

OIP GROUP 5

Ahmad, Usman

From: Benczkowski, Brian A (OLA)
Sent: Tuesday, October 09, 2007 5:21 AM
To: Tracci, Robert N
Subject: Re: draft FISA revision

EFF2OLA(2)-163

Our guys have it already. Apparently it is known as the "ACLU working draft"

----- Original Message -----
From: Tracci, Robert N
To: Benczkowski, Brian A (OLA)
Sent: Mon Oct 08 20:38:14 2007
Subject: Fw: draft FISA revision

EFF2OLA(2)-164

I don't want to forward to folks with the accomanying email thread.

NO was great.

----- Original Message -----
From: Volkov, Michael [redacted]@mail.house.gov
To: Tracci, Robert N
Sent: Mon Oct 08 11:47:19 2007
Subject: Fw: draft FISA revision

EFF2OLA(2)-165

I assume you have a copy
Michael Volkov

-----Original Message-----
From: McLaughlin, Sean
To: Beach, Allison; Volkov, Michael; Lynch, Caroline; Cylke, Chris; Blom, Bryan; Gibson, Joseph; [redacted]@mail.house.gov'
[redacted]@mail.house.gov
Sent: Mon Oct 08 10:44:01 2007
Subject: Fw: draft FISA revision

EFF2OLA(2)-166

FOIA Exemption b(6)

FOIA Exemption b(6)

Please find the RESTORE Republicans to the Majority Act attached below.

Sent using BlackBerry

-----Original Message-----
From: Apelbaum, Perry
To: Gibson, Joseph; McLaughlin, Sean
Sent: Mon Oct 08 10:24:29 2007
Subject: draft FISA revision

EFF2OLA(2)-167

<<FISAMOD_002_xml.pdf>>
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Please find attached a discussion draft of the RESTORE Act (the revisions to the Foreign Intelligence Surveillance Act modifications that were made this summer) that is currently contemplated for introduction tomorrow

3/14/2008

Re: draft FISA revision

Page 2 of 2

Thank you

Perry Apelbaum

Judiciary Committee

3/14/2008

[DISCUSSION DRAFT]

110TH CONGRESS
1ST SESSION

H. R. _____

To amend the Foreign Intelligence Surveillance Act of 1978 to establish a procedure for authorizing certain acquisitions of foreign intelligence, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Foreign Intelligence Surveillance Act of 1978 to establish a procedure for authorizing certain acquisitions of foreign intelligence, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Responsible Electronic Surveillance That is Overseen,
6 Reviewed, and Effective Act of 2007” or “RESTORE Act
7 of 2007”.

1 (b) TABLE OF CONTENTS.—The table of contents for
2 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Clarification of electronic surveillance of persons outside the United States.
- Sec. 3. Procedure for authorizing acquisitions of communications of persons located outside the United States.
- Sec. 4. Emergency authorization of acquisitions of communications of persons located outside the United States.
- Sec. 5. Oversight of acquisitions of communications of persons located outside of the United States.
- Sec. 6. Foreign Intelligence Surveillance Court en banc.
- Sec. 7. Audit of warrantless surveillance programs.
- Sec. 8. Database on acquisition of communications of United States persons without a court order.
- Sec. 9. Authorization for increased resources relating to foreign intelligence surveillance.
- Sec. 10. Reiteration of FISA as the exclusive means by which electronic surveillance may be conducted for gathering foreign intelligence information.
- Sec. 11. Technical and conforming amendments.
- Sec. 12. Sunset; transition procedures.

3 **SEC. 2. CLARIFICATION OF ELECTRONIC SURVEILLANCE**
4 **OF PERSONS OUTSIDE THE UNITED STATES.**

5 Section 105A of the Foreign Intelligence Surveillance
6 Act of 1978 (50 U.S.C. 1801 et seq.) is amended to read
7 as follows:

8 “CLARIFICATION OF ELECTRONIC SURVEILLANCE OF
9 PERSONS OUTSIDE THE UNITED STATES

10 “SEC. 105A. (a) FOREIGN TO FOREIGN COMMUNICA-
11 TIONS.—Notwithstanding any other provision of this Act,
12 a court order is not required for the acquisition of the
13 contents of any communication between persons that are
14 not located within the United States for the purpose of
15 collecting foreign intelligence information (as defined in
16 paragraph (1) or (2)(A) of section 101(e)), without re-

1 spect to whether the communication passes through the
2 United States or the surveillance device is located within
3 the United States:

4 “(b) COMMUNICATIONS OF PERSONS OUTSIDE OF
5 THE UNITED STATES.—Notwithstanding any other provi-
6 sion of this Act, electronic surveillance that is directed at
7 the acquisition of the communications of a person reason-
8 ably believed to be outside the United States for the pur-
9 pose of collecting foreign intelligence information (as de-
10 fined in paragraph (1) or (2)(A) of section 101(e)) by tar-
11 geting that person shall be conducted pursuant to—

12 “(1) an order approved in accordance with sec-
13 tion 105 or 105B; or

14 “(2) an emergency authorization in accordance
15 with section 105C.”.

16 **SEC. 3. PROCEDURE FOR AUTHORIZING ACQUISITIONS OF**
17 **COMMUNICATIONS OF PERSONS LOCATED**
18 **OUTSIDE THE UNITED STATES.**

19 Section 105B of the Foreign Intelligence Surveillance
20 Act of 1978 (50 U.S.C. 1801 et seq.) is amended to read
21 as follows:

22 **“PROCEDURE FOR AUTHORIZING ACQUISITIONS OF COM-**
23 **MUNICATIONS OF PERSONS LOCATED OUTSIDE THE**
24 **UNITED STATES**

25 **“SEC. 105B. (a) IN GENERAL.—**Notwithstanding
26 any other provision of this Act, the Director of National

1 Intelligence and the Attorney General may jointly apply
2 to a judge of the court established under section 103(a)
3 for an ex parte order, or the extension of an order, author-
4 izing for a period of up to one year the acquisition of com-
5 munications of persons reasonably believed to be outside
6 the United States for the purpose of collecting foreign in-
7 telligence information (as defined in paragraph (1) or
8 (2)(A) of section 101(e)) by targeting those persons.

9 “(b) APPLICATION INCLUSIONS.—An application
10 under subsection (a) shall include—

11 “(1) a certification by the Director of National
12 Intelligence and the Attorney General that—

13 “(A) the targets of the acquisition of for-
14 eign intelligence information under this section
15 are persons reasonably believed to be located
16 outside the United States;

17 “(B) the targets of the acquisition are not
18 known United States persons;

19 “(C) the acquisition involves obtaining the
20 foreign intelligence information from, or with
21 the assistance of, a communications service pro-
22 vider or custodian, or an officer, employee, or
23 agent of such service provider or custodian, who
24 has authorized access to the communications to
25 be acquired, either as they are transmitted or

1 while they are stored, or equipment that is
2 being or may be used to transmit or store such
3 communications; and

4 “(D) a significant purpose of the acquisi-
5 tion is to obtain foreign intelligence information
6 (as defined in paragraph (1) or (2)(A) of sec-
7 tion 101(e)); and

8 “(2) a description of—

9 “(A) the procedures that will be used by
10 the Director of National Intelligence and the
11 Attorney General during the duration of the
12 order to determine that there is a reasonable
13 belief that the targets of the acquisition are
14 persons outside the United States;

15 “(B) the nature of the information sought,
16 including the identity of any foreign power
17 against whom the acquisition will be directed;

18 “(C) minimization procedures that meet
19 the definition of minimization procedures under
20 section 101(h) to be used with respect to such
21 acquisition; and

22 “(D) the guidelines that will be used to en-
23 sure that an application is filed under section
24 104, if otherwise required by this Act, when the
25 Federal Government seeks to conduct electronic

1 surveillance of a person reasonably believed to
2 be located in the United States.

3 “(c) SPECIFIC PLACE NOT REQUIRED.—An applica-
4 tion under subsection (a) is not required to identify the
5 specific facilities, places, premises, or property at which
6 the acquisition of foreign intelligence information will be
7 directed.

8 “(d) REVIEW OF APPLICATION.—Not later than 15
9 days after a judge receives an application under subsection
10 (a), the judge shall review such application and shall ap-
11 prove the application if the judge finds that—

12 “(1) the proposed procedures referred to in sub-
13 section (b)(2)(A) are reasonably designed to deter-
14 mine whether the targets of the acquisition are out-
15 side the United States;

16 “(2) the proposed minimization procedures re-
17 ferred to in subsection (b)(2)(C) meet the definition
18 of minimization procedures under section 101(h);
19 and

20 “(3) the guidelines referred to in subsection
21 (b)(2)(D) are reasonably designed to ensure that an
22 application is filed under section 104, if otherwise
23 required by this Act, when the Federal Government
24 seeks to conduct electronic surveillance of a person

1 reasonably believed to be located in the United
2 States.

3 “(e) ORDER.—

4 “(1) IN GENERAL.—A judge approving an ap-
5 plication under subsection (d) shall issue an order—

6 “(A) authorizing the acquisition of the con-
7 tents of the communications as requested, or as
8 modified by the judge;

9 “(B) requiring the communications service
10 provider or custodian, or officer, employee, or
11 agent of such service provider or custodian, who
12 has authorized access to the information, facili-
13 ties, or technical assistance necessary to accom-
14 plish the acquisition to provide such informa-
15 tion, facilities, or technical assistance necessary
16 to accomplish the acquisition and to produce a
17 minimum of interference with the services that
18 provider, custodian, officer, employee, or agent
19 is providing the target of the acquisition;

20 “(C) requiring such communications serv-
21 ice provider, custodian, officer, employee, or
22 agent, upon the request of the applicant, to
23 maintain under security procedures approved by
24 the Attorney General and the Director of Na-

1 tional Intelligence any records concerning the
2 acquisition or the aid furnished;

3 “(D) directing the Federal Government
4 to—

5 “(i) compensate, at the prevailing
6 rate, a person for providing information,
7 facilities, or assistance pursuant to such
8 order; and

9 “(ii) provide a copy of the portion of
10 the order directing the person to comply
11 with the order to such person; and

12 “(E) directing the applicant to follow—

13 “(i) the procedures referred to in sub-
14 section (b)(2)(A) as proposed or as modi-
15 fied by the judge;

16 “(ii) the minimization procedures re-
17 ferred to in subsection (b)(2)(C) as pro-
18 posed or as modified by the judge; and

19 “(iii) the guidelines referred to in sub-
20 section (b)(2)(D) as proposed or as modi-
21 fied by the judge.

22 “(2) FAILURE TO COMPLY.—If a person fails to
23 comply with an order issued under paragraph (1),
24 the Attorney General may invoke the aid of the
25 court established under section 103(a) to compel

1 compliance with the order. Failure to obey an order
2 of the court may be punished by the court as con-
3 tempt of court. Any process under this section may
4 be served in any judicial district in which the person
5 may be found.

6 “(3) LIABILITY OF ORDER.—Notwithstanding
7 any other law, no cause of action shall lie in any
8 court against any person for providing any informa-
9 tion, facilities, or assistance in accordance with an
10 order issued under this subsection.

11 “(4) RETENTION OF ORDER.—The Director of
12 National Intelligence and the court established
13 under subsection 103(a) shall retain an order issued
14 under this section for a period of not less than 10
15 years from the date on which such order is issued.

16 “(5) ASSESSMENT OF COMPLIANCE WITH MINI-
17 MIZATION PROCEDURES.—At or before the end of
18 the period of time for which an acquisition is ap-
19 proved by an order or an extension under this sec-
20 tion, the judge may assess compliance with the mini-
21 mization procedures referred to in paragraph
22 (1)(E)(ii) and the guidelines referred to in para-
23 graph (1)(E)(iii) by reviewing the circumstances
24 under which information concerning United States
25 persons was acquired, retained, or disseminated.”

1 SEC. 4. EMERGENCY AUTHORIZATION OF ACQUISITIONS OF
2 COMMUNICATIONS OF PERSONS LOCATED
3 OUTSIDE THE UNITED STATES.

4 Section 105C of the Foreign Intelligence Surveillance
5 Act of 1978 (50 U.S.C. 1801 et seq.) is amended to read
6 as follows:

7 "EMERGENCY AUTHORIZATION OF ACQUISITIONS OF COM-
8 MUNICATIONS OF PERSONS LOCATED OUTSIDE THE
9 UNITED STATES

10 "SEC. 105C. (a) APPLICATION AFTER EMERGENCY
11 AUTHORIZATION.—As soon as is practicable, but not more
12 than 7 days after the Director of National Intelligence and
13 the Attorney General authorize an acquisition under this
14 section, an application for an order authorizing the acqui-
15 sition in accordance with section 105B shall be submitted
16 to the judge referred to in subsection (b)(2) of this section
17 for approval of the acquisition in accordance with section
18 105B.

19 "(b) EMERGENCY AUTHORIZATION.—Notwith-
20 standing any other provision of this Act, the Director of
21 National Intelligence and the Attorney General may joint-
22 ly authorize the emergency acquisition of foreign intel-
23 ligence information for a period of not more than 45 days
24 if—

25 "(1) the Director of National Intelligence and
26 the Attorney General jointly determine that—

1 “(A) an emergency situation exists with re-
2 spect to an authorization for an acquisition
3 under section 105B before an order approving
4 the acquisition under such section can with due
5 diligence be obtained;

6 “(B) the targets of the acquisition of for-
7 eign intelligence information under this section
8 are persons reasonably believed to be located
9 outside the United States;

10 “(C) there are reasonable procedures in
11 place for determining that the acquisition of
12 foreign intelligence information under this sec-
13 tion will be acquired by targeting only persons
14 reasonably believed to be located outside the
15 United States;

16 “(D) the targets of the acquisition are not
17 known United States persons;

18 “(E) the acquisition involves obtaining the
19 foreign intelligence information from, or with
20 the assistance of, a communications service pro-
21 vider or custodian, or an officer, employee, or
22 agent of such service provider or custodian, who
23 has authorized access to the communications to
24 be acquired, either as they are transmitted or
25 while they are stored, or equipment that is

1 being or may be used to transmit or store such
2 communications;

3 “(F) a significant purpose of the acquisi-
4 tion is to obtain foreign intelligence information
5 (as defined in paragraph (1) or (2)(A) of sec-
6 tion 101(e));

7 “(G) minimization procedures to be used
8 with respect to such acquisition activity meet
9 the definition of minimization procedures under
10 section 101(h); and

11 “(H) there are guidelines that will be used
12 to ensure that an application is filed under sec-
13 tion 104, if otherwise required by this Act,
14 when the Federal Government seeks to conduct
15 electronic surveillance of a person reasonably
16 believed to be located in the United States; and

17 “(2) the Director of National Intelligence and
18 the Attorney General, or their designees, inform a
19 judge having jurisdiction to approve an acquisition
20 under section 105B at the time of the authorization
21 under this section that the decision has been made
22 to acquire foreign intelligence information.

23 “(c) INFORMATION, FACILITIES, AND TECHNICAL
24 ASSISTANCE.—Pursuant to an authorization of an acquisi-
25 tion under this section, the Attorney General may direct

1 a communications service provider, custodian, or an offi-
2 cer, employee, or agent of such service provider or custo-
3 dian, who has the lawful authority to access the informa-
4 tion, facilities, or technical assistance necessary to accom-
5 plish such acquisition to—

6 “(1) furnish the Attorney General forthwith
7 with such information, facilities, or technical assist-
8 ance in a manner that will protect the secrecy of the
9 acquisition and produce a minimum of interference
10 with the services that provider, custodian, officer,
11 employee, or agent is providing the target of the ac-
12 quisition; and

13 “(2) maintain under security procedures ap-
14 proved by the Attorney General and the Director of
15 National Intelligence any records concerning the ac-
16 quisition or the aid furnished.”

17 **SEC. 5. OVERSIGHT OF ACQUISITIONS OF COMMUNICA-**
18 **TIONS OF PERSONS LOCATED OUTSIDE OF**
19 **THE UNITED STATES.**

20 The Foreign Intelligence Surveillance Act of 1978
21 (50 U.S.C. 1801 et seq.) is amended by inserting after
22 section 105C the following new section:

23 “OVERSIGHT OF ACQUISITIONS OF COMMUNICATIONS OF
24 PERSONS LOCATED OUTSIDE OF THE UNITED STATES

25 “SEC. 105D. (a) APPLICATION; PROCEDURES; OR-
26 DERS.—Not later than 7 days after an application is sub-

1 mitted under section 105B(a) or an order is issued under
2 section 105B(e), the Director of National Intelligence and
3 the Attorney General shall submit to the appropriate com-
4 mittees of Congress—

5 “(1) in the case of an application, a copy of the
6 application, including the certification made under
7 section 105B(b)(1); and

8 “(2) in the case of an order, a copy of the
9 order, including the procedures and guidelines re-
10 ferred to in section 105B(e)(1)(E).

11 “(b) QUARTERLY AUDITS.—

12 “(1) AUDIT.—Not later than 120 days after the
13 date of the enactment of this section, and every 120
14 days thereafter until the expiration of all orders
15 issued under section 105B, the Inspector General of
16 the Department of Justice shall complete an audit
17 on the implementation of and compliance with the
18 procedures and guidelines referred to in section
19 105B(e)(1)(E) and shall submit to the appropriate
20 committees of Congress, the Attorney General, the
21 Director of National Intelligence, and the court es-
22 tablished under section 103(a) the results of such
23 audit, including, for each order authorizing the ac-
24 quisition of foreign intelligence under section
25 105B—

1 “(A) the number of targets of an acqui-
2 sition under section 105B that were later deter-
3 mined to be located in the United States;

4 “(B) the number of persons located in the
5 United States whose communications have been
6 acquired under section 105B;

7 “(C) the number of reports disseminated
8 containing information on a United States per-
9 son that was collected under section 105B; and

10 “(D) the number of applications submitted
11 for approval of electronic surveillance under
12 section 104 based upon information collected
13 pursuant to acquisition authorized under sec-
14 tion 105B.

15 “(2) REPORT.—Not later than 30 days after
16 the completion of an audit under paragraph (1), the
17 Attorney General shall submit to the appropriate
18 committees of Congress and the court established
19 under section 103(a) a report containing the results
20 of such audit.

21 “(c) COMPLIANCE REPORTS.—Not later than 60 days
22 after the date of the enactment of this section, and every
23 120 days thereafter until the expiration of all orders
24 issued under section 105B, the Director of National Intel-
25 ligence and the Attorney General shall submit to the ap-

1 appropriate committees of Congress and the court estab-
2 lished under section 103(a) a report concerning acquisi-
3 tions under section 105B during the previous 120-day pe-
4 riod. Each report submitted under this section shall in-
5 clude a description of any incidents of non-compliance
6 with an order issued under section 105B(e), including inci-
7 dents of non-compliance by—

8 “(1) an element of the intelligence community
9 with minimization procedures referred to in section
10 105B(e)(1)(E)(i);

11 “(2) an element of the intelligence community
12 with procedures referred to in section
13 105B(e)(1)(E)(ii);

14 “(3) an element of the intelligence community
15 with guidelines referred to in section
16 105B(e)(1)(E)(iii); and

17 “(4) a person directed to provide information,
18 facilities, or technical assistance under such order.

19 “(d) **REPORT ON EMERGENCY AUTHORITY.**—The Di-
20 rector of National Intelligence and the Attorney General
21 shall annually submit to the appropriate committees a
22 Congress a report containing the number of emergency au-
23 thorizations of acquisitions under section 105C and a de-
24 scription of any incidents of non-compliance with an emer-
25 gency authorization under such section.

1 “(e) APPROPRIATE COMMITTEES OF CONGRESS DE-
2 FINED.—In this section, the term ‘appropriate committees
3 of Congress’ means—

4 “(1) the Permanent Select Committee on Intel-
5 ligence of the House of Representatives;

6 “(2) the Select Committee on Intelligence of the
7 Senate; and

8 “(3) the Committees on the Judiciary of the
9 House of Representatives and the Senate.”.

10 **SEC. 6. FOREIGN INTELLIGENCE SURVEILLANCE COURT EN**
11 **BANC.**

12 Section 103 of the Foreign Intelligence Surveillance
13 Act of 1978 (50 U.S.C. 1803) is amended by adding at
14 the end the following new subsection:

15 “(g) In any case where the court established under
16 subsection (a) or a judge of such court is required to re-
17 view a matter under this Act, the court may, at the discre-
18 tion of the court, sit en banc to review such matter and
19 issue any orders related to such matter.”.

20 **SEC. 7. AUDIT OF WARRANTLESS SURVEILLANCE PRO-**
21 **GRAMS.**

22 (a) AUDIT.—Not later than 180 days after the date
23 of the enactment of this Act, the Inspector General of the
24 Department of Justice shall complete an audit of all pro-
25 grams of electronic surveillance (as defined in section

1 101(f) of the Foreign Intelligence Surveillance Act of 1978
2 (50 U.S.C. 1801(f)) of the Federal Government con-
3 ducted without a court order on or after September 11,
4 2001, including the Terrorist Surveillance Program re-
5 ferred to by the President in a radio address on December
6 17, 2005. Such audit shall include acquiring all documents
7 relevant to such programs, including memoranda con-
8 cerning the legal authority of a program, authorizations
9 of a program, certifications to telecommunications car-
10 riers, and court orders.

11 (b) REPORT.—

12 (1) IN GENERAL.—Not later than 30 days after
13 the completion of the audit under subsection (a), the
14 Inspector General shall submit to the Permanent Se-
15 lect Committee on Intelligence and the Committee
16 on the Judiciary of the House of Representatives
17 and the Select Committee on Intelligence and the
18 Committee on the Judiciary of the Senate a report
19 containing the results of such audit, including all
20 documents acquired pursuant to conducting such
21 audit.

22 (2) FORM.—The report under paragraph (1)
23 shall be submitted in unclassified form, but may in-
24 clude a classified annex.

1 (c) EXPEDITED SECURITY CLEARANCE.—The Direc-
2 tor of National Intelligence shall ensure that the process
3 for the investigation and adjudication of an application by
4 the Inspector General or the appropriate staff of the Of-
5 fice of the Inspector General of the Department of Justice
6 for a security clearance necessary for the conduct of the
7 audit under subsection (a) is conducted as expeditiously
8 as possible.

9 **SEC. 8. DATABASE ON ACQUISITION OF COMMUNICATIONS**
10 **OF UNITED STATES PERSONS WITHOUT A**
11 **COURT ORDER.**

12 (a) DATABASE.—The Director of National Intel-
13 ligence and the Attorney General shall jointly develop and
14 maintain a record-keeping system that will keep track of—

15 (1) the instances where the identity of a United
16 States person whose communications were acquired
17 without a court order was disclosed by an element
18 of the intelligence community (as defined in section
19 3(4) of the National Security Act of 1947 (50
20 U.S.C. 401a(4)) that collected the communications
21 to other departments or agencies of the United
22 States; and

23 (2) the persons to whom such identity informa-
24 tion was disclosed.

1 (b) REPORT.—The Director of National Intelligence
2 and the Attorney General shall annually submit to the
3 Permanent Select Committee on Intelligence and the Com-
4 mittee on the Judiciary of the House of Representatives
5 and the Select Committee on Intelligence and the Com-
6 mittee on the Judiciary of the Senate a report on the data-
7 base created under subsection (a), including the number
8 of instances referred to in paragraph (1).

9 **SEC. 9. AUTHORIZATION FOR INCREASED RESOURCES RE-**
10 **LATING TO FOREIGN INTELLIGENCE SUR-**
11 **VEILLANCE.**

12 There are authorized to be appropriated the Depart-
13 ment of Justice, for the activities of the Office of the In-
14 spector General, the Office of Intelligence Policy and Re-
15 view, and other appropriate elements of the National Secu-
16 rity Division, and the National Security Agency such sums
17 as may be necessary to meet the personnel and informa-
18 tion technology demands to ensure the timely and efficient
19 processing of—

20 (1) applications and other submissions to the
21 court established under section 103(a) of the For-
22 eign Intelligence Surveillance Act of 1978 (50
23 U.S.C. 1803(a));

24 (2) the audit and reporting requirements
25 under—

- 1 (A) section 105D of such Act; and
2 (B) section 7; and
3 (3) the database and reporting requirements
4 under section 8.

5 **SEC. 10. REITERATION OF FISA AS THE EXCLUSIVE MEANS**
6 **BY WHICH ELECTRONIC SURVEILLANCE MAY**
7 **BE CONDUCTED FOR GATHERING FOREIGN**
8 **INTELLIGENCE INFORMATION.**

9 (a) **EXCLUSIVE MEANS.**—Notwithstanding any other
10 provision of law, the Foreign Intelligence Surveillance Act
11 of 1978 (50 U.S.C. 1801 et seq.) shall be the exclusive
12 means by which electronic surveillance may be conducted
13 for the purpose of gathering foreign intelligence informa-
14 tion.

15 (b) **SPECIFIC AUTHORIZATION REQUIRED FOR EX-**
16 **CEPTION.**—Subsection (a) shall apply until specific statu-
17 tory authorization for electronic surveillance, other than
18 as an amendment to the Foreign Intelligence Surveillance
19 Act of 1978 (50 U.S.C. 1801 et seq.), is enacted. Such
20 specific statutory authorization shall be the only exception
21 to subsection (a).

22 **SEC. 11. TECHNICAL AND CONFORMING AMENDMENTS.**

23 (a) **TABLE OF CONTENTS.**—The table of contents in
24 the first section of the Foreign Intelligence Surveillance
25 Act of 1978 (50 U.S.C. 1801 et seq.) is amended by strik-

1 ing the items relating to sections 105A, 105B, and 105C
2 and inserting the following new items:

“Sec. 105A. Clarification of electronic surveillance of persons outside the United States.

“Sec. 105B. Procedure for authorizing acquisitions of communications of persons located outside the United States.

“Sec. 105C. Emergency authorization of acquisitions of communications of persons located outside the United States.

“Sec. 105D. Oversight of acquisitions of communications of persons located outside of the United States.”.

3 (b) SECTION 103(e) OF FISA.—Section 103(e) of the
4 Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.
5 1803(e)) is amended—

6 (1) in paragraph (1), by striking “105B(h) or”;

7 and

8 (2) in paragraph (2), by striking “105B(h) or”.

9 (c) REPEAL OF CERTAIN PROVISIONS OF THE PRO-
10 TECT AMERICA ACT.—Sections 4 and 6 of the Protect
11 America Act (Public Law 110-55) are hereby repealed.

12 **SEC. 12. SUNSET; TRANSITION PROCEDURES.**

13 (a) SUNSET OF NEW PROVISIONS.—

14 (1) IN GENERAL.—Except as provided in para-
15 graph (2), effective on December 31, 2009—

16 (A) sections 105A, 105B, 105C, and 105D
17 of the Foreign Intelligence Surveillance Act of
18 1978 (50 U.S.C. 1801 et seq.) are hereby re-
19 pealed; and

20 (B) the table of contents in the first sec-
21 tion of such Act is amended by striking the

1 items relating to sections 105A, 105B, 105C,
2 and 105D.

3 (2) ACQUISITIONS AUTHORIZED PRIOR TO SUN-
4 SET.—Any authorization or order issued under sec-
5 tion 105B of the Foreign Intelligence Surveillance
6 Act of 1978, as amended by this Act, in effect on
7 December 31, 2009, shall continue in effect until the
8 date of the expiration of such authorization or order.

