of electronic surveillance without a court order for up to 72 hours by the Attorney General if he reasonably determines that an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can, with due diligence, be obtained; and that the factual basis for issuance of an order under this title to approve such surveillance exists. The Attorney General must notify an FISC judge of the emergency employment of electronic surveillance at the time of its authorization. During this 72 hour window, a court order under Sec. 105 must be sought. Subsection 105(f) also currently requires termination of the surveillance when the information sought is acquired, if a FISC order approving the surveillance is denied, or at the end of the 72 hours, whichever is earliest; and restricts use or disclosure of information acquired or derived from that surveillance if a court order is not obtained.

¹⁶ This is the same as is currently required under subsection 105(f) of FISA, 50 U.S.C. § 1805(f).

As amended, this provision would be deleted and replaced by a new subsection (f)(1) which would permit “an official authorized by the President to conduct electronic surveillance” to authorize emergency electronic surveillance without a court order for up to seven days (rather than 72 hours) when that official reasonably determines that an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can, with due diligence, be obtained; and the factual basis for issuance of an order under this title to approve such surveillance exists. Although the authority to trigger such emergency electronic surveillance is not limited to the Attorney General, as in current law, the Attorney General must be informed of the emergency electronic surveillance. While current law required notice to a FISC judge at the time of the authorization, the new provision would require that a FISC judge be informed as soon as practicable following such an authorization. During the seven-day period, a court order approving the surveillance must be sought from an FISC judge as soon as practicable. The surveillance must terminate when the information sought is obtained, when the application is denied, or at the end of the seven-day period, whichever is earliest. In the absence of a court order authorizing the electronic surveillance, the proposed provision imposes the same restrictions on use and disclosure of information acquired or derived from an emergency electronic surveillance as those in current law.

Limitations on liability for providers aiding in a FISA electronic surveillance or physical search. Sec. 209(f) of S. 3886, Sec. 9(f) of S. 2453, would also modify subsection 105(i) dealing with limitations in liability for those who provide information, facilities, or technical assistance with respect to execution of a FISA electronic surveillance or physical search. As amended, no cause of action would lie against any provider of electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any such aid in accordance with a court order or a request for emergency assistance under this title for electronic surveillance or physical search, or in response to a certification by the Attorney General or his designee seeking information, facilities, or technical assistance from such person that does not constitute electronic surveillance as defined in Sec. 101(f) of FISA.

Use of information acquired by electronic surveillance under FISA. Sec. 106 of FISA limits the use by federal, state, or local governments of information regarding unconsenting U.S. persons acquired or derived from electronic surveillance under FISA. It also includes notification requirements and provides an opportunity for an aggrieved person against whom such information is proffered in an official proceeding to move to suppress such information if it was unlawfully acquired or if the surveillance was not made in conformity with an order of authorization or approval.

Under Sec. 209(g) of S. 3886, Sec. 9(g) of S. 2453, Sec. 106(i) of FISA, 50 U.S.C. § 1806(i), which deals with destruction of unintentionally acquired information, would be modified to provide that, where *any communication* is unintentionally acquired by an electronic, mechanical, or other surveillance device, in circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located in the United States, such contents shall be

destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person. Current subsection 106(i) includes parallel provisions, but applies only to unintentionally acquired *radio* communications. (Emphasis added.)

The import of a second amendment to subsection 106(i) of FISA, 50 U.S.C. § 1806(i), in Sec. 209(g)(1)(B) of S. 3886, Sec. 9(g)(1)(B) of S. 2453, is unclear. The provision indicates that subsection 106(i) of FISA would be amended by “inserting ‘Attorney General determines that the contents’ after ‘contain significant foreign intelligence information or.’” However, the current provision being amended does not include the phrase “contain significant foreign intelligence information or.”¹⁷

Sec. 209(g)(2) of S. 3886, Sec. 9(g)(2) of S. 2453, makes a conforming amendment to subsection 106(k), replacing “104(a)(7)” with “104(a)(6),” reflecting a change made to Sec. 104 of FISA, 50 U.S.C. § 1804, by Sec. 209(e) of S. 3886, Sec. 9(e) of S. 2453.

Congressional oversight under Sec. 108 of FISA regarding a document management system for applications for FISC orders authorizing electronic surveillance. Sec. 209(h) of S. 3886, Sec. 9(h) of S. 2453, amends the congressional oversight provisions of Sec. 108 of FISA, 50 U.S.C. § 1808, to add a new subsection 108(c) requiring the Attorney General and the Director of National Intelligence, in consultation with the Director of the FBI, the Director of the NSA, the Director of the CIA, and the FISC, to conduct a feasibility study to develop and implement a secure, classified document management system that would permit prompt preparation, modification, and review by appropriate personnel of the Department of Justice, the FBI, the NSA, and other applicable U.S. government elements, of applications for FISC orders authorizing electronic surveillance before their submittal to the FISC. Such a system would permit and facilitate prompt submittal of applications and all other matters, including electronic filings to the FISC under Sections 104 or 105(g)(5)¹⁸ of FISA, and would permit and facilitate the prompt transmittal of FISC rulings to personnel submitting such applications.

Second amendment of criminal provisions in Sec. 109 of FISA. Sec. 209(i) of S. 3886, Sec. 9(i) of S. 2453, amends Sec. 109 of FISA, 50 U.S.C. § 1809, to delete subsection 109(a) of FISA, 50 U.S.C. § 1809(a), and to replace it with a new subsection 109(a), which provides that “[a] person is guilty of an offense if he intentionally — (1) engages in electronic surveillance as defined in section 101(f)[, 50 U.S.C. § 101(f)], under color of law except as *authorized by law*; or (2) discloses

¹⁷ The phrase “Attorney General determines that the content” does exist in the current provision. One possible question might be whether the phrase “contain significant foreign intelligence information or” was intended to be inserted after “Attorney General determines that the content,” rather than the reverse, as is provided in this section of the bills.

