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FAA SUNSETS EXTENSION ACT OF 2012

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JUNE 7, 2012.—Ordered to be printed
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Mrs. FEINSTEIN, from the Committee on Intelligence,
submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 3276]

The Select Committee on Intelligence, having considered an original bill (S. 3276) to extend certain amendments made by the FISA Amendments Act of 2008, and for other purposes, reports favorably thereon and recommends that the bill do pass.

BACKGROUND AND NEED FOR LEGISLATION

The sunset for Title VII of the Foreign Intelligence Surveillance Act (FISA), as added by the FISA Amendments Act (Public Law 110-261), is scheduled to occur on December 31, 2012. This bill extends the sunset to June 1, 2017. The Director of National Intelligence (DNI) and the Attorney General wrote to the leadership of the Senate and the House of Representatives on February 8, 2012, to urge that Congress reauthorize Title VII of FISA. They noted that the authorities under this title of FISA allow the Intelligence Community to collect vital information about international terrorists and other important targets overseas while providing a comprehensive regime of oversight to protect the civil liberties and privacy of Americans. The DNI and Attorney General also provided an unclassified background paper on the structure, operation, and oversight of Title VII (reprinted in the appendix of this report). On March 26, 2012, the DNI provided the Administration's proposed legislation to extend the sunset to June 1, 2017, and reauthorize Title VII without amendment.

The Committee, since its inception in 1976, has considered oversight of the Executive branch's use of electronic surveillance for foreign intelligence purposes to be one of its most important responsibilities. A central focus of that oversight has been the implementation of FISA by the Intelligence Community and the Department of Justice as well as the interpretation and judicial oversight of FISA performed by the Foreign Intelligence Surveillance Court (FISC). Consistent with this focus, the Committee's oversight of the implementation of the FISA Amendments Act has been extensive. In addition to the letter and background paper described above, the Committee has held several hearings and briefings on the implementation of the FAA between 2008 and 2012. Committee Members and staff have held numerous meetings with supervisors, operators, analysts, lawyers, compliance officers, and others at the National Security Agency, Department of Justice, Federal Bureau of Investigation (FBI), Office of the DNI (ODNI), and other relevant entities.

Specifically related to reauthorizing the FAA, the Committee has received testimony in support from the Assistant Attorney General for National Security, the DNI, the Director of the FBI, the Director and Deputy Director of the National Security Agency, the Director of the National Counterterrorism Center, the General Counsel of the ODNI, and other officials. The Committee has also received and considered views from nongovernmental organizations with interests in FISA.

The Committee has found, based on its numerous hearings and briefings since 2008, that the authorities provided under the FISA Amendments Act have greatly increased the government's ability to collect information and act quickly against important foreign intelligence targets. The Committee has also found that Title VII has been implemented with attention to protecting the privacy and civil liberties of U.S. persons, and has been the subject of extensive oversight by the Executive branch, the FISC, as well as the Congress. As pointed out by the Attorney General and DNI, failure to reauthorize Title VII of FISA would "result in a loss of significant intelligence and impede the ability of the Intelligence Community to respond quickly to new threats and intelligence opportunities."

In light of its findings, the Committee has concluded that the authorities of Title VII should be extended until June 1, 2017, a period of sufficient duration to help assure the stability of this critical foreign intelligence collection effort while the three branches of government continue their close oversight of the use of these authorities.

OPERATION AND OVERSIGHT OF TITLE VII OF FISA

Title VII of FISA, as added by the FISA Amendments Act, established procedures for the conduct of certain intelligence collection activities targeting persons reasonably believed to be located outside the United States. Under Section 702, the FISC is authorized to approve annual certifications made by the Attorney General and the DNI to obtain foreign intelligence information by engaging in

collection directed at non-U.S. person reasonably believed to be located outside the United States.¹

Section 702 also requires that the government adopt targeting and minimization procedures, which must be reviewed and approved by the FISC. The minimization procedures, in particular, govern the handling of any information concerning U.S. persons acquired incidentally under Section 702, including procedures governing the retention and dissemination of such information. These procedures serve to protect the privacy and civil liberties of U.S. persons. The targeting procedures must be reasonably designed to ensure that persons subjected to an acquisition under Section 702 are reasonably believed to be outside the United States.

Subject to FISC approval of the certifications and procedures or an exigent circumstances determination, the government may engage in intelligence collection directed at non-U.S. persons abroad who fall within the scope of the certification, without the requirement for individualized court orders. In enacting this amendment to FISA, Congress ensured there would be important protections and oversight measures to safeguard the privacy and civil liberties of U.S. persons, including specific prohibitions against using Section 702 authority to: “intentionally target any person known at the time of acquisition to be located in the United States;” “intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;” “intentionally target a United States person reasonably believed to be located outside the United States;” or “intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.” As an additional measure the law also requires that an acquisition under Section 702 “shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.”