9 (b) ACQUISITIONS AUTHORIZED PRIOR TO ENACT-
10 MENT.—

11 (1) EFFECT.—Notwithstanding the amend-
12 ments made by this Act, an authorization of the ac-
13 quisition of foreign intelligence information under
14 section 105B of the Foreign Intelligence Surveillance
15 Act of 1978 (50 U.S.C. 1801 et seq.) made before
16 the date of the enactment of this Act shall remain
17 in effect until the date of the expiration of such au-
18 thorization or the date that is 180 days after such
19 date of enactment, whichever is earlier.

20 (2) REPORT.—Not later than 30 days after the
21 date of the expiration of all authorizations of acqui-
22 sition of foreign intelligence information under sec-
23 tion 105B of the Foreign Intelligence Surveillance
24 Act of 1978 (as added by Public Law 110-55) made
25 before the date of the enactment of this Act in ac-

1 cordance with paragraph (1), the Director of Na-
2 tional Intelligence and the Attorney General shall
3 submit to the Permanent Select Committee on Intel-
4 ligence and the Committee on the Judiciary of the
5 House of Representatives and the Select Committee
6 on Intelligence and the Committee on the Judiciary
7 of the Senate a report on such authorizations, in-
8 cluding—

9 (A) the number of targets of an acquisition
10 under section 105B of such Act (as in effect on
11 the day before the date of the enactment of this
12 Act) that were later determined to be located in
13 the United States;

14 (B) the number of persons located in the
15 United States whose communications have been
16 acquired under such section;

17 (C) the number of reports disseminated
18 containing information on a United States per-
19 son that was collected under such section;

20 (D) the number of applications submitted
21 for approval of electronic surveillance under
22 section 104 of such Act based upon information
23 collected pursuant to an acquisition authorized
24 under section 105B of such Act (as in effect on

1 the day before the date of the enactment of this
2 Act); and

3 (E) a description of any incidents of non-
4 compliance with an authorization under such
5 section, including incidents of non-compliance
6 by—

7 (i) an element of the intelligence com-
8 munity with procedures referred to in sub-
9 section (a)(1) of such section;

10 (ii) an element of the intelligence com-
11 munity with minimization procedures re-
12 ferred to in subsection (a)(5) of such sec-
13 tion; and

14 (iii) a person directed to provide infor-
15 mation, facilities, or technical assistance
16 under subsection (e) of such section.

17 (3) INTELLIGENCE COMMUNITY DEFINED.—In
18 this subsection, the term “intelligence community”
19 has the meaning given the term in section 3(4) of
20 the National Security Act of 1947 (50 U.S.C.
21 401a(4)).

Gerry, Brett

FOIA Exemption b(6)

From: Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov] EFF2AG(2)-19
Sent: Tuesday, October 09, 2007 11:01 AM
To: Ben Powell; Gerry, Brett (OLP); Eisenberg, John; Demers, John (NSD); Potenza, Vito; Caproni, Valerie E.; [REDACTED]
Subject: FW: Draft of the RESTORE ACT FOIA Exemption b(3)
Attachments: FISAMOD_002_xml.pdf

Have you seen this yet? I just got it and am starting to study it now. So far it looks pretty bad. It seems like they spent more time thinking about the title of the bill, instead of the problems we're trying to solve.

Not Responsive

Not Responsive

110TH CONGRESS
1ST SESSION

S. _____

To provide appropriate defenses in actions concerning alleged assistance to elements of the intelligence community and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. ROCKEFELLER (for himself and MR. BOND) introduced the following bill; which was read twice and referred to the Committee on

A BILL

To provide appropriate defenses in actions concerning alleged assistance to elements of the intelligence community and for other purposes.

1 *Be it enacted by the Senate and House of Representatives of the United States of America*
2 *in Congress assembled,*

3 **TITLE I – DISPOSITION OF CERTAIN MATTERS ARISING FROM THE PRESIDENT’S TERRORIST**
4 **SURVEILLANCE PROGRAM**

5 Sec.101. Definitions. (a) The term “assistance” means the provision of information (including
6 records or other information relating to a customer), facilities, or another form of assistance;
7 (b) The term “covered civil action” means a civil action filed in any Federal or State court
8 alleging that an electronic communication provider furnished assistance to an element of the
9 intelligence community and seeking monetary or other relief from the provider;
10 (c) The term “element of the intelligence community” means an element of the intelligence
11 community specified in or designated under section 3(4) of the National Security Act of 1947 (50
12 U.S.C. 401(a)(4));
13 (d) The term “electronic communication provider” means –
14 (1) A telecommunications carrier as that term is used in section 3 of the Communications

EFF2AG(2)-19(a)

1 Act of 1934 (47 U.S.C. 153);

2 (2) An electronic communication service, as that term is defined in section 2510 of title
3 18, United States Code; or

4 (3) a remote computing service, as that term is defined in section 2711 of title 18, United
5 States Code; and

6 (4) includes an officer, employee, or agent of an entity described in subparagraphs (1),
7 (2), or (3).

8 Sec. 102. Limitations on Civil Actions -- (a) In General -- Notwithstanding any other provision of
9 law, a covered civil action may not be filed or maintained in any court if the Attorney General
10 certifies to the court that --

11 (1) The relevant electronic communication provider did not provide any of the alleged
12 assistance; or

13 (2) Any assistance by that electronic communication provider was --

14 (A) in connection with a communications intelligence program that was --

15 (i) authorized by the President after September 11, 2001, and not
16 reauthorized after January 17, 2007; and

17 (ii) designed to identify or intercept the communications of
18 international terrorism organizations in order to detect or
19 prevent a terrorist attack or activities in preparation for a
20 terrorist attack against the United States; and

21 (B) pursuant to a written request or directive from the Attorney General or the
22 head of an element of the intelligence community indicating that the program was
23 authorized by the President and determined to be lawful.

24 (b) Review of Certifications. -- If the Attorney General files a declaration under section 1746 of
25 title 28 that disclosure of the certification pursuant to subsection (a) would harm the national
26 security of the United States, the court shall review such certification in camera and ex parte.

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

30 Sec. 103. Civil Actions in State Court. -- Any covered civil action that is brought in a State court
31 shall be deemed to arise under the Constitution and laws of the United States and shall be
32 removable under section 1441 of title 28, United States Code.

33 Sec. 104. Rule of Construction -- Nothing in this Act may be construed to limit any immunity,
34 privilege, or defense under any other provision of law.

35 Sec. 105. Effective Date and Application. -- This title shall apply to any covered civil action
36 pending on or after the date of enactment of this Act.

1 **TITLE II – GENERAL PROCEDURES FOR IMPLEMENTING STATUTORY DEFENSES**

2
3 The Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et seq.) is amended by inserting after
4 title VII the following new title:

5 **“TITLE VIII – GENERAL PROVISIONS**

6 **“DEFINITIONS**

7 **“SEC. 801. DEFINITIONS. – In this title --**

8 (a) The term “State” means any State, political subdivision of a State, the Commonwealth of
9 Puerto Rico, the District of Columbia, and any territory or possession of the United States, and
10 includes any officer, public utility commission, or other body authorized to regulate a provider.

11 (b) The term “assistance” means the provision of information (including records or other
12 information relating to a customer), facilities, or any other form of assistance.

13 (c) The term “element of the intelligence community” means an element of the intelligence
14 community as specified or designated under section 3(4) of the National Security Act of 1947 (50
15 U.S.C. 401a(4)).

16 (d) The term “electronic communication provider”–

17 (1) means --

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

20 (B) an electronic communications service, as that term is defined in section 2510 of title 18,
21 United States Code; or

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

24 (2) includes an officer, employee, or agent of an entity described in subparagraph (1).

25 (e) The term “person” means any electronic communication provider, landlord, custodian, or other
26 person who is authorized to provide information (including records or other information relating
27 to a customer), facilities, or another form of assistance under this Act.

28 **“PROCEDURES FOR IMPLEMENTING STATUTORY DEFENSES**

29 **“SEC. 802. (a) IN GENERAL. – Notwithstanding any other provision of law, no civil action may be**
30 **filed or maintained in any Federal or State court against any person for providing assistance to an**
31 **element of the intelligence community if the Attorney General certifies to the court that --**

32 (1) the person did not provide any of the alleged assistance; _____

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

3 (3) any assistance by that person was provided pursuant to a certification in writing under
4 section 2511(2)(a)(ii)(B) of title 18;

5 (4) any assistance by that person was provided pursuant to a directive under subsections
6 102(a)(4), 105B(e), or 701(g).

7 (b) REVIEW OF CERTIFICATIONS. -- If the Attorney General files a declaration under section 1746
8 of title 28 that disclosure of a certification pursuant to subsection (a) would harm the national
9 security of the United States, the court shall review such certification in camera and ex parte.

10

11

TITLE III – PREEMPTION OF STATE INVESTIGATIONS

12

The Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et seq.) as amended by title II
13 of this Act is further amended by inserting at the end the following new section:

14

“PREEMPTION

15 “SEC. 803. – (a) IN GENERAL. – No State shall have authority to --

16 (1) conduct an investigation into an electronic communication provider’s alleged assistance to an
17 element of the intelligence community;

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

20 (3) impose any administrative sanction on an electronic communication provider for assistance to
21 an element of the intelligence community; or

22 (4) commence or maintain a civil action or other proceeding to enforce a requirement that an
23 electronic communication provider disclose information concerning alleged assistance to an
24 element of the intelligence community.

25 (b) AUTHORITY TO BRING SUIT. – The United States may bring suit to enforce the provisions of
26 this section.

27 (c) JURISDICTION. – The district courts of the United States shall have jurisdiction over any civil
28 action brought by the United States to enforce the provisions of this section.

- 1 (d) APPLICATION TO PENDING MATTERS. – This section shall apply to any and all investigations,
- 2 actions, or proceedings pending on or after the effective date of the Act.

Gerry, Brett

FOIA Exemption b(6)

From: Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov

EFF2AG(2)-12

Sent: Thursday, October 11, 2007 1:04 PM

To: Wainstein, Kenneth (NSD); Gerry, Brett (OLP); Ben Powell

Subject: FW: FISA Paper

Attachments: FISA Modernization Paper -- PART V AS CLEARED BY DOJ (DRAFT of 10-9-07).doc

Here's what Kris sent us last night. I'm only interested in your views on his markup of the PAA (the second proposal). Prior court approval (the first proposal) is a non-starter. I'm interested in what you think. I haven't had time to study it carefully, but my first impression is that it contains a fairly clean-cut approach to the authorization problem. I'm getting ready to go back in. If you need to talk to me, call 202.224.1700 and ask our receptionist to pull me out of the front conference room. Feel free to forward this to the other experts.

Not Responsive
EFF2AG(2)-12(b)



V. MODEL LEGISLATION

I offer below two alternatives to the PAA.¹⁷¹ The first is based on draft legislation I submitted to the Senate Judiciary Committee on March 28, 2006.¹⁷² This would create new Subchapter VI of FISA, 50 U.S.C. §§ 1881-1885, concerning programmatic surveillance authorized by the FISA Court. The second alternative assumes that Congress is committed to the basic model of the PAA with only minor changes, and is a redline of the text of that law.¹⁷³

Both alternatives allow court-authorized, programmatic surveillance in certain circumstances. Instead of evaluating FISA applications one telephone number at a time, under traditional practice, the FISA Court would instead evaluate general criteria, and leave it to the executive branch to apply those criteria in particular cases, subject to after-the-fact auditing. This approach would allow speedy and agile surveillance of particular communications, but also ensure some level of judicial oversight. In effect, it would treat the traditional up-front requirements of FISA, such as probable cause, the way that minimization is treated today.

The two alternatives share one other feature in common: they do not change FISA's definition of "electronic surveillance" from what it was before the PAA.¹⁷⁴ Instead, they take an approach similar to the one taken by Congress when it enacted FISA's pen-trap surveillance provisions.¹⁷⁵ They leave undisturbed the definition of "electronic surveillance," but grant supplemental authority for the government to conduct a defined subset of such surveillance under less onerous standards than those in Subchapter I of FISA.¹⁷⁶ This has the advantage of avoiding major surgery on the spinal column of the statute at a time when consensus may be out of reach and time is short to enact new legislation. It also leaves in place both the criminal and civil penalty provisions for intentionally unlawful surveillance,¹⁷⁷ and the complex rules governing use, notice and suppression of information obtained or derived from FISA surveillance.¹⁷⁸

¹⁷¹ While this paper was undergoing prepublication review, media reports discussed legislation introduced in Congress by Representative Conyers and others. I have not seen that legislation, and the time lag involved in prepublication review makes it difficult to keep up with legislative developments in real time.

¹⁷² See Testimony of David S. Kris before the Committee on the Judiciary, United States Senate (Mar. 28, 2006) (available at http://judiciary.senate.gov/testimony.cfm?id=1825&wit_id=944).

¹⁷³ The models below would surely benefit from further consideration and refinement, as well as a review for constitutionality by OLC or another similar entity, and do not include every element of a public law that might be desirable – e.g., a severability clause in the event that a court finds one aspect of the law unconstitutional. Explanatory legislative history would also be extremely helpful with respect to certain of the provisions – e.g., proposed 50 U.S.C. § 1882(a)(1).

¹⁷⁴ 50 U.S.C. § 1801(f).

¹⁷⁵ 50 U.S.C. §§ 1841-1846.

¹⁷⁶ 50 U.S.C. §§ 1801-1811.

¹⁷⁷ See 50 U.S.C. §§ 1809-1810; *NSIP* Chapter 14.

¹⁷⁸ See 50 U.S.C. § 1806; *NSIP* Chapters 26-31.