¹⁸ There is no current Sec. 105(g)(5) of FISA. Sec. 105(g) of FISA, 50 U.S.C. § 1805(g) deals with “testing of electronic equipment; discovering unauthorized electronic surveillance; training of intelligence personnel.”

or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not *authorized by law*.” Sec. 109(a) was previously amended in Sec. 208(c) of S. 3886, Sec. 8(c) of S. 2453. As amended by Sec. 208(c)(2)(A) of S. 3886, Sec. 8(c)(2)(A) of S. 2453, a person would face criminal liability if he or she: (1) intentionally engages in electronic surveillance under color of law except as authorized by statute *or under the Constitution*; (2) intentionally discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute *or under the Constitution*; or (3) “*knowingly discloses or uses information obtained under color of law by electronic surveillance in a manner or for a purpose not authorized by law*.” (Italics indicate new language.) These changes are earlier in the respective bills, and Sec. 209(i) of S. 3886, Sec. 9(i) of S. 2453, deletes subsection 109(a) and replaces it with its own new language. Therefore, it would seem that while Sec. 208(c)(2)(A) of S. 3886, Sec. 8(c)(2)(A) of S. 2453, would operate to amend the current subsection 109(a) of FISA; Sec. 209(i) would have the effect of deleting subsection 109(a) of FISA as amended by Sec. 208(c)(2)(A) of S. 3886, Sec. 8(c)(2)(A) of S. 2453, and replacing it with its own language.

Striking of previously repealed provisions authorizing electronic surveillances and physical searches without a court order for up to 15 calendar days following a declaration of war by Congress. Sec. 209(j) of S. 3886, Sec. 9(j) of S. 2453, and Sec. 209(k)(3) of S. 3886, Sec. 9(k)(3) of S. 2453, strike Sections 111 and 309 of FISA, 50 U.S.C. §§ 1811 and 1829, respectively. Sec. 111 of FISA permits the President, through the Attorney General, to authorize electronic surveillance without a court order to obtain foreign intelligence information for up to 15 calendar days following a declaration of war by Congress. Sec. 309 of FISA permits the President, through the Attorney General, to authorize physical searches without a court order to obtain foreign intelligence information for up to 15 calendar days following a congressional declaration of war. Both of these provisions were repealed earlier in the bills by Sec. 208(b) of S. 3886, Sec. 8(b) of S. 2453, which also repealed Sec. 404 of FISA, 50 U.S.C. § 1844, a parallel authority regarding the use of pen registers or trap and trace devices without a court order for up to 15 calendar days following a congressional declaration of war.

Physical searches. Under Sec. 209(k) of S. 3886, Sec. 9(k) of S. 2453, the definition of “physical search” under current Sec. 301(5) of FISA, 50 U.S.C. § 1821(5),¹⁹ is deleted and replaced with a new subsection 301(5) defining “physical

¹⁹ Under current Sec. 301(5) of FISA, “physical search” is defined to mean “any physical intrusion within the United States into premises or property (including examination of the interior of property by technical means) that is intended to result in a seizure, reproduction, inspection, or alteration of information, material, or property, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, but does not include (A) “electronic surveillance”, as defined in section 101(f) [50 U.S.C. § 1801(f)], or (B) the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law (continued...) ”

search” to mean “any physical intrusion within the United States into premises or property (including examination of the interior of property by technical means) that is intended to result in a seizure, reproduction, inspection, or alteration of information, material, or property, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, but does not include activities conducted in accordance with sections 102 or 105.”

Criminal provisions relating to physical searches. Sec. 209(k)(2) of S. 3886, Sec. 9(k)(2) of S. 2453, would delete the current criminal provisions in subsection 307(a) of FISA, 50 U.S.C. § 1827(a), and replace it with a new subsection 307(a). Under the new language, a person would be guilty of an offense if he intentionally — “(1) under color of law for the purpose of obtaining foreign intelligence information, executes a physical search within the United States except as authorized by statute or under the Constitution; or (2) discloses or uses information obtained under color of law by physical search within the United States, knowing or having reason to know that the information was obtained through physical search not authorized by statute or the Constitution.” This is similar to current law, but, in subsection 307(a)(1) the current phrase “as authorized by statute” is replaced with “as authorized by statute or under the Constitution;” and, in subsection 307(a)(2) the current phrase “not authorized by statute for the purpose of obtaining intelligence information” is replaced by the phrase “not authorized by statute or the Constitution.” The deletion in subsection 307(a)(2) of “for the purpose of obtaining intelligence information” may suggest that the new language may have a potentially broader application than the current provision. For example, it would appear that it might criminalize the intentional disclosure or use of information obtained under color of law by physical search within the United States, knowing or having reason to know that the information was obtained through a physical search not authorized by statute or the Constitution for intelligence gathering purposes, criminal investigative purposes, or other purposes.

Conforming Amendments to the Table of Contents of FISA

Sec. 210 of S. 3886, Sec. 10 of S. 2453, would amend the table of contents to FISA to strike the items related to the current Title VII of FISA, and to reflect the creation of the new Titles VII and VIII of FISA in these bills.

¹⁹ (...continued)

involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101(f) [50 U.S.C. § 1801(f)].”