In addition to establishing procedures for obtaining foreign intelligence information through collection directed at non-U.S. persons reasonably believed to be located outside of the United States, Title VII established new requirements in Sections 703 and 704 for collection targeted against U.S. persons located overseas. Prior to the enactment of the FISA Amendments Act, elements of the Intelligence Community were authorized to engage in collection under Section 2.5 of Executive Order 12333, provided that the Attorney General made a determination that there was probable cause to believe the U.S. person target was a foreign power or agent of a foreign power. After enactment of the FISA Amendments Act, Sections 703 and 704 provide the FISC with a specific grant of jurisdiction to issue individualized court orders based upon a showing of probable cause that the targeted U.S. person is reasonably believed to be outside the United States and a foreign power, agent of a foreign power, or an officer or employee of a foreign power. Section 704, in particular, strengthens the privacy protections and civil liberties of U.S. persons located outside the United States by

¹In exigent circumstances, the Attorney General and the DNI may authorize an immediate acquisition under Section 702; however, they must then submit a certification to the FISC as soon as practicable, but in no event later than seven days after they determined the existence of such exigent circumstances.

providing judicial review where such review did not previously exist.

Title VII also imposes, with Title VI of FISA, substantial reporting requirements on the government in order to enable both judicial and congressional oversight, in addition to the oversight performed within the Executive branch by the Department of Justice, the Office of the DNI, the individual agencies within the Intelligence Community, and the associated Inspectors General. Section 702 requires semiannual assessments by the Attorney General and the DNI that are provided to Congress and the FISC. In addition, the Inspectors General of the Department of Justice and certain elements of the Intelligence Community are authorized to review the implementation of Section 702 and must provide copies of any such reviews to the Attorney General, DNI, and congressional committees of jurisdiction. The head of each element of the Intelligence Community conducting an acquisition under Section 702 is also required to perform annual reviews of the implementation of Section 702 and provide copies of those reviews to the FISC, Attorney General, DNI, and congressional committees of jurisdiction. Also, Section 707 mandates comprehensive semiannual reports by the Attorney General to the congressional intelligence and judiciary committees on the implementation of Title VII. Finally, pursuant to Section 601 of the Act, the Attorney General is required to provide a semiannual report to congressional intelligence and judiciary committees that includes summaries of significant legal interpretations of FISA made by the FISC and copies of all decisions, orders, or opinions of the FISC that include a significant construction or interpretation of the Act.

It should also be clear what is not involved in this sunset extension. Title VIII of FISA, which was added by Title II of the FISA Amendments Act, established procedures for immunity for electronic communication service providers who furnish certain assistance to an element of the Intelligence Community, including assistance furnished in connection with an intelligence activity authorized by the President during the period between 2001 and 2007. These immunity provisions are not subject to a sunset. They have been subject, however, to judicial review as provided for in Title VIII of FISA. Nothing in the sunset extension in this bill will have any effect on such litigation or the underlying immunity provision of Title VIII of FISA.

SECTION-BY-SECTION ANALYSIS AND EXPLANATION

The following is a section-by-section analysis and explanation of the FAA Sunsets Extension Act of 2012 that is being reported by the Committee.

Section 1. Short title

Section 1 states that the Act may be cited as the “FAA Sunsets Extension Act of 2012.”

Section 2. Extension of FISA Amendments Act of 2008 Sunset

Section 2(a) amends Section 403(b)(1) of the FISA Amendments Act of 2008 (Public Law 110–261; 50 U.S.C. 1881 note) by striking “December 31, 2012” and inserting “June 1, 2017”.

Subsection (b) makes technical and conforming changes in Section 403(b)(2) of the Act.

Subsection (c) amends the heading in Section 404(b)(1) of the Act to strike “DECEMBER 31, 2012” and insert “JUNE 1, 2017”.

COMMITTEE ACTION

On May 22, 2012, a quorum being present, the Committee met to consider the bill and amendments. The Committee took the following actions:

Votes on amendments to the committee bill

By unanimous consent, the Committee made the Chairman and Vice Chairman’s bill the base text for purposes of amendment. The Committee also authorized the staff to make technical and conforming changes in the bill and report, following the completion of the mark-up.

By a vote of 12 ayes and 3 noes, the Committee determined that Senator Wyden’s motion to request that the Committee’s Technical Advisory Group be reconstituted to examine the FISA Amendments Act was out of order. The votes in person or by proxy were as follows: Chairman Feinstein—aye; Senator Rockefeller—aye; Senator Wyden—no; Senator Mikulski—aye; Senator Nelson—aye; Senator Conrad—no; Senator Udall—no; Senator Warner—aye; Vice Chairman Chambliss—aye; Senator Snowe—aye; Senator Burr—aye; Senator Risch—aye; Senator Coats—aye; Senator Blunt—aye; Senator Rubio—aye.