1 TITLE 50, UNITED STATES CODE, CHAPTER 36, SUBCHAPTER VI:
2 PROGRAMMATIC SURVEILLANCE AND SEARCHES

3
4
5 50 U.S.C. § 1881. JURISDICTION AND RELATED MATTERS
6

7 (a) Jurisdiction of the Foreign Intelligence Surveillance Court
8

9 In addition to the jurisdiction granted in other subchapters of this chapter, and
10 notwithstanding any other law, the court established by section 1803(a) of this title shall have
11 jurisdiction to review and approve, or direct modifications of, the standards and procedures
12 governing electronic surveillance or a physical search of stored electronic communications,
13 anywhere within the United States, under the procedures set forth in this subchapter.
14

15 (b) Jurisdiction of the Court of Review
16

17 In addition to the jurisdiction granted in other subchapters of this chapter, and
18 notwithstanding any other law, the court established by section 1803(b) of this title shall have
19 jurisdiction to review any order directing modifications of the standards and procedures
20 governing electronic surveillance or a physical search of stored electronic communications made
21 under this subchapter.
22

23 (c) Expeditious Conduct of Proceedings; Security Measures for Maintenance of Records
24

25 Proceedings under this subchapter shall be conducted as expeditiously as possible, and
26 within the time limits established by this subchapter. The record of proceedings under this
27 subchapter shall be maintained under security measures established by the Chief Justice in
28 consultation with the Attorney General and the Director of National Intelligence.
29

30 (d) Definitions
31

32 Unless otherwise indicated, terms used in this subchapter shall have the same meanings
33 as in section 1801 of this title. The term "physical search" shall have the same meaning as in
34 section 1821 of this title. The terms "minimization procedures" and "aggrieved person" shall
35 have the same meaning as in section 1801 of this title with respect to electronic surveillance, and
36 the same meaning as in section 1821 of this title with respect to a physical search of stored
37 electronic communications. The term "stored electronic communication" shall mean any
38 communication, other than a wire or radio communication, that is in "electronic storage" as
39 defined by 18 U.S.C. § 2510(17). The term "international communication" shall mean a
40 communication involving at least one party reasonably believed to be located outside the United
41 States.
42

43 (e) Clarification of Authority
44

45 The authority under this subchapter is in addition to the authority under other subchapters
46 of this chapter to conduct electronic surveillance and a physical search.

47
48
49 **50 U.S.C. § 1882: PROGRAMMATIC SURVEILLANCE AND SEARCHES**
50

51 Notwithstanding any other law, the Attorney General may authorize electronic
52 surveillance or a physical search of stored electronic communications, for periods of up to 180
53 days if the surveillance or search satisfies each of the following requirements:
54

55 **(a) Standards and Procedures**
56

57 The surveillance or search is conducted under specific standards and procedures,
58 approved by the Attorney General, that are reasonably designed to ensure compliance with the
59 following requirements –
60

61 (1) the surveillance or search is conducted only when it cannot with due diligence
62 be conducted under the standards and procedures set forth in subchapters I, II, and III of
63 this chapter;
64

65 (2) the information acquired by the surveillance or search is part of an
66 international communication;
67

68 (3) the information sought by the surveillance or search is foreign intelligence
69 information;
70

71 (4) with respect to information other than dialing, routing, addressing, and
72 signaling information utilized in the processing and transmitting of a communication –
73

74 (A) there is probable cause to believe that the communication was sent to
75 or from a foreign power or the agent of a foreign power; and
76

77 (B) the minimization procedures with respect such surveillance or search
78 meet the definition of minimization procedures set forth in section 1801(h) of this
79 title or section 1821(4) of this title, respectively;
80

81 **(b) Transmission of Standards and Procedures to Court and to Congress**
82

83 Within 72 hours after the surveillance or search is authorized, the Attorney General
84 provides to the committees listed in section 1871 of this title, and to a judge of the court
85 established by section 1803 of this title, a report setting forth the standards and procedures
86 governing the surveillance or search, including an explanation of how they are reasonably
87 designed to ensure compliance with the requirements of subsection (a) of this section; and
88

89 **(c) Conformity with Court Orders**
90

91 The surveillance or search is conducted in conformity with any orders of the court issued
92 under section 1883 of this title.

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50 U.S.C. § 1883. JUDICIAL REVIEW

(a) Foreign Intelligence Surveillance Court

Upon receipt of the information provided under subsection (b) of section 1882 of this title, a judge of the court established by section 1803 of this title shall within 14 days issue an order approving the standards and procedures governing the surveillance or search, or directing the Attorney General to make such modifications to them or to take such other actions as are necessary to satisfy section 1882 or the Constitution.

(b) Court of Review

An order issued by the court under this section requiring the Attorney General to make modifications or take other actions shall be accompanied by a written statement of reasons and subject to further review as would an order denying an application under section 1805 of this title.

(c) Suppression for Unlawful Surveillance

With respect to any surveillance or search determined to have been conducted in violation of this subchapter or the Constitution, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

50 U.S.C. § 1884. ASSISTANCE FROM THIRD PARTIES AND RELATED MATTERS

(a) Assistance of Third Parties

With respect to electronic surveillance or a physical search of stored electronic communications authorized by section 1882 of this title, the Attorney General or his designee may direct a communications common carrier or other specified party to --

- (1) furnish all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier is providing its customers; and

138 (2) maintain under security procedures approved by the Attorney General and the
139 Director of National Intelligence any records concerning the surveillance or the aid
140 furnished which such carrier wishes to retain.

141
142 The Government shall compensate, at the prevailing rate, such carrier or other specified party for
143 furnishing such aid.

144
145 (b) Protection from Liability

146
147 A party who, in good faith, complies with a direction under this section shall not be liable
148 to any other person for such compliance.

149
150

151 50 U.S.C. § 1885. REPORTING AND OVERSIGHT

152
153 The semiannual report required by section 1871 of this title shall include an accounting
154 with respect to the previous six-month period of any surveillance or search conducted under this
155 subchapter, including the following: a detailed description of, and explanation for, any
156 deviations from the standards and procedures governing the surveillance or search; the number
157 of communications, communications facilities, and U.S. persons subjected to the surveillance or
158 search; the types of attributes (such as the number or other identifier) of all communications to or
159 from a U.S. person that were subjected to the surveillance or search; and a general description of
160 the foreign intelligence information acquired from the surveillance or search.

A REDLINE OF THE PROTECT AMERICA ACT

50 U.S.C. § 1805B. ADDITIONAL PROCEDURE FOR AUTHORIZING CERTAIN ACQUISITIONS CONCERNING PERSONS LOCATED OUTSIDE THE UNITED STATES

Deleted: 50 U.S.C. § 1805A.
CLARIFICATION OF ELECTRONIC SURVEILLANCE OF PERSONS OUTSIDE THE UNITED STATES
¶
Nothing in the definition of electronic surveillance under section 101(f) shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States.

(a) Notwithstanding any other law, the Director of National Intelligence and the Attorney General, may for periods of up to one year authorize electronic surveillance or a physical search of stored electronic communications targeting an individual reasonably believed to be located outside of the United States if the Director of National Intelligence and the Attorney General determine, based on the information provided to them, that –

Deleted: the acquisition of foreign intelligence information

Deleted: concerning persons reasonably believed to be outside the United States

(1) there are reasonable procedures in place for determining that the targeted individual is reasonably believed to be located outside of the United States, and if such individual is a United States person, that there is probable cause to believe that he is an agent of a foreign power, and such procedures will be subject to review of the Court pursuant to section 105C of this Act;

Deleted: acquisition of foreign intelligence information under this section concerns persons reasonably believed to be located outside the United States

(2) the acquisition involves obtaining the foreign intelligence information from or with the assistance of a communications service provider, custodian, or other person (including any officer, employee, agent, or other specified person of such service provider, custodian, or other person) who has access to communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications;

Deleted: ¶
(2) the acquisition does not constitute electronic surveillance;¶

Deleted: 3

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

Deleted: 4

(4) the minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 101(h) with respect to electronic surveillance, and under section 121(4) with respect to a physical search of stored electronic communications, and will be subject to review of the Court pursuant to section 105C of this Act.

Deleted: 5

This determination shall be in the form of a written certification, under oath, supported as appropriate by affidavit of appropriate officials in the national security field occupying positions appointed by the President, by and with the consent of the Senate, or the Head of any Agency of the Intelligence Community, unless immediate action by the Government is required and time does not permit the preparation of a certification. In such a case, the determination of the Director of National Intelligence and the Attorney General shall be reduced to a certification as soon as possible but in no event more than 72 hours after the determination is made.

(b) A certification under subsection (a) is not required to identify the specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed.

(c) The Attorney General shall transmit as soon as practicable under seal to the court established under section 103(a) a copy of a certification made under subsection (a). Such certification shall be maintained under security measures established by the Chief Justice of the United States and the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless the certification is necessary to determine the legality of the acquisition under this section.

Deleted: section 105B

(d) An acquisition under this section may be conducted only in accordance with the certification of the Director of National Intelligence and the Attorney General, or their oral instructions if time does not permit the preparation of a certification, including the minimization procedures,

Deleted: and

(e) With respect to an authorization of an acquisition under this section, the Director of National Intelligence and Attorney General may direct a person to –

Deleted: adopted by the Attorney General. The Director of National Intelligence and the Attorney General shall assess compliance with such procedures and shall report such assessments to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate under section 108(a)

Deleted: section 105B

(1) immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition in such a manner as will protect the secrecy of the acquisition and produce a minimum of interference with the services that such person is providing to the target; and

(2) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the acquisition or the aid furnished that such person wishes to maintain.

(f) The Government shall compensate, at the prevailing rate, a person for providing information, facilities, or assistance pursuant to subsection (e).

(g) In the case of a failure to comply with a directive issued pursuant to subsection (e), the Attorney General may invoke the aid of the court established under section 103(a) to compel compliance with the directive. The court shall issue an order requiring the person to comply with the directive if it finds that the directive was issued in accordance with subsection (e) and is otherwise lawful. Failure to obey an order of the court may be punished by the court as contempt of court. Any process under this section may be served in any judicial district in which the person may be found.

(h)(1)(A) A person receiving a directive issued pursuant to subsection (e) may challenge the legality of that directive by filing a petition with the pool established under section 103(e)(1).

(B) The presiding judge designated pursuant to section 103(b) shall assign a petition filed under subparagraph (A) to one of the judges serving in the pool established by section 103(e)(1). Not later than 48 hours after the assignment of such petition, the assigned judge shall conduct an initial review of the directive. If the assigned judge determines that the petition is frivolous, the assigned judge

shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition. If the assigned judge determines the petition is not frivolous, the assigned judge shall, within 72 hours, consider the petition in accordance with the procedures established under section 103(e)(2) and provide a written statement for the record of the reasons for any determination under this subsection.

(2) A judge considering a petition to modify or set aside a directive may grant such petition only if the judge finds that such directive does not meet the requirements of this section or is otherwise unlawful. If the judge does not modify or set aside the directive, the judge shall immediately affirm such directive, and order the recipient to comply with such directive.

(3) Any directive not explicitly modified or set aside under this subsection shall remain in full effect.

(i) The Government or a person receiving a directive reviewed pursuant to subsection (h) may file a petition with the Court of Review established under section 103(b) for review of the decision issued pursuant to subsection (h) not later than 7 days after the issuance of such decision. Such court of review shall have jurisdiction to consider such petitions and shall provide for the record a written statement of the reasons for its decision. On petition for a writ of certiorari by the Government or any person receiving such directive, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(j) Judicial proceedings under this section shall be concluded as expeditiously as possible. The record of proceedings, including petitions filed, orders granted, and statements of reasons for decision, shall be maintained under security measures established by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.

(k) All petitions under this section shall be filed under seal. In any proceedings under this section, the court shall, upon request of the Government, review *ex parte* and *in camera* any Government submission, or portions of a submission, which may include classified information.

(l) Notwithstanding any other law, no cause of action shall lie in any court against any person for providing any information, facilities, or assistance in accordance with a directive under this section.

(m) A directive made or an order granted under this section shall be retained for a period of not less than 10 years from the date on which such directive or such order is made.

50 U.S.C. § 1805C. SUBMISSION TO COURT REVIEW OF PROCEDURES

(a) No later than 120 days after the effective date of this Act, the Attorney General shall submit to the Court established under section 103(a), the procedures by which the Government determines that the targeted individual under section 105B is reasonably believed to be located outside of the United States, and if such individual is a United States person, that there is probable cause to believe that he is an agent of a foreign power. The procedures submitted pursuant to this section shall be updated and submitted to the Court on an annual basis.

Deleted: acquisitions conducted pursuant to section 105B do not constitute electronic surveillance

(b) No later than 180 days after the effective date of this Act, the court established under section 103(a) shall assess the Government's determination under section 105B(a)(1) that those procedures are reasonably designed to ensure that the targeted individual is reasonably believed to be located outside of the United States, and if such individual is a United States person, that there is probable cause to believe that he is an agent of a foreign power.

Deleted: acquisitions conducted pursuant to section 105B do not constitute electronic surveillance. The court's review shall be limited to whether the Government's determination is clearly erroneous.

(c) If the court concludes that the determination is correct, it shall enter an order approving the continued use of such procedures. If the court concludes that the determination is erroneous, it shall issue an order directing the Government to submit new procedures within 30 days or cease any acquisitions under section 105B that are implicated by the court's order.

Deleted: not clearly erroneous

Deleted: clearly

(d) The Government may appeal any order issued under subsection (c) to the court established under section 103(b). If such court determines that the order was properly entered, the court shall immediately provide for the record a written statement of each reason for its decision, and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision. Any acquisitions affected by the order issued under subsection (c) of this section may continue during the pendency of any appeal, the period during which a petition for writ of certiorari may be pending, and any review by the Supreme Court of the United States.

Gerry, Brett

FOIA Exemption b(6)

From: Davidson, M (Intelligence) [redacted]@ssci.senate.gov] EFF2AG(1)-101
Sent: Tuesday, October 23, 2007 9:15 AM
To: Gerry, Brett (OLP); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [redacted]
Subject: RE: Draft US Person Technical Assistance

FOIA Exemptions b(2) and b(6)

FOIA Exemption b(6)

Yes, it definitely would be a good idea to reach out directly to John -- [redacted] and perhaps to come by to speak with John (and others who may be interested).