By a vote of 2 ayes to 13 noes, the Committee rejected an amendment offered by Senator Wyden and Senator Udall, to require a report by the Inspector General of the Department of Justice and the Inspector General of the Intelligence Community on the implementation of the amendments made by the FISA Amendments Act of 2008. The votes in person or by proxy were as follows: Chairman Feinstein—no; Senator Rockefeller—no; Senator Wyden—aye; Senator Mikulski—no; Senator Nelson—no; Senator Conrad—no; Senator Udall—aye; Senator Warner—no; Vice Chairman Chambliss—no; Senator Snowe—no; Senator Burr—no; Senator Risch—no; Senator Coats—no; Senator Blunt—no; Senator Rubio—no.

By a vote of 2 ayes to 13 noes, the Committee rejected an amendment offered by Senator Wyden and Senator Udall, concerning prohibitions on acquisition of or searching contents of communications of United States persons. The votes in person or by proxy were as follows: Chairman Feinstein—no; Senator Rockefeller—no; Senator Wyden—aye; Senator Mikulski—no; Senator Nelson—no; Senator Conrad—no; Senator Udall—aye; Senator Warner—no; Vice Chairman Chambliss—no; Senator Snowe—no; Senator Burr—no; Senator Risch—no; Senator Coats—no; Senator Blunt—no; Senator Rubio—no.

Vote to report the committee bill

The Committee voted to report the bill, by a vote of 13 ayes and 2 noes. The votes in person or by proxy were as follows: Chairman Feinstein—aye; Senator Rockefeller—aye; Senator Wyden—no; Senator Mikulski—aye; Senator Nelson—aye; Senator Conrad—aye; Senator Udall—no; Senator Warner—aye; Vice Chairman Chambliss—aye; Senator Snowe—aye; Senator Burr—aye; Senator

Risch—aye; Senator Coats—aye; Senator Blunt—aye; Senator Rubio—aye.

COMPLIANCE WITH RULE XLIV

Rule XLIV of the Standing Rules of the Senate requires publication of a list of any “congressionally directed spending item, limited tax benefit, and limited tariff benefit” that is included in the bill or the committee report accompanying the bill. Consistent with the determination of the Committee not to create any congressionally directed spending items or earmarks, none have been included in the bill or the report to accompany it. The bill and report also contain no limited tax benefits or limited tariff benefits.

ESTIMATE OF COSTS

Pursuant to paragraph 11(a)(3) of rule XXVI of the Standing Rules of the Senate, the Committee deems it impractical to include an estimate of the costs incurred in carrying out the provisions of this report due to the classified nature of the operations conducted pursuant to this legislation. On May 24, 2012, the Committee transmitted this bill to the Congressional Budget Office and requested it to conduct an estimate of the costs incurred in carrying out unclassified provisions.

EVALUATION OF REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee finds that no substantial regulatory impact will be incurred by implementing the provisions of this legislation.

CHANGES IN EXISTING LAWS

In the opinion of the Committee, it is necessary to dispense with the requirements of paragraph 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

ADDITIONAL VIEWS

For the past four years, the Senate Select Committee on Intelligence has conducted robust oversight of the Executive Branch's use of the surveillance authorities added to the Foreign Intelligence Surveillance Act (FISA) by the FISA Amendments Act of 2008 (FAA). This oversight has included the receipt and examination of over eight assessments and reviews per year concerning the implementation of FAA surveillance authorities, which by law are required to be prepared by the Attorney General, the Director of National Intelligence, the heads of various elements of the intelligence community, and the Inspectors General associated with those elements. In addition, the Committee has received and scrutinized unredacted copies of every classified opinion of the Foreign Intelligence Surveillance Court (FISA Court) containing a significant construction or interpretation of the law, as well as the pleadings submitted by the Executive Branch to the FISA Court relating to such opinions. Finally, the Committee has conducted several full hearings on both FISA generally and FAA specifically, which have been supplemented by numerous staff meetings with officials from the National Security Agency (NSA), Department of Justice (DOJ), Office of the Director of National Intelligence (ODNI), Federal Bureau of Investigation (FBI), and others.

As Chairman of the Committee, I appreciate the efforts taken by the Executive Branch to keep the Committee fully informed regarding the implementation of the FAA and for its continued willingness to brief Members of Congress as we consider legislation to extend those provisions of the law set to expire on December 31, 2012.

Collectively, the assessments, reports, and other information obtained by the Committee demonstrate that the government implements the FAA surveillance authorities in a responsible manner with relatively few incidents of non-compliance. Where such incidents have arisen, they have been the inadvertent result of human error or technical defect and have been promptly reported and remedied. Through four years of oversight, the Committee has not identified a single case in which a government official engaged in a willful effort to circumvent or violate the law. Moreover, having reviewed opinions by the FISA Court, the Committee has also seen the seriousness with which the Court takes its responsibility to carefully consider Executive Branch applications for the exercise of FAA surveillance authorities.

As a result of this oversight, the Committee has acted on a large, bipartisan majority basis to reauthorize the parts of this important legislation that are set to expire at the end of this year. For the reasons described elsewhere in this report concerning the intelligence value the FAA provides, I believe that reauthorization is imperative.

As the Committee considered legislation to reauthorize these expiring provisions, concerns were raised regarding the effects that one provision (Section 702 of FISA) may have on the privacy and civil liberties of U.S. persons. This provision established a legal framework for the government to acquire foreign intelligence by targeting *non-U.S. persons* who are reasonably believed to be located *outside* the United States, under a program that is approved by the FISA Court. The concerns associated with this provision—some of which are articulated elsewhere in this report—stem from the potential for collection directed at non-U.S. persons located abroad to result in incidental collection of communications of or concerning U.S. persons. I understand these concerns, and would like to explain why I believe that the existing FAA provisions are adequate to address them.

First, Section 702 is narrowly tailored to ensure that it may only be used to target non-U.S. persons located abroad. For example, Section 702 includes specific prohibitions on targeting U.S. persons or persons inside the United States and engaging in so-called “reverse targeting” (i.e., targeting a non-U.S. person abroad in order to obtain their communications with a person inside the United States).

Second, Congress recognized at the time the FISA Amendments Act was enacted that it is simply not possible to collect intelligence on the communications of a party of interest without also collecting information about the people with whom, and about whom, that party communicates, including in some cases non-targeted U.S. persons. It is important to recognize, however, that a similar potential for incidental collection concerning non-targeted U.S. persons exists under traditional FISA collection and law enforcement wiretaps, and it is a concern that was addressed when the FAA was originally drafted.

Specifically, in order to protect the privacy and civil liberties of U.S. persons, Congress mandated that, for collection conducted under Section 702, the Attorney General adopt, and the FISA Court review and approve, procedures that minimize the acquisition, retention, and dissemination of nonpublicly available information concerning unconsenting U.S. persons.

Third, the numerous reporting requirements outlined above provide the Committee with extensive visibility into the application of these minimization procedures and enable the Committee to evaluate the extent to which these procedures are effective in protecting the privacy and civil liberties of U.S. persons. Notably, the FISA Court, which receives many of the same reports available to the Committee, has repeatedly held that collection carried out pursuant to the Section 702 minimization procedures used by the government is reasonable under the Fourth Amendment.

During the Committee’s consideration of this legislation, several Senators expressed a desire to quantify the extent of incidental collection under Section 702. I share this desire. However, the Committee has been repeatedly advised by the ODNI that due to the nature of the collection and the limits of the technology involved, it is not reasonably possible to identify the number of people located in the United States whose communications may have been reviewed under Section 702 authority. Senators Ron Wyden and

Mark Udall have requested a review by the Inspector General of the NSA and the Inspector General of the Intelligence Community to determine whether it is feasible to estimate this number. The Inspectors General are conducting that review now, thus making an amendment on this subject unnecessary.

Finally, on a related matter, the Committee considered whether querying information collected under Section 702 to find communications of a particular United States person should be prohibited or more robustly constrained. As already noted, the Intelligence Community is strictly prohibited from using Section 702 to target a U.S. person, which must at all times be carried out pursuant to an individualized court order based upon probable cause. With respect to analyzing the information lawfully collected under Section 702, however, the Intelligence Community provided several examples in which it might have a legitimate foreign intelligence need to conduct queries in order to analyze data already in its possession. The Department of Justice and Intelligence Community reaffirmed that any queries made of Section 702 data will be conducted in strict compliance with applicable guidelines and procedures and do not provide a means to circumvent the general requirement to obtain a court order before targeting a U.S. person under FISA.

Ultimately, it is in the Nation's interest to see this statute reauthorized, and the first priority of this Congress must be to ensure that this important law does not lapse at the end of the year. The Committee's action to report a clean bill that would extend the sunsets of the FISA Amendments Act, without amendment that could impede its ultimate enactment, is an important step in ensuring this result.

I look forward to moving this process forward, through the Senate and in discussions with the House of Representatives.

DIANNE FEINSTEIN.

MINORITY VIEWS

The bill that is now being reported by the Senate Intelligence Committee would extend the expiration date of the FISA Amendments Act of 2008 from December 2012 to June 2017. We opposed this long-term, multi-year extension because we believe that Congress does not have an adequate understanding of the impact that this law has had on the privacy of law-abiding American citizens. In our view it is important for members of Congress and the public to get a fuller understanding of this law's privacy impact so that Congress can consider whether it should be modified, rather than simply extended without changes.

We are particularly concerned about a loophole in the law that could allow the government to effectively conduct warrantless searches for Americans' communications. Since we do not know how many Americans have had their phone calls and emails collected under this law, we believe that it is particularly important to have strong rules in place to protect the privacy of these Americans. We are disappointed that this bill does not attempt to add these protections.

The central provision in the FISA Amendments Act added a new section 702 to the original FISA statute. Section 702 was designed to give the government new authorities to collect the communications of people who are reasonably believed to be foreigners outside the United States. Because section 702 does not involve obtaining individual warrants, it contains language specifically intended to limit the government's ability to use these new authorities to deliberately spy on American citizens.¹

We have concluded, however, that section 702 currently contains a loophole that could be used to circumvent traditional warrant protections and search for the communications of a potentially large number of American citizens. We have sought repeatedly to gain an understanding of how many Americans have had their phone calls or emails collected and reviewed under this statute, but we have not been able to obtain even a rough estimate of this number.