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

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov] EFF2AG(1)-102
Sent: Tuesday, October 23, 2007 9:12 AM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [redacted] FOIA Exemptions b(2) and b(6)
Subject: RE: Draft US Person Technical Assistance

Thanks Mike. Interesting re: Title VII. Please let me know if I can speak with John Dickas on this.

FOIA Exemption b(6)

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

From: Davidson, M (Intelligence) [mailto:[redacted]@ssci.senate.gov] EFF2AG(1)-103
Sent: Tuesday, October 23, 2007 8:56 AM
To: Gerry, Brett (OLP); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [redacted] FOIA Exemptions b(2) and b(6)
Subject: RE: Draft US Person Technical Assistance

Brett,

I'll share the Wyden amendment suggestion with Senator Wyden's designee here (John Dickas).

On the really arcane level -- the old Title VII, see the Intelligence Reform Act, section 6002(a), 118 Stat. 3743. In adding a new Title VI on reporting, Congress redesignated the old Title VI (the original effective date of FISA) as Title VII. With confidence that 29 years later FISA is here to stay, we thought that the original effective date provision could now be retired.

Many thanks for all the suggestions. I'm sure we'll be in touch as the day goes on.

Mike

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

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov] EFF2AG(1)-104
Sent: Tuesday, October 23, 2007 8:30 AM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [redacted] FOIA Exemptions b(2) and b(6)
Subject: RE: Draft US Person Technical Assistance

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

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov]
Sent: Tuesday, October 23, 2007 8:30 AM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito;
[REDACTED] FOIA Exemptions b(2) and b(6)
Subject: RE: Draft US Person Technical Assistance

Mike, Jack --

I am attaching a few proposed technical changes as you finalize the bill. Several concern clarifications to the transition procedures, and I've provided brief explanations besides each. I wanted to flag two that are of particular importance in the cover e-mail.

First, I understand that there is only room at the present time for purely technical amendments to the Sen. Wyden amendment. There is one proposed here that I believe falls into that category, and which I hope you can consider. The draft as written (section 703(c)(2)) applies to the targeting of "communications" of US persons outside the United States. This language, which I believe may stem from the fact that earlier drafts of the SSCI mark used a similar formulation in describing the section 703 authority, could be read to require court approval for the collection of incidental communications to Uspers overseas when a non-Uspers is the target, which we do not believe was intended. Reversing the order of the phrasing to make it clear that the requirement applies to the targeting of persons to acquire communications resolves any ambiguity.

Second, on the transition procedures, it is clear that directives issued under the PAA remain in effect until their expiration; it is not clear, however, that the authorizations themselves remain in effect, and that such authorizations do not again become electronic surveillance upon the repeal of the PAA. Depending on how it is read, this could cause significant disruption at the point of transition from the PAA to the section 703 authority. We believe based upon language that was in earlier drafts that this was unintended and may have been introduced by a leg counsel reorganization, and we hope it can be clarified.

Thanks,
Brett

Delete Page 6, line 13 through Page 8, line 24.

Insert the following:

"(c) United States Persons Located Outside The United States.—

"(1) United States Persons Outside The United States.—An acquisition by an electronic, mechanical, or other surveillance device may not intentionally target a United States person reasonably believed to be located outside the United States to acquire the contents of a wire or radio communication sent by or intended to be received by 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 if the technique were used inside the United States, unless the Attorney General determines that there is probable cause to believe that the person is a foreign power, agent of a foreign power, or an officer, employee, or member of a foreign power.

"(2) Duration.—A probable cause determination made under paragraph (1) shall be effective for a period not to exceed 90 days and such a determination may be renewed for additional 90-day periods.

"(3) Review.—A probable cause determination made under paragraph (1) shall—

"(A) be submitted, together with any supporting affidavits, by the Attorney General, or his designee, to the Foreign Intelligence Surveillance Court not later than 168 hours after such determination is made; and

"(B) be subject to judicial review pursuant to subsection (i).

(4) This subsection shall not apply to an acquisition intentionally targeting a United States person who is the target with respect to a court order requiring probable cause under this Act.

Page 19, insert after line 9 the following:

(5) United States Persons Outside the United States.—

"(A) Authority to Review—The Court has jurisdiction to review, and shall review, any probable cause determination made by the Attorney General pursuant to subsection (c). Such review shall be limited to an assessment of whether, on the basis of the facts submitted by the Attorney General pursuant to subsection (c), there is probable cause to

EFF2AG(1)-105(a)

believe that the United States person who is outside the United States is a foreign power, agent of a foreign power, or an officer, employee, or member of a foreign power.

"(B) Orders.—If the Court, after review under subparagraph (A) determines that there is not probable cause to believe that the United States person who is outside the United States is a foreign power, agent of a foreign power, or an officer, employee, or member of a foreign power, the court shall issue an order directing the Government to cease the targeting of such person.

Page 19, line 10: delete "(5) Orders.—" and insert "(6) Orders.—"

Page 20, line 19: delete "(6)" and insert "(7)"

Page 21, line 6: delete "(5) (B)" and insert "(5) (B) or (6) (B)"

Page 59, insert after line 12 the following:

"(7) Transition Procedures Concerning the Targeting of U.S. Persons Overseas. Notwithstanding the provisions of this Act, any authorization in effect pursuant to section 2.5 of Executive Order 12333 to intentionally target a United States person reasonably believed to be located outside the United States, to acquire the contents of a wire or radio communication sent by or intended to be received by that United States person, shall remain in effect, and shall constitute a sufficient basis for conducting such surveillance of a United States person located outside the United States, until that authorization expires or 90 days after the effective date of this Act, whichever is earlier."

Clifton, Deborah J

Not Responsive
EFF2OLA(2)-1

FOIA Exemption b(6)

EFF2OLA(2)-2

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

From: Livingston, J (Intelligence) [mailto: [REDACTED]@ssci.senate.gov]
Sent: Wednesday, November 07, 2007 4:38 PM
To: Ben Powell; Gerry, Brett (OLP); Vito Potenza (work); Caproni, Valerie E.; Eisenberg, John; Demers, John (NSD)
Subject: FW: Substitute Amendment for Title I, S.2248

I just received a copy of the Leahy substitute. Here it is in case you haven't seen it yet. The summary I was provided is below. It looks fairly depressing.

Below is a summary of the changes made to Title I by this amendment.

Proposed substitute for Title I of S.2248, the Senate Intel's FISA Amendments Act of 2007.

Summary of changes to Title I of the SSCI bill:

- 1) Strikes 701, the redefinition of electronic surveillance, and makes clear, in what is now Sec. 702, that FISA grants additional authority to target persons outside the U.S. to acquire foreign intelligence information without an individual court order
- 2) Revisions to (c) United States Persons Located Outside the United States, amendment regarding the acquisition of U.S. persons communications when those U.S. persons are outside the U.S. These revisions include: an emergency provision, an explicit grant of FISC jurisdiction, language ensuring the court is only issuing a probable cause determination and approving certain minimization procedures, and a transition provision.
- 3) (7) Compliance Review- amendment strengthening minimization by allowing the Court to assess compliance.
- 4) Strike section 102, the current exclusivity provision, and replace it with a stronger exclusivity provision, a provision that not only states that FISA is the exclusive means by which foreign intelligence surveillance may be conducted, but also requires certifications to the electronic service provider to identify the specific provisions of FISA that allow for an exception to providing a court order and certifies that the statutory requirements of that provision have been met.
- 5) (B) Stay pending appeal, allows the government to move for a stay of an order of the FISC pending appeal. (p. 27 line 6-).
- 6) (ii) Limitation on Use of Information strengthens the restrictions on use and dissemination of acquired communications.
- 7) Striking the designation of the Deputy FBI Director for certifications

AMENDMENT NO. _____ Calendar No. _____

Purpose: To improve title I.

IN THE SENATE OF THE UNITED STATES—110th Cong., 1st Sess.

S. 2248

To amend the Foreign Intelligence Surveillance Act of 1978, to modernize and streamline the provisions of that Act, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. LEAHY

Viz:

1 On page 2, strike line 7 and all that follows through
2 page 43, line 13, and insert the following:

3 **SEC. 101. TARGETING THE COMMUNICATIONS OF CERTAIN**
4 **PERSONS OUTSIDE THE UNITED STATES.**

5 (a) IN GENERAL.—The Foreign Intelligence Surveil-
6 lance Act of 1978 (50 U.S.C. 1801 et seq.) is amended—

7 (1) by striking title VII; and

8 (2) by adding after title VI the following new
9 title:

1 **“TITLE VII—ADDITIONAL PROCE-**
2 **DURES FOR TARGETING COM-**
3 **MUNICATIONS OF CERTAIN**
4 **PERSONS OUTSIDE THE**
5 **UNITED STATES**

6 **“SEC. 701. DEFINITIONS.**

7 “In this title:

8 “(1) IN GENERAL.—The terms ‘agent of a for-

9 eign power’, ‘Attorney General’, ‘contents’, ‘elec-

10 tronic surveillance’, ‘foreign intelligence informa-

11 tion’, ‘foreign power’, ‘minimization procedures’,

12 ‘person’, ‘United States’, and ‘United States person’

13 shall have the meanings given such terms in section

14 101.

15 “(2) ADDITIONAL DEFINITIONS.—

16 “(A) CONGRESSIONAL INTELLIGENCE COM-

17 MITTEES.—The term ‘congressional intelligence

18 committees’ means—

19 “(i) the Select Committee on Intel-

20 ligence of the Senate; and

21 “(ii) the Permanent Select Committee

22 on Intelligence of the House of Represent-

23 atives.

24 “(B) FOREIGN INTELLIGENCE SURVEIL-

25 LANCE COURT; COURT.—The terms ‘Foreign In-

1 intelligence Surveillance Court' and 'Court' mean
2 the court established by section 103(a).

3 "(C) FOREIGN INTELLIGENCE SURVEIL-
4 LANCE COURT OF REVIEW; COURT OF RE-
5 VIEW.—The terms 'Foreign Intelligence Surveil-
6 lance Court of Review' and 'Court of Review'
7 mean the court established by section 103(b).

8 "(D) ELECTRONIC COMMUNICATION SERV-
9 ICE PROVIDER.—The term 'electronic commu-
10 nication service provider' means—

11 "(i) a telecommunications carrier, as
12 that term is defined in section 3 of the
13 Communications Act of 1934 (47 U.S.C.
14 153);

15 "(ii) a provider of electronic commu-
16 nications service, as that term is defined in
17 section 2510 of title 18, United States
18 Code;

19 "(iii) a provider of a remote com-
20 puting service, as that term is defined in
21 section 2711 of title 18, United States
22 Code;

23 "(iv) any other communication service
24 provider who has access to wire or elec-
25 tronic communications either as such com-

1 “(2) may not intentionally target a person rea-
2 sonably believed to be outside the United States if
3 the purpose of such acquisition is to target for sur-
4 veillance a particular, known person reasonably be-
5 lieved to be in the United States, except in accord-
6 ance with title I; and

7 “(3) shall be conducted in a manner consistent
8 with the fourth amendment to the Constitution of
9 the United States.

10 “(c) UNITED STATES PERSONS LOCATED OUTSIDE
11 THE UNITED STATES.—

12 “(1) ACQUISITION INSIDE THE UNITED STATES
13 OF UNITED STATES PERSONS OUTSIDE THE UNITED
14 STATES.—An acquisition authorized by subsection
15 (a) that occurs inside the United States may not
16 target a United States person except in accordance
17 with the provisions of title I.

18 “(2) ACQUISITION OUTSIDE THE UNITED
19 STATES OF UNITED STATES PERSONS OUTSIDE THE
20 UNITED STATES.—An acquisition by an electronic,
21 mechanical, or other surveillance device outside the
22 United States may not intentionally target a United
23 States person reasonably believed to be outside the
24 United States to acquire the contents of a wire or
25 radio communication sent by or intended to be re-

1 ceived by that United States person under cir-
2 cumstances in which a person has a reasonable ex-
3 pectation of privacy and a warrant would be re-
4 quired for law enforcement purposes if the technique
5 were used inside the United States unless—

6 “(A) the Attorney General submits an ap-
7 plication to the Foreign Intelligence Surveil-
8 lance Court that includes a statement of the
9 facts and circumstances relied upon by the ap-
10 plicant to justify the Attorney General’s belief
11 that the target of the acquisition is a foreign
12 power or an agent of a foreign power;

13 “(B) the Foreign Intelligence Surveillance
14 Court—

15 “(i) finds on the basis of the facts
16 submitted by the applicant there is prob-
17 able cause to believe that the target of the
18 acquisition is a foreign power or an agent
19 of a foreign power; and

20 “(ii) issues a determination as re-
21 quested or as modified approving the tar-
22 geting of that United States person;

23 “(C) the Attorney General has established
24 minimization procedures for such acquisition

1 that meet the definition of minimization proce-
2 dures under section 101(h); and

3 “(D) the Foreign Intelligence Surveillance
4 Court has determined that the minimization
5 procedures applicable to dissemination of infor-
6 mation obtained through such acquisition meet
7 the requirements of the definition of minimiza-
8 tion procedures under section 101(h) relating to
9 the dissemination of information.

10 “(3) EMERGENCY PROCEDURES.—

11 “(A) IN GENERAL.—Notwithstanding para-
12 graph (2), and in accordance with the require-
13 ments of this paragraph, the Attorney General
14 may authorize the emergency employment of an
15 acquisition under paragraph (2) if the Attorney
16 General—

17 “(i) reasonably determines that—

18 “(I) an emergency situation ex-
19 ists with respect to the employment of
20 that acquisition before a determina-
21 tion of probable cause to believe that
22 the target of the electronic surveil-
23 lance is a foreign power or an agent
24 of a foreign power can with due dili-
25 gence be obtained; and

1 “(II) the factual basis for
2 issuance of a determination under
3 paragraph (2) to approve such an ac-
4 quisition exists; and

5 “(ii) informs a judge of the Foreign
6 Intelligence Surveillance Court at the time
7 of the authorization of the emergency em-
8 ployment of an acquisition under para-
9 graph (2) that the decision has been made
10 to employ an emergency acquisition.