The Office of the Director of National Intelligence told the two of us in July 2011 that "it is not reasonably possible to identify the number of people located in the United States whose communications may have been reviewed" under the FISA Amendments Act. We are prepared to accept that it might be difficult to come up with an exact count of this number, but it is hard for us to believe that it is impossible to even estimate it.

¹The FISA Amendments Act also contains provisions that are intended to require the government to get an individual warrant before deliberately collecting the communications of an American believed to be outside the United States. These provisions, which were added by an amendment offered by Senator Wyden, are now sections 703 and 704 of the FISA statute.

During the committee's markup of this bill we offered an amendment that would have directed the Inspectors General of the Intelligence Community and the Department of Justice to produce an estimate of how many Americans have had their communications collected under section 702. Our amendment would have permitted the Inspectors General to come up with a rough estimate of this number, using whatever analytical techniques they deemed appropriate. We are disappointed that this amendment was voted down by the committee, but we will continue our efforts to obtain this information.²

We are concerned, of course, that if no one has even estimated how many Americans have had their communications collected under the FISA Amendments Act, then it is possible that this number could be quite large. Since all of the communications collected by the government under section 702 are collected without individual warrants, we believe that there should be clear rules prohibiting the government from searching through these communications in an effort to find the phone calls or emails of a particular American, unless the government has obtained a warrant or emergency authorization permitting surveillance of that American.

Section 702, as it is currently written, does not contain adequate protections against warrantless "back door" searches of this nature. We offered an amendment during the committee's markup of this bill that would have clarified the law to prohibit searching through communications collected under section 702 in an effort to find a particular American's communications. Our amendment included exceptions for searches that involved a warrant or an emergency authorization, as well as for searches for the phone calls or emails of people who are believed to be in danger or who consent to the search.³ We were disappointed that this amendment was also voted down by the committee, but we will continue to work to close this loophole before the FISA Amendments Act is extended.

We recognize that the collection that has taken place under the FISA Amendments Act has produced some useful intelligence, so our preference would be to enact a short-term reauthorization to give Congress time to get more information about the impact of this law on Americans' privacy rights and consider possible modifications. We believe that protections against warrantless searches for Americans' communications should be added to the law immediately, however.

An obvious question that we have not answered here is whether any warrantless searches for Americans' communications have taken place. We are not suggesting that any warrantless searches have or have not occurred, because Senate and committee rules regarding classified information generally prohibit us from discussing what intelligence agencies are actually doing or not doing. However, we have an obligation as elected legislators to discuss what these agencies *should* or *should not* be doing, and we hope that a majority of our Senate colleagues will agree with us that searching

²We also proposed directing the committee's Technical Advisory Group to study FISA Amendments Act collection and provide recommendations for improvements. We were disappointed that our motion to request that the Technical Advisory Group study this issue was ruled by our colleagues to be out of order.

³The full text of both of our amendments is below.

for Americans' phone calls and emails without a warrant is something that these agencies should not do.

RON WYDEN.
MARK UDALL.

COMMITTEE AMENDMENT PROPOSED BY MR. WYDEN (FOR HIMSELF
AND MR. UDALL OF COLORADO)

At the appropriate place, insert the following:

SEC. ____ . REPORT ON THE IMPLEMENTATION OF THE FISA AMENDMENTS ACT OF 2008.

(a) **REQUIREMENT FOR REPORT.**—Not later than one year after the date of the enactment of this Act, the Inspector General of the Department of Justice and the Inspector General of the Intelligence Community shall submit to the entities described in subsection (b) a report on the implementation of the amendments made by the FISA Amendments Act of 2008 (Public Law 110–261; 122 Stat. 2436).

(b) **ENTITIES DESCRIBED.**—The entities described in this subsection are the following:

- (1) Congress.
- (2) The Attorney General.
- (3) The Director of National Intelligence.
- (4) The court established under section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803).

(c) **CONTENT.**—The report required by subsection (a) shall include the following:

(1) An assessment of the impact that implementation of section 702 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1881a) has had on the privacy of persons inside the United States.

(2) An assessment of the extent to which acquisitions made under such section 702 have resulted in the acquisition or review of the contents of communications of persons located inside the United States, including—

(A) the number of persons located inside the United States who have had the contents of their communications acquired under such section 702, and the number of persons located inside the United States who have had the contents of their communications reviewed under such section 702; or

(B) if it is not possible to determine such numbers, the estimate of the Inspectors General of such numbers made using representative sampling or other analytical techniques.

(3) A review of the Inspectors General of incidents of non-compliance with such section 702, with a particular focus on any types of non-compliance incidents that have recurred, and the impact of such non-compliance on the privacy of persons inside the United States.

(4) An assessment of any significant instances in which an intelligence agency may have complied with the statutory language of such section 702, but not with the spirit or intent of

such section 702, and the impact of such non-compliance on the privacy of persons inside the United States.