11 “(B) APPLICATION.—As soon as prac-
12 ticable, but not more than 72 hours after the
13 authorization of the emergency employment of
14 an acquisition under paragraph (2), the Attor-
15 ney General shall submit to the judge informed
16 under subparagraph (A)(ii) an application in
17 accordance with this subsection.

18 “(C) MINIMIZATION.—If the Attorney
19 General authorizes the emergency employment
20 of an acquisition under paragraph (2), the At-
21 torney General shall require that the minimiza-
22 tion procedures required by this section for the
23 issuance of a judicial order be followed.

24 “(D) TERMINATION.—In the absence of a
25 judicial determination finding such probable

1 cause finding probable cause to believe that the
2 target of the electronic surveillance is a foreign
3 power or an agent of a foreign power, the ac-
4 quisition shall terminate when the information
5 sought is obtained, when the application for a
6 determination is denied, or after the expiration
7 of 72 hours from the time of authorization by
8 the Attorney General, whichever is earliest.

9 “(E) USE OF INFORMATION.—

10 “(i) IN GENERAL.—Except as pro-
11 vided in clause (ii), if an application de-
12 scribed in subparagraph (B) is denied, or
13 in any other case where the emergency em-
14 ployment of an acquisition under para-
15 graph (2) is terminated and no judicial de-
16 termination finding probable cause to be-
17 lieve that the target of the electronic sur-
18 veillance is a foreign power or an agent of
19 a foreign power is issued, no information
20 obtained or evidence derived from such ac-
21 quisition shall be received in evidence or
22 otherwise disclosed in any trial, hearing, or
23 other proceeding in or before any court,
24 grand jury, department, office, agency,
25 regulatory body, legislative committee, or

1 other authority of the United States, a
2 State, or political subdivision thereof, and
3 no information concerning any United
4 States person acquired from such acquisi-
5 tion shall subsequently be used or disclosed
6 in any other manner by Federal officers or
7 employees without the consent of such
8 United States person.

9 “(ii) EXCEPTION.—Information de-
10 scribed in clause (i) may be disclosed with
11 the approval of the Attorney General if the
12 information indicates a threat of death or
13 serious bodily harm to any person.

14 “(F) REVIEW OF DENIALS.—The denial of
15 an application described in subparagraph (B)
16 may be reviewed as provided in section 103.

17 “(4) PROCEDURES.—

18 “(A) SUBMITTAL TO FOREIGN INTEL-
19 LIGENCE SURVEILLANCE COURT.—Not later
20 than 30 days after the date of the enactment of
21 this title, the Attorney General shall submit to
22 the Foreign Intelligence Surveillance Court the
23 procedures to be utilized in determining wheth-
24 er a target reasonably believed to be outside the
25 United States is a United States person.

1 “(B) APPROVAL BY FOREIGN INTEL-
2 LIGENCE SURVEILLANCE COURT.—The proce-
3 dures submitted under subparagraph (A) shall
4 be utilized as described in that subparagraph
5 only upon the approval of the Foreign Intel-
6 ligence Surveillance Court.

7 “(C) UTILIZATION IN TARGETING.—Any
8 targeting of persons authorized by subsection
9 (a) shall utilize the procedures submitted under
10 subparagraph (A) as approved by the Foreign
11 Intelligence Surveillance Court under subpara-
12 graph (B).

13 “(5) TRANSITION PROCEDURES CONCERNING
14 THE TARGETING OF UNITED STATES PERSONS OVER-
15 SEAS.—Any authorization in effect on the effective
16 date of this section pursuant to section 2.5 of Exec-
17 utive Order 12333 to intentionally target a United
18 States person reasonably believed to be located out-
19 side the United States, to acquire the contents of a
20 wire or radio communication sent by or intended to
21 be received by that United States person, shall re-
22 main in effect, and shall constitute a sufficient basis
23 for conducting such acquisition of a United States
24 person located outside the United States, until the

1 date that authorization expires or 90 days after the
2 effective date of this section, whichever is earlier.

3 “(d) CONDUCT OF ACQUISITION.—An acquisition au-
4 thorized under subsection (a) may be conducted only in
5 accordance with—

6 “(1) a certification made by the Attorney Gen-
7 eral and the Director of National Intelligence pursu-
8 ant to subsection (g); and

9 “(2) the targeting and minimization procedures
10 required pursuant to subsections (e) and (f).

11 “(e) TARGETING PROCEDURES.—

12 “(1) REQUIREMENT TO ADOPT.—The Attorney
13 General, in consultation with the Director of Na-
14 tional Intelligence, shall adopt targeting procedures
15 that are reasonably designed to ensure that any ac-
16 quisition authorized under subsection (a) is limited
17 to targeting persons reasonably believed to be lo-
18 cated outside the United States.

19 “(2) JUDICIAL REVIEW.—The procedures re-
20 ferred to in paragraph (1) shall be subject to judicial
21 review pursuant to subsection (i).

22 “(f) MINIMIZATION PROCEDURES.—

23 “(1) REQUIREMENT TO ADOPT.—The Attorney
24 General, in consultation with the Director of Na-
25 tional Intelligence, shall adopt, consistent with the

1 requirements of section 101(h), minimization proce-
2 dures for acquisitions authorized under subsection
3 (a).

4 “(2) JUDICIAL REVIEW.—The minimization
5 procedures required by this subsection shall be sub-
6 ject to judicial review pursuant to subsection (i).

7 “(g) CERTIFICATION.—

8 “(1) IN GENERAL.—

9 “(A) REQUIREMENT.—Subject to subpara-
10 graph (B), prior to the initiation of an acquisi-
11 tion authorized under subsection (a), the Attor-
12 ney General and the Director of National Intel-
13 ligence shall provide, under oath, a written cer-
14 tification, as described in this subsection.

15 “(B) EXCEPTION.—If the Attorney Gen-
16 eral and the Director of National Intelligence
17 determine that immediate action by the Govern-
18 ment is required and time does not permit the
19 preparation of a certification under this sub-
20 section prior to the initiation of an acquisition,
21 the Attorney General and the Director of Na-
22 tional Intelligence shall prepare such certifi-
23 cation, including such determination, as soon as
24 possible but in no event more than 168 hours
25 after such determination is made.

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

3 “(A) attest that—

4 “(i) there are reasonable procedures
5 in place for determining that the acqui-
6 sition authorized under subsection (a) is tar-
7 geted at persons reasonably believed to be
8 located outside the United States and that
9 such procedures have been approved by, or
10 will promptly be submitted for approval by,
11 the Foreign Intelligence Surveillance Court
12 pursuant to subsection (i);

13 “(ii) the procedures referred to in
14 clause (i) are consistent with the require-
15 ments of the fourth amendment to the
16 Constitution of the United States and do
17 not permit the intentional targeting of any
18 person who is known at the time of acqui-
19 sition to be located in the United States;

20 “(iii) a significant purpose of the ac-
21 quisition is to obtain foreign intelligence
22 information;

23 “(iv) the minimization procedures to
24 be used with respect to such acquisition—

1 “(I) meet the definition of mini-
2 mization procedures under section
3 101(h); and

4 “(II) have been approved by, or
5 will promptly be submitted for ap-
6 proval by, the Foreign Intelligence
7 Surveillance Court pursuant to sub-
8 section (i); and

9 “(v) the acquisition involves obtaining
10 the foreign intelligence information from or
11 with the assistance of an electronic com-
12 munication service provider; and

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

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

18 “(ii) the head of any element of the
19 intelligence community.

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

1 “(4) SUBMISSION TO THE COURT.—The Attor-
2 ney General shall transmit a copy of a certification
3 made under this subsection, and any supporting affi-
4 davit, under seal to the Foreign Intelligence Surveil-
5 lance Court as soon as possible, but in no event
6 more than 5 days after such certification is made.
7 Such certification shall be maintained under security
8 measures adopted by the Chief Justice of the United
9 States and the Attorney General, in consultation
10 with the Director of National Intelligence.

11 “(5) REVIEW.—The certification required by
12 this subsection shall be subject to judicial review
13 pursuant to subsection (i).

14 “(h) DIRECTIVES.—

15 “(1) AUTHORITY.—With respect to an acquisi-
16 tion authorized under subsection (a), the Attorney
17 General and the Director of National Intelligence
18 may direct, in writing, an electronic communication
19 service provider to—

20 “(A) immediately provide the Government
21 with all information, facilities, or assistance
22 necessary to accomplish the acquisition in a
23 manner that will protect the secrecy of the ac-
24 quisition and produce a minimum of inter-
25 ference with the services that such electronic

1 communication service provider is providing to
2 the target; and

3 “(B) maintain under security procedures
4 approved by the Attorney General and the Di-
5 rector of National Intelligence any records con-
6 cerning the acquisition or the aid furnished that
7 such electronic communication service provider
8 wishes to maintain.

9 “(2) COMPENSATION.—The Government shall
10 compensate, at the prevailing rate, an electronic
11 communication service provider for providing infor-
12 mation, facilities, or assistance pursuant to para-
13 graph (1).

14 “(3) RELEASE FROM LIABILITY.—Notwith-
15 standing any other law, no cause of action shall lie
16 in any court against any electronic communication
17 service provider for providing any information, facili-
18 ties, or assistance in accordance with a directive
19 issued pursuant to paragraph (1).

20 “(4) CHALLENGING OF DIRECTIVES.—

21 “(A) AUTHORITY TO CHALLENGE.—An
22 electronic communication service provider re-
23 ceiving a directive issued pursuant to paragraph
24 (1) may challenge the directive by filing a peti-

1 tion with the Foreign Intelligence Surveillance
2 Court.

3 “(B) ASSIGNMENT.—The presiding judge
4 of the Court shall assign the petition filed
5 under subparagraph (A) to 1 of the judges serv-
6 ing in the pool established by section 103(e)(1)
7 not later than 24 hours after the filing of the
8 petition.

9 “(C) STANDARDS FOR REVIEW.—A judge
10 considering a petition to modify or set aside a
11 directive may grant such petition only if the
12 judge finds that the directive does not meet the
13 requirements of this section or is otherwise un-
14 lawful. If the judge does not modify or set aside
15 the directive, the judge shall immediately affirm
16 such directive, and order the recipient to com-
17 ply with the directive. The judge shall provide
18 a written statement for the record of the rea-
19 sons for a determination under this paragraph.

20 “(D) CONTINUED EFFECT.—Any directive
21 not explicitly modified or set aside under this
22 paragraph shall remain in full effect.

23 “(5) ENFORCEMENT OF DIRECTIVES.—

24 “(A) ORDER TO COMPEL.—In the case of
25 a failure to comply with a directive issued pur-

1 suant to paragraph (1), the Attorney General
2 may file a petition for an order to compel com-
3 pliance with the directive with the Foreign In-
4 telligence Surveillance Court.

5 “(B) ASSIGNMENT.—The presiding judge
6 of the Court shall assign a petition filed under
7 subparagraph (A) to 1 of the judges serving in
8 the pool established by section 103(e)(1) not
9 later than 24 hours after the filing of the peti-
10 tion.

11 “(C) STANDARDS FOR REVIEW.—A judge
12 considering a petition shall issue an order re-
13 quiring the electronic communication service
14 provider to comply with the directive if the
15 judge finds that the directive was issued in ac-
16 cordance with paragraph (1), meets the require-
17 ments of this section, and is otherwise lawful.
18 The judge shall provide a written statement for
19 the record of the reasons for a determination
20 under this paragraph.

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

1 “(E) PROCESS.—Any process under this
2 paragraph may be served in any judicial district
3 in which the electronic communication service
4 provider may be found.

5 “(6) APPEAL.—

6 “(A) APPEAL TO THE COURT OF RE-
7 VIEW.—The Government or an electronic com-
8 munication service provider receiving a directive
9 issued pursuant to paragraph (1) may file a pe-
10 tition with the Foreign Intelligence Surveillance
11 Court of Review for review of the decision
12 issued pursuant to paragraph (4) or (5) not
13 later than 7 days after the issuance of such de-
14 cision. The Court of Review shall have jurisdic-
15 tion to consider such a petition and shall pro-
16 vide a written statement for the record of the
17 reasons for a decision under this paragraph.

18 “(B) CERTIORARI TO THE SUPREME
19 COURT.—The Government or an electronic com-
20 munication service provider receiving a directive
21 issued pursuant to paragraph (1) may file a pe-
22 tition for a writ of certiorari for review of the
23 decision of the Court of Review issued under
24 subparagraph (A). The record for such review
25 shall be transmitted under seal to the Supreme

1 Court of the United States, which shall have ju-
2 risdiction to review such decision.

3 “(i) JUDICIAL REVIEW.—

4 “(1) IN GENERAL.—

5 “(A) REVIEW BY THE FOREIGN INTEL-
6 LIGENCE SURVEILLANCE COURT.—The Foreign
7 Intelligence Surveillance Court shall have juris-
8 diction to review any certification required by
9 subsection (d) or targeting and minimization
10 procedures adopted pursuant to subsections (e)
11 and (f).

12 “(B) SUBMISSION TO THE COURT.—The
13 Attorney General shall submit to the Court any
14 such certification or procedure, or amendment
15 thereto, not later than 5 days after making or
16 amending the certification or adopting or
17 amending the procedures.

18 “(2) CERTIFICATIONS.—The Court shall review
19 a certification provided under subsection (g) to de-
20 termine whether the certification contains all the re-
21 quired elements.