(d) CONSULTATION.—The Inspector General of the Department of Justice and the Inspector General of the Intelligence Community may consult with the inspectors general of elements of the intelligence community in preparing the report required by subsection (a).

(e) ACCESS.—The Inspector General of the Department of Justice and the Inspector General of the Intelligence Community shall have all appropriate access needed to prepare the report required by subsection (a).

(f) PUBLIC DISCLOSURE.—The Inspector General of the Department of Justice and the Inspector General of the Intelligence Community shall make the report required by subsection (a) available to the public. The version made available to the public shall contain whatever redactions may be necessary to protect properly classified information.

COMMITTEE AMENDMENT PROPOSED BY MR. WYDEN (FOR HIMSELF
AND MR. UDALL OF COLORADO)

At the appropriate place, insert the following:

SEC. __. CLARIFICATION ON PROHIBITION ON ACQUISITION OF OR SEARCHING CONTENTS OF COMMUNICATIONS OF UNITED STATES PERSONS.

Section 702 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1881a) is amended—

(1) in subsection (b), by redesignating paragraphs (1) through (5) as subparagraphs (A) through (E), respectively, and indenting such subparagraphs, as so redesignated, an additional two ems from the left margin;

(2) by striking “An acquisition” and inserting the following:

“(1) IN GENERAL.—An acquisition”; and

(3) by adding at the end the following:

“(2) CLARIFICATION ON PROHIBITION ON ACQUISITION OF OR SEARCHING CONTENTS OF COMMUNICATIONS OF UNITED STATES PERSONS.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), nothing in this section may be construed to permit—

“(i) the intentional acquisition of the contents of communications of a particular United States person; or

“(ii) the searching of the contents of communications acquired under this section in an effort to find communications of a particular United States person.

“(B) CONCURRENT AUTHORIZATION AND EXCEPTION FOR EMERGENCY SITUATIONS.—Subparagraph (A) does not apply to a search of communications related to a particular United States person if—

“(i) such United States person is the subject of an order or emergency authorization authorizing electronic surveillance or physical search under section 105, 304, 703 or 704, or title 18, United States Code, for the effective period of that order;

“(ii) the entity carrying out the search has a reasonable belief that the life or safety of such United States person is threatened and the information is sought for the purpose of assisting that person; or

“(iii) such United States person has consented to the search.”.

APPENDIX

BACKGROUND PAPER ON TITLE VII OF FISA PREPARED BY THE DEPARTMENT OF JUSTICE AND THE OFFICE OF DIRECTOR OF NATIONAL INTELLIGENCE (ODNI)

This paper describes the provisions of Title VII of the Foreign Intelligence Surveillance Act (FISA) that were added by the FISA Amendments Act of 2008 (FAA).⁵ Title VII has proven to be an extremely valuable authority in protecting our nation from terrorism and other national security threats. Title VII is set to expire at the end of this year, and its reauthorization is the top legislative priority of the Intelligence Community.

The FAA added a new section 702 to FISA, permitting the Foreign Intelligence Surveillance Court (FISC) to approve surveillance of terrorist suspects and other foreign intelligence targets who are *non-U.S. persons outside the United States*, without the need for individualized court orders. Section 702 includes a series of protections and oversight measures to safeguard the privacy and civil liberties interests of U.S. persons. FISA continues to include its original electronic surveillance provisions, meaning that, in most cases,⁶ an individualized court order, based on probable cause that the target is a foreign power or an agent of a foreign power, is still required to conduct electronic surveillance of targets inside the United States. Indeed, other provisions of Title VII extend these protections to U.S. persons overseas. The extensive oversight measures used to implement these authorities demonstrate that the Government has used this capability in the manner contemplated by Congress, taking great care to protect privacy and civil liberties interests.

This paper begins by describing how section 702 works, its importance to the Intelligence Community, and its extensive oversight provisions. Next, it turns briefly to the other changes made to FISA by the FAA, including section 704, which requires an order from the FISC before the Government may engage in surveillance targeted at U.S. persons overseas. Third, this paper describes the reporting to Congress that the Executive Branch has done under Title VII of FISA. Finally, this paper explains why the Administration believes it is essential that Congress reauthorize Title VII.

⁵Title VII of FISA is codified at 50 U.S.C. §§ 1881–1881g.

⁶In very limited circumstances, FISA expressly permits surveillance without a court order. See, e.g., 50 U.S.C. § 1805(e) (Attorney General may approve emergency surveillance if the standards of the statute are met and he submits an application to the FISC within seven days).

1. Section 702 provides valuable foreign intelligence information about terrorists and other targets overseas, while protecting the privacy and civil liberties of Americans

Section 702 permits the FISC to approve surveillance of terrorist suspects and other targets who are non-U.S. persons outside the United States, without the need for individualized court orders. The FISC may approve surveillance of these kinds of targets when the Government needs the assistance of an electronic communications service provider.