22 “(3) TARGETING PROCEDURES.—The Court
23 shall review the targeting procedures required by
24 subsection (e) to assess whether the procedures are
25 reasonably designed to ensure that the acquisition

1 authorized under subsection (a) is limited to the tar-
2 geting of persons reasonably believed to be located
3 outside the United States.

4 “(4) MINIMIZATION PROCEDURES.—The Court
5 shall review the minimization procedures required by
6 subsection (f) to assess whether such procedures
7 meet the definition of minimization procedures
8 under section 101(h).

9 “(5) ORDERS.—

10 “(A) APPROVAL.—If the Court finds that
11 a certification required by subsection (g) con-
12 tains all of the required elements and that the
13 targeting and minimization procedures required
14 by subsections (e) and (f) are consistent with
15 the requirements of those subsections and with
16 the fourth amendment to the Constitution of
17 the United States, the Court shall enter an
18 order approving the continued use of the proce-
19 dures for the acquisition authorized under sub-
20 section (a).

21 “(B) CORRECTION OF DEFICIENCIES.—

22 “(i) IN GENERAL.—If the Court finds
23 that a certification required by subsection
24 (g) does not contain all of the required ele-
25 ments, or that the procedures required by

1 subsections (e) and (f) are not consistent
2 with the requirements of those subsections
3 or the fourth amendment to the Constitu-
4 tion of the United States, the Court shall
5 issue an order directing the Government
6 to, at the Government's election and to the
7 extent required by the Court's order—

8 “(I) correct any deficiency identi-
9 fied by the Court's order not later
10 than 30 days after the date the Court
11 issues the order; or

12 “(II) cease the acquisition au-
13 thORIZED under subsection (a).

14 “(ii) LIMITATION ON USE OF INFOR-
15 MATION.—

16 “(I) IN GENERAL.—Except as
17 provided in subclause (II), no infor-
18 mation obtained or evidence derived
19 from such acquisition shall be received
20 in evidence or otherwise disclosed in
21 any trial, hearing, or other proceeding
22 in or before any court, grand jury, de-
23 partment, office, agency, regulatory
24 body, legislative committee, or other
25 authority of the United States, a

1 State, or political subdivision thereof,
2 and no information concerning any
3 United States person acquired from
4 such acquisition shall subsequently be
5 used or disclosed in any other manner
6 by Federal officers or employees with-
7 out the consent of such person, except
8 with the approval of the Attorney
9 General if the information indicates a
10 threat of death or serious bodily harm
11 to any person.

12 “(II) EXCEPTION.—If the Gov-
13 ernment corrects any deficiency iden-
14 tified by the Court’s order under
15 clause (i) and such corrected certifi-
16 cation or procedure is substantially
17 similar to the certification or proce-
18 dure rejected by the Court, the Court
19 may permit the use or disclosure of
20 information acquired before the date
21 of the correction pursuant to such
22 minimization procedures as the Court
23 shall establish for purposes of this
24 clause.

1 “(C) REQUIREMENT FOR WRITTEN STATE-
2 MENT.—In support of its orders under this sub-
3 section, the Court shall provide, simultaneously
4 with the orders, for the record a written state-
5 ment of its reasons.

6 “(6) APPEAL.—

7 “(A) APPEAL TO THE COURT OF RE-
8 VIEW.—The Government may appeal any order
9 under this section to the Foreign Intelligence
10 Surveillance Court of Review, which shall have
11 jurisdiction to review such order. For any deci-
12 sion affirming, reversing, or modifying an order
13 of the Foreign Intelligence Surveillance Court,
14 the Court of Review shall provide for the record
15 a written statement of its reasons.

16 “(B) STAY PENDING APPEAL.—The Gov-
17 ernment may move for a stay of any order of
18 the Foreign Intelligence Surveillance Court
19 under paragraph (5)(B)(i) pending review by
20 the Court en banc or pending appeal to the
21 Foreign Intelligence Surveillance Court of Re-
22 view.

23 “(C) CERTIORARI TO THE SUPREME
24 COURT.—The Government may file a petition
25 for a writ of certiorari for review of a decision

1 of the Court of Review issued under subpara-
2 graph (A). The record for such review shall be
3 transmitted under seal to the Supreme Court of
4 the United States, which shall have jurisdiction
5 to review such decision.

6 “(7) COMPLIANCE REVIEW.—The Court may
7 review and assess compliance with the minimization
8 procedures submitted to the Court pursuant to sub-
9 sections (e) and (f) by reviewing the semiannual as-
10 sessments submitted by the Attorney General and
11 the Director of National Intelligence pursuant to
12 subsection (l)(1) with respect to compliance with
13 minimization procedures. In conducting a review
14 under this paragraph, the Court may, to the extent
15 necessary, require the Government to provide addi-
16 tional information regarding the acquisition, reten-
17 tion, or dissemination of information concerning
18 United States persons during the course of an acqui-
19 sition authorized under subsection (a).

20 “(j) JUDICIAL PROCEEDINGS.—Judicial proceedings
21 under this section shall be conducted as expeditiously as
22 possible.

23 “(k) MAINTENANCE OF RECORDS.—

24 “(1) STANDARDS.—A record of a proceeding
25 under this section, including petitions filed, orders

1 granted, and statements of reasons for decision,
2 shall be maintained under security measures adopted
3 by the Chief Justice of the United States, in con-
4 sultation with the Attorney General and the Director
5 of National Intelligence.

6 “(2) FILING AND REVIEW.—All petitions under
7 this section shall be filed under seal. In any pro-
8 ceedings under this section, the court shall, upon re-
9 quest of the Government, review ex parte and in
10 camera any Government submission, or portions of
11 a submission, which may include classified informa-
12 tion.

13 “(3) RETENTION OF RECORDS.—A directive
14 made or an order granted under this section shall be
15 retained for a period of not less than 10 years from
16 the date on which such directive or such order is
17 made.

18 “(1) OVERSIGHT.—

19 “(1) SEMIANNUAL ASSESSMENT.—Not less fre-
20 quently than once every 6 months, the Attorney
21 General and Director of National Intelligence shall
22 assess compliance with the targeting and minimiza-
23 tion procedures required by subsections (c), (e), and
24 (f) and shall submit each such assessment to—

1 “(A) the Foreign Intelligence Surveillance
2 Court; and

3 “(B) the congressional intelligence commit-
4 tees.

5 “(2) AGENCY ASSESSMENT.—The Inspectors
6 General of the Department of Justice and of any
7 element of the intelligence community authorized to
8 acquire foreign intelligence information under sub-
9 section (a)—

10 “(A) are authorized to review the compli-
11 ance of their agency or element with the tar-
12 geting and minimization procedures required by
13 subsections (c), (e), and (f);

14 “(B) with respect to acquisitions author-
15 ized under subsection (a), shall review the num-
16 ber of disseminated intelligence reports con-
17 taining a reference to a United States person
18 identity and the number of United States per-
19 son identities subsequently disseminated by the
20 element concerned in response to requests for
21 identities that were not referred to by name or
22 title in the original reporting;

23 “(C) with respect to acquisitions author-
24 ized under subsection (a), shall review the num-
25 ber of targets that were later determined to be

1 located in the United States and the number of
2 persons located in the United States whose
3 communications were reviewed; and

4 “(D) shall provide each such review to—

5 “(i) the Attorney General;

6 “(ii) the Director of National Intel-
7 ligence; and

8 “(iii) the congressional intelligence
9 committees.

10 “(3) ANNUAL REVIEW.—

11 “(A) REQUIREMENT TO CONDUCT.—The
12 head of an element of the intelligence commu-
13 nity conducting an acquisition authorized under
14 subsection (a) shall direct the element to con-
15 duct an annual review to determine whether
16 there is reason to believe that foreign intel-
17 ligence information has been or will be obtained
18 from the acquisition. The annual review shall
19 provide, with respect to such acquisitions au-
20 thorized under subsection (a)—

21 “(i) an accounting of the number of
22 disseminated intelligence reports con-
23 taining a reference to a United States per-
24 son identity;

1 “(ii) an accounting of the number of
2 United States person identities subse-
3 quently disseminated by that element in re-
4 sponse to requests for identities that were
5 not referred to by name or title in the
6 original reporting; and

7 “(iii) the number of targets that were
8 later determined to be located in the
9 United States and the number of persons
10 located in the United States whose commu-
11 nications were reviewed.

12 “(B) USE OF REVIEW.—The head of each
13 element of the intelligence community that con-
14 ducts an annual review under subparagraph (A)
15 shall use each such review to evaluate the ade-
16 quacy of the minimization procedures utilized
17 by such element or the application of the mini-
18 mization procedures to a particular acquisition
19 authorized under subsection (a).

20 “(C) PROVISION OF REVIEW TO FOREIGN
21 INTELLIGENCE SURVEILLANCE COURT.—The
22 head of each element of the intelligence commu-
23 nity that conducts an annual review under sub-
24 paragraph (A) shall provide such review to the
25 Foreign Intelligence Surveillance Court.

1 “(4) REPORTS TO CONGRESS.—

2 “(A) SEMIANNUAL REPORT.—Not less fre-
3 quently than once every 6 months, the Attorney
4 General shall fully inform, in a manner con-
5 sistent with national security, the congressional
6 intelligence committees, the Committee on the
7 Judiciary of the Senate, and the Committee on
8 the Judiciary of the House of Representatives,
9 concerning the implementation of this Act.

10 “(B) CONTENT.—Each report made under
11 subparagraph (A) shall include—

12 “(i) any certifications made under
13 subsection (g) during the reporting period;

14 “(ii) any directives issued under sub-
15 section (h) during the reporting period;

16 “(iii) the judicial review during the re-
17 porting period of any such certifications
18 and targeting and minimization procedures
19 utilized with respect to such acquisition,
20 including a copy of any order or pleading
21 in connection with such review that con-
22 tains a significant legal interpretation of
23 the provisions of this Act;

1 “(iv) any actions taken to challenge or
2 enforce a directive under paragraphs (4) or
3 (5) of subsections (h);

4 “(v) any compliance reviews con-
5 ducted by the Department of Justice or
6 the Office of the Director of National In-
7 telligence of acquisitions authorized under
8 subsection (a);

9 “(vi) a description of any incidents of
10 noncompliance with a directive issued by
11 the Attorney General and the Director of
12 National Intelligence under subsection (h),
13 including—

14 “(I) incidents of noncompliance
15 by an element of the intelligence com-
16 munity with procedures adopted pur-
17 suant to subsections (c), (e), and (f);
18 and

19 “(II) incidents of noncompliance
20 by a specified person to whom the At-
21 torney General and Director of Na-
22 tional Intelligence issued a directive
23 under subsection (h);

24 “(vii) any procedures implementing
25 this section; and

1 “(viii) any annual review conducted
2 pursuant to paragraph (3).

3 **“SEC. 703. USE OF INFORMATION ACQUIRED UNDER SEC-**
4 **TION 702.**

5 “Information acquired from an acquisition conducted
6 under section 702 shall be deemed to be information ac-
7 quired from an electronic surveillance pursuant to title I
8 for purposes of section 106, except for the purposes of
9 subsection (j) of such section.”.

10 (b) TABLE OF CONTENTS.—The table of contents in
11 the first section of the Foreign Intelligence Surveillance
12 Act of 1978 (50 U.S.C. 1801 et seq.) is amended—

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

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

15 and

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

“TITLE VII—ADDITIONAL PROCEDURES FOR TARGETING COMMU-
NICATIONS OF CERTAIN PERSONS OUTSIDE THE UNITED
STATES

“Sec. 701. Definitions.

“Sec. 702. Procedures for acquiring the communications of certain persons out-
side the United States.

“Sec. 703. Use of information acquired under section 702.”.

17 (c) SUNSET.—

18 (1) IN GENERAL.—Except as provided in para-
19 graph (2), the amendments made by subsections
20 (a)(2) and (b) shall cease to have effect on Decem-
21 ber 31, 2013.

1 (2) CONTINUING APPLICABILITY.—Section
2 702(h)(3) of the Foreign Intelligence Surveillance
3 Act of 1978 (as amended by subsection (a)) shall re-
4 main in effect with respect to any directive issued
5 pursuant to section 702(h) of that Act (as so
6 amended) during the period such directive was in ef-
7 fect. The use of information acquired by an acquisi-
8 tion conducted under section 702 of that Act (as so
9 amended) shall continue to be governed by the provi-
10 sions of section 703 of that Act (as so amended).

11 **SEC. 102. STATEMENT OF EXCLUSIVE MEANS BY WHICH**
12 **ELECTRONIC SURVEILLANCE AND INTERCEP-**
13 **TION OF CERTAIN COMMUNICATIONS MAY BE**
14 **CONDUCTED.**

15 (a) STATEMENT OF EXCLUSIVE MEANS.—Title I of
16 the Foreign Intelligence Surveillance Act of 1978 (50
17 U.S.C. 1801 et seq.) is amended by adding at the end
18 the following new section:

19 “STATEMENT OF EXCLUSIVE MEANS BY WHICH ELEC-
20 TRONIC SURVEILLANCE AND INTERCEPTION OF CER-
21 TAIN COMMUNICATIONS MAY BE CONDUCTED

22 “SEC. 112. (a) This Act shall be the exclusive means
23 for targeting the communications or communications in-
24 formation of United States persons for foreign intelligence
25 purposes, whether such persons are inside the United
26 States or outside the United States.

1 “(b) Chapters 119 and 121 of title 18, United States
2 Code, and this Act shall be the exclusive means by which
3 electronic surveillance and the interception of domestic
4 wire, oral, or electronic communications may be con-
5 ducted.

6 “(c) Subsections (a) and (b) shall apply unless spe-
7 cific statutory authorization for electronic surveillance,
8 other than as an amendment to this Act, is enacted. Such
9 specific statutory authorization shall be the only exception
10 to subsection (a) and (b).”.

11 (b) CONFORMING AMENDMENTS.—

12 (1) IN GENERAL.—Section 2511(2)(a) of title
13 18, United States Code, is amended by adding at
14 the end the following:

15 “(iii) A certification under subparagraph (ii)(B) for
16 assistance to obtain foreign intelligence information shall
17 identify the specific provision of the Foreign Intelligence
18 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) that
19 provides an exception from providing a court order, and
20 shall certify that the statutory requirements of such provi-
21 sion have been met.”.

22 (2) TABLE OF CONTENTS.—The table of con-
23 tents in the first section of the Foreign Intelligence
24 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.)

1 is amended by adding after the item relating to sec-
2 tion 111, the following:

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

3 **SEC. 103. SUBMITTAL TO CONGRESS OF CERTAIN COURT**
4 **ORDERS UNDER THE FOREIGN INTEL-**
5 **LIGENCE SURVEILLANCE ACT OF 1978.**

6 (a) **INCLUSION OF CERTAIN ORDERS IN SEMI-AN-**
7 **NUAL REPORTS OF ATTORNEY GENERAL.**—Subsection
8 (a)(5) of section 601 of the Foreign Intelligence Surveil-
9 lance Act of 1978 (50 U.S.C. 1871) is amended by strik-
10 ing “(not including orders)” and inserting “, orders,”.

11 (b) **REPORTS BY ATTORNEY GENERAL ON CERTAIN**
12 **OTHER ORDERS.**—Such section 601 is further amended
13 by adding at the end the following new subsection:

14 “(c) The Attorney General shall submit to the com-
15 mittees of Congress referred to in subsection (a) a copy
16 of any decision, order, or opinion issued by the court es-
17 tablished under section 103(a) or the court of review es-
18 tablished under section 103(b) that includes significant
19 construction or interpretation of any provision of this Act
20 not later than 45 days after such decision, order, or opin-
21 ion is issued.”.

22 **SEC. 104. APPLICATIONS FOR COURT ORDERS.**

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

1 (1) in subsection (a)—

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

3 (B) by redesignating paragraphs (3)
4 through (10) as paragraphs (2) through (9), re-
5 spectively;

6 (C) in paragraph (5), as redesignated by
7 subparagraph (B) of this paragraph, by striking
8 “detailed”;

9 (D) in paragraph (7), as redesignated by
10 subparagraph (B) of this paragraph, by striking
11 “statement of” and inserting “summary state-
12 ment of”;

13 (E) in paragraph (8), as redesignated by
14 subparagraph (B) of this paragraph, by adding
15 “and” at the end; and

16 (F) in paragraph (9), as redesignated by
17 subparagraph (B) of this paragraph, by striking
18 “; and” and inserting a period;

19 (2) by striking subsection (b);

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

22 (4) in paragraph (1)(A) of subsection (d), as re-
23 designating by paragraph (3) of this subsection, by
24 striking “or the Director of National Intelligence”

1 and inserting “the Director of National Intelligence,
2 or the Director of the Central Intelligence Agency”.

3 **SEC. 105. ISSUANCE OF AN ORDER.**

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

6 (1) in subsection (a)—

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

8 (B) by redesignating paragraphs (2)
9 through (5) as paragraphs (1) through (4), re-
10 spectively;

11 (2) in subsection (b), by striking “(a)(3)” and
12 inserting “(a)(2)”;

13 (3) in subsection (c)(1)—

14 (A) in subparagraph (D), by adding “and”
15 at the end;

16 (B) in subparagraph (E), by striking “;
17 and” and inserting a period; and

18 (C) by striking subparagraph (F);

19 (4) by striking subsection (d);

20 (5) by redesignating subsections (e) through (i)
21 as subsections (d) through (h), respectively;

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

24 “(e)(1) Notwithstanding any other provision of this
25 title, the Attorney General may authorize the emergency

1 employment of electronic surveillance if the Attorney Gen-
2 eral—

3 “(A) determines that an emergency situation
4 exists with respect to the employment of electronic
5 surveillance to obtain foreign intelligence informa-
6 tion before an order authorizing such surveillance
7 can with due diligence be obtained;

8 “(B) determines that the factual basis for
9 issuance of an order under this title to approve such
10 electronic surveillance exists;

11 “(C) informs, either personally or through a
12 designee, a judge having jurisdiction under section
13 103 at the time of such authorization that the deci-
14 sion has been made to employ emergency electronic
15 surveillance; and

16 “(D) makes an application in accordance with
17 this title to a judge having jurisdiction under section
18 103 as soon as practicable, but not later than 168
19 hours after the Attorney General authorizes such
20 surveillance.

21 “(2) If the Attorney General authorizes the emer-
22 gency employment of electronic surveillance under para-
23 graph (1), the Attorney General shall require that the
24 minimization procedures required by this title for the
25 issuance of a judicial order be followed.

1 “(3) In the absence of a judicial order approving such
2 electronic surveillance, the surveillance shall terminate
3 when the information sought is obtained, when the appli-
4 cation for the order is denied, or after the expiration of
5 168 hours from the time of authorization by the Attorney
6 General, whichever is earliest.

7 “(4) A denial of the application made under this sub-
8 section may be reviewed as provided in section 103.

9 “(5) In the event that such application for approval
10 is denied, or in any other case where the electronic surveil-
11 lance is terminated and no order is issued approving the
12 surveillance, no information obtained or evidence derived
13 from such surveillance shall be received in evidence or oth-
14 erwise disclosed in any trial, hearing, or other proceeding
15 in or before any court, grand jury, department, office,
16 agency, regulatory body, legislative committee, or other
17 authority of the United States, a State, or political sub-
18 division thereof, and no information concerning any
19 United States person acquired from such surveillance shall
20 subsequently be used or disclosed in any other manner by
21 Federal officers or employees without the consent of such
22 person, except with the approval of the Attorney General
23 if the information indicates a threat of death or serious
24 bodily harm to any person.

1 “(6) The Attorney General shall assess compliance
2 with the requirements of paragraph (5).”; and

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

4 “(i) In any case in which the Government makes an
5 application to a judge under this title to conduct electronic
6 surveillance involving communications and the judge
7 grants such application, upon the request of the applicant,
8 the judge shall also authorize the installation and use of
9 pen registers and trap and trace devices, and direct the
10 disclosure of the information set forth in section
11 402(d)(2).”.

12 **SEC. 106. USE OF INFORMATION.**

13 Subsection (i) of section 106 of the Foreign Intel-
14 ligence Surveillance Act of 1978 (8 U.S.C. 1806) is
15 amended by striking “radio communication” and inserting
16 “communication”.

17 **SEC. 107. AMENDMENTS FOR PHYSICAL SEARCHES.**

18 (a) **APPLICATIONS.**—Section 303 of the Foreign In-
19 telligence Surveillance Act of 1978 (50 U.S.C. 1823) is
20 amended—

21 (1) in subsection (a)—

22 (A) by striking paragraph (2);

23 (B) by redesignating paragraphs (3)
24 through (9) as paragraphs (2) through (8), re-
25 spectively;

1 (C) in paragraph (2), as redesignated by
2 subparagraph (B) of this paragraph, by striking
3 “detailed”;

4 (D) in paragraph (3)(C), as redesignated
5 by subparagraph (B) of this paragraph, by in-
6 serting “or is about to be” before “owned”; and

7 (E) in paragraph (6), as redesignated by
8 subparagraph (B) of this paragraph, in the
9 matter preceding subparagraph (A)—

10 (i) by striking “Affairs or” and insert-
11 ing “Affairs,”; and

12 (ii) by striking “Senate—” and insert-
13 ing “Senate, or the Deputy Director of the
14 Federal Bureau of Investigation, if des-
15 ignated by the President as a certifying of-
16 ficial—”; and

17 (2) in subsection (d)(1)(A), by striking “or the
18 Director of National Intelligence” and inserting “the
19 Director of National Intelligence, or the Director of
20 the Central Intelligence Agency”.

21 (b) ORDERS.—Section 304 of the Foreign Intel-
22 ligence Surveillance Act of 1978 (50 U.S.C. 1824) is
23 amended—

24 (1) in subsection (a)—

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

1 (B) by redesignating paragraphs (2)
2 through (5) as paragraphs (1) through (4), re-
3 spectively; and

4 (2) by amending subsection (e) to read as fol-
5 lows:

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

9 “(A) determines that an emergency situation
10 exists with respect to the employment of a physical
11 search to obtain foreign intelligence information be-
12 fore an order authorizing such physical search can
13 with due diligence be obtained;

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

17 “(C) informs, either personally or through a
18 designee, a judge of the Foreign Intelligence Surveil-
19 lance Court at the time of such authorization that
20 the decision has been made to employ an emergency
21 physical search; and

22 “(D) makes an application in accordance with
23 this title to a judge of the Foreign Intelligence Sur-
24 veillance Court as soon as practicable, but not more

1 than 168 hours after the Attorney General author-
2 izes such physical search.

3 “(2) If the Attorney General authorizes the emer-
4 gency employment of a physical search under paragraph
5 (1), the Attorney General shall require that the minimiza-
6 tion procedures required by this title for the issuance of
7 a judicial order be followed.

8 “(3) In the absence of a judicial order approving such
9 physical search, the physical search shall terminate when
10 the information sought is obtained, when the application
11 for the order is denied, or after the expiration of 168
12 hours from the time of authorization by the Attorney Gen-
13 eral, whichever is earliest.

14 “(4) A denial of the application made under this sub-
15 section may be reviewed as provided in section 103.

16 “(5)(A) In the event that such application for ap-
17 proval is denied, or in any other case where the physical
18 search is terminated and no order is issued approving the
19 physical search, no information obtained or evidence de-
20 rived from such physical search shall be received in evi-
21 dence or otherwise disclosed in any trial, hearing, or other
22 proceeding in or before any court, grand jury, department,
23 office, agency, regulatory body, legislative committee, or
24 other authority of the United States, a State, or political
25 subdivision thereof, and no information concerning any

1 United States person acquired from such physical search
2 shall subsequently be used or disclosed in any other man-
3 ner by Federal officers or employees without the consent
4 of such person, except with the approval of the Attorney
5 General if the information indicates a threat of death or
6 serious bodily harm to any person.

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

9 (c) CONFORMING AMENDMENTS.—The Foreign Intel-
10 ligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.)
11 is amended—

12 (1) in section 304(a)(4), as redesignated by
13 subsection (b) of this section, by striking
14 “303(a)(7)(E)” and inserting “303(a)(6)(E)”; and

15 (2) in section 305(k)(2), by striking
16 “303(a)(7)” and inserting “303(a)(6)”.

17 **SEC. 108. AMENDMENTS FOR EMERGENCY PEN REGISTERS**
18 **AND TRAP AND TRACE DEVICES.**

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

21 (1) in subsection (a)(2), by striking “48 hours”
22 and inserting “168 hours”; and

23 (2) in subsection (c)(1)(C), by striking “48
24 hours” and inserting “168 hours”.

1 **SEC. 109. FOREIGN INTELLIGENCE SURVEILLANCE COURT.**

2 (a) **DESIGNATION OF JUDGES.**—Subsection (a) of
3 section 103 of the Foreign Intelligence Surveillance Act
4 of 1978 (50 U.S.C. 1803) is amended by inserting “at
5 least” before “seven of the United States judicial cir-
6 cuits”.

7 (b) **EN BANC AUTHORITY.**—

8 (1) **IN GENERAL.**—Subsection (a) of section
9 103 of the Foreign Intelligence Surveillance Act of
10 1978, as amended by subsection (a) of this section,
11 is further amended—

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

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

15 “(2)(A) The court established under this subsection
16 may, on its own initiative, or upon the request of the Gov-
17 ernment in any proceeding or a party under section 501(f)
18 or paragraph (4) or (5) of section 702(h), hold a hearing
19 or rehearing, en banc, when ordered by a majority of the
20 judges that constitute such court upon a determination
21 that—

22 “(i) en banc consideration is necessary to se-
23 cure or maintain uniformity of the court’s decisions;
24 or

25 “(ii) the proceeding involves a question of ex-
26 ceptional importance.

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

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

9 (2) CONFORMING AMENDMENTS.—The Foreign
10 Intelligence Surveillance Act of 1978 is further
11 amended—

12 (A) in subsection (a) of section 103, as
13 amended by this subsection, by inserting “(ex-
14 cept when sitting en banc under paragraph
15 (2))” after “no judge designated under this
16 subsection”; and

17 (B) in section 302(e) (50 U.S.C. 1822(e)),
18 by inserting “(except when sitting en banc)”
19 after “except that no judge”.

20 (c) STAY OR MODIFICATION DURING AN APPEAL.—
21 Section 103 of the Foreign Intelligence Surveillance Act
22 of 1978 (50 U.S.C. 1803) is amended—

23 (1) by redesignating subsection (f) as sub-
24 section (g); and

1 (2) by inserting after subsection (e) the fol-
2 lowing new subsection:

3 “(f)(1) A judge of the court established under sub-
4 section (a), the court established under subsection (b) or
5 a judge of that court, or the Supreme Court of the United
6 States or a justice of that court, may, in accordance with
7 the rules of their respective courts, enter a stay of an order
8 or an order modifying an order of the court established
9 under subsection (a) or the court established under sub-
10 section (b) entered under any title of this Act, while the
11 court established under subsection (a) conducts a rehear-
12 ing, while an appeal is pending to the court established
13 under subsection (b), or while a petition of certiorari is
14 pending in the Supreme Court of the United States, or
15 during the pendency of any review by that court.

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

19 **SEC. 110. TECHNICAL AND CONFORMING AMENDMENTS.**

20 Section 103(e) of the Foreign Intelligence Surveil-
21 lance Act of 1978 (50 U.S.C. 1803(e)) is amended—

22 (1) in paragraph (1), by striking “105B(h) or
23 501(f)(1)” and inserting “501(f)(1) or 702”; and