Before the enactment of the FAA and its predecessor legislation, in order to conduct the kind of surveillance authorized by section 702, FISA was interpreted to require that the Government show on an individualized basis, with respect to all non-U.S. person targets located overseas, that there was probable cause to believe that the target was a foreign power or an agent of a foreign power, and to obtain an order from the FISC approving the surveillance on this basis. In effect, the Intelligence Community treated non-U.S. persons located overseas like persons in the United States, even though foreigners outside the United States generally are not entitled to the protections of the Fourth Amendment. Although FISA's original procedures are proper for electronic surveillance of persons inside this country, such a process for surveillance of terrorist suspects overseas can slow, or even prevent, the Government's acquisition of vital information, without enhancing the privacy interests of Americans. Since its enactment in 2008, section 702 has significantly increased the Government's ability to act quickly.

Under section 702, instead of issuing individual court orders, the FISC approves annual certifications submitted by the Attorney General and the DNI that identify categories of foreign intelligence targets. The provision contains a number of important protections for U.S. persons and others in the United States. First, the Attorney General and the DNI must certify that a significant purpose of the acquisition is to obtain foreign intelligence information. Second, an acquisition may not intentionally target a U.S. person. Third, it may not intentionally target any person known at the time of acquisition to be in the United States. Fourth, it may not target someone outside the United States for the purpose of targeting a particular, known person in this country. Fifth, section 702 prohibits the intentional acquisition of "any communication as to which the sender and all intended recipients are known at the time of the acquisition" to be in the United States. Finally, it requires that any acquisition be consistent with the Fourth Amendment.

To implement these provisions, section 702 requires targeting procedures, minimization procedures, and acquisition guidelines. The targeting procedures are designed to ensure that an acquisition only targets persons outside the United States, and that it complies with the restriction on acquiring wholly domestic communications. The minimization procedures protect the identities of U.S. persons, and any nonpublic information concerning them that may be incidentally acquired. The acquisition guidelines seek to ensure compliance with all of the limitations of section 702 described

above, and to ensure that the Government files an application with the FISC when required by FISA.

The FISC reviews the targeting and minimization procedures for compliance with the requirements of both the statute and the Fourth Amendment. Although the FISC does not approve the acquisition guidelines, it receives them, as do the appropriate congressional committees. By approving the certifications submitted by the Attorney General and the DNI as well as by approving the targeting and minimization procedures, the FISC plays a major role in ensuring that acquisitions under section 702 are conducted in a lawful and appropriate manner.

Section 702 is vital in keeping the nation safe. It provides information about the plans and identities of terrorists, allowing us to glimpse inside terrorist organizations and obtain information about how those groups function and receive support. In addition, it lets us collect information about the intentions and capabilities of weapons proliferators and other foreign adversaries who threaten the United States. Failure to reauthorize section 702 would result in a loss of significant intelligence and impede the ability of the Intelligence Community to respond quickly to new threats and intelligence opportunities. Although this unclassified paper cannot discuss more specifically the nature of the information acquired under section 702 or its significance, the Intelligence Community is prepared to provide Members of Congress with detailed classified briefings as appropriate.

The Executive Branch is committed to ensuring that its use of section 702 is consistent with the law, the FISC's orders, and the privacy and civil liberties interests of U.S. persons. The Intelligence Community, the Department of Justice, and the FISC all oversee the use of section 702. In addition, congressional committees conduct essential oversight, which is discussed in section 3 below.

Oversight of activities conducted under section 702 begins with components in the intelligence agencies themselves, including their Inspectors General. The targeting procedures, described above, seek to ensure that an acquisition targets only persons outside the United States and that it complies with section 702's restriction on acquiring wholly domestic communications. For example, the targeting procedures for the National Security Agency (NSA) require training of agency analysts, and audits of the databases they use. NSA's Signals Intelligence Directorate also conducts other oversight activities, including spot checks of targeting decisions. With the strong support of Congress, NSA has established a compliance office, which is responsible for developing, implementing, and monitoring a comprehensive mission compliance program.

Agencies using section 702 authority must report promptly to the Department of Justice and ODNI incidents of noncompliance with the targeting or minimization procedures or the acquisition guidelines. Attorneys in the National Security Division (NSD) of the Department routinely review the agencies' targeting decisions. At least once every 60 days, NSD and ODNI conduct oversight of the agencies' activities under section 702. These reviews are normally conducted on-site by a joint team from NSD and ODNI. The team evaluates and, where appropriate, investigates each potential inci-

dent of noncompliance, and conducts a detailed review of agencies' targeting and minimization decisions.

Using the reviews by Department of Justice and ODNI personnel, the Attorney General and the DNI conduct a semi-annual assessment, as required by section 702, of compliance with the targeting and minimization procedures and the acquisition guidelines. The assessments have found that agencies have "continued to implement the procedures and follow the guidelines in a manner that reflects a focused and concerted effort by agency personnel to comply with the requirements of Section 702." The reviews have not found "any intentional attempt to circumvent or violate" legal requirements. Rather, agency personnel "are appropriately focused on directing their efforts at non-United States persons reasonably believed to be located outside the United States."⁷

Section 702 thus enables the Government to collect information effectively and efficiently about foreign targets overseas and in a manner that protects the privacy and civil liberties of Americans. Through rigorous oversight, the Government is able to evaluate whether changes are needed to the procedures or guidelines, and what other steps may be appropriate to safeguard the privacy of personal information. In addition, the Department of Justice provides the joint assessments and other reports to the FISC. The FISC has been actively involved in the review of section 702 collection. Together, all of these mechanisms ensure thorough and continuous oversight of section 702 activities.

2. Other important provisions of Title VII of FISA also should be reauthorized

In contrast to section 702, which focuses on foreign targets, section 704 provides heightened protection for collection activities conducted overseas and directed against U.S. persons located outside the United States. Section 704 requires an order from the FISC in circumstances in which the target has "a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes." It also requires a showing of probable cause that the targeted U.S. person is "a foreign power, an agent of a foreign power, or an officer or employee of a foreign power." Previously, these activities were outside the scope of FISA and governed exclusively by section 2.5 of Executive Order 12333.⁸ By requiring the approval of the FISC, section 704 enhanced the civil liberties of U.S. persons.

The FAA also added several other provisions to FISA. Section 703 complements section 704 and permits the FISC to authorize an application targeting a U.S. person outside the United States to acquire foreign intelligence information, if the acquisition constitutes electronic surveillance or the acquisition of stored electronic com-

⁷ *Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, Submitted by the Attorney General and the Director of National Intelligence, Reporting Period: December 1, 2010–May 31, 2011* at 2–3, 5 (December 2011).

⁸ Since before the enactment of the FAA, section 2.5 of Executive Order 12333 has required the Attorney General to approve the use by the Intelligence Community against U.S. persons abroad of "any technique for which a warrant would be required if undertaken for law enforcement purposes." The Attorney General must find that there is probable cause to believe that the U.S. person is a foreign power or an agent of a foreign power. The provisions of section 2.5 continue to apply to these activities, in addition to the requirements of section 704.

munications or data, and is conducted in the United States. Because the target is a U.S. person, section 703 requires an individualized court order and a showing of probable cause that the target is a foreign power, an agent of a foreign power, or an officer or employee of a foreign power. Other sections of Title VII allow the Government to obtain various authorities simultaneously, govern the use of information in litigation, and provide for congressional oversight. Section 708 clarifies that nothing in Title VII is intended to limit the Government's ability to obtain authorizations under other parts of FISA.

3. Congress has been kept fully informed, and conducts vigorous oversight, of Title VII's implementation

FISA imposes substantial reporting requirements on the Government to ensure effective congressional oversight of these authorities. Twice a year, the Attorney General must "fully inform, in a manner consistent with national security," the Intelligence and Judiciary Committees about the implementation of Title VII. With respect to section 702, this semi-annual report must include copies of certifications and significant FISC pleadings and orders. It also must describe any compliance incidents, any use of emergency authorities, and the FISC's review of the Government's pleadings. With respect to sections 703 and 704, the report must include the number of applications made, and the number granted, modified, or denied by the FISC.

Section 702 requires the Government to provide to the Intelligence and Judiciary Committees its assessment of compliance with the targeting and minimization procedures and the acquisition guidelines. In addition, Title VI of FISA requires a summary of significant legal interpretations of FISA in matters before the FISC or the Foreign Intelligence Surveillance Court of Review. The requirement extends to interpretations presented in applications or pleadings filed with either court by the Department of Justice. In addition to the summary, the Department must provide copies of judicial decisions that include significant interpretations of FISA within 45 days.

The Government has complied with the substantial reporting requirements imposed by FISA to ensure effective congressional oversight of these authorities. The Government has informed the Intelligence and Judiciary Committees of acquisitions authorized under section 702; reported, in detail, on the results of the reviews and on compliance incidents and remedial efforts; made all written reports on these reviews available to the Committees; and provided summaries of significant interpretations of FISA, as well as copies of relevant judicial opinions and pleadings.

4. It is essential that Title VII of FISA be reauthorized well in advance of its expiration

The Administration strongly supports the reauthorization of Title VII of FISA. It was enacted after many months of bipartisan effort and extensive debate. Since its enactment, Executive Branch officials have provided extensive information to Congress on the Government's use of Title VII, including reports, testimony, and numerous briefings for Members and their staffs. This extensive

record demonstrates the proven value of these authorities, and the commitment of the Government to their lawful and responsible use.

Reauthorization will ensure continued certainty with the rules used by Government employees and our private partners. The Intelligence Community has invested significant human and financial resources to enable its personnel and technological systems to acquire and review vital data quickly and lawfully. Our adversaries, of course, seek to hide the most important information from us. It is at best inefficient and at worst unworkable for agencies to develop new technologies and procedures and train employees, only to have a statutory framework subject to wholesale revision. This is particularly true at a time of limited resources. It is essential that these authorities remain in place without interruption—and without the threat of interruption—so that those who have been entrusted with their use can continue to protect our nation from its enemies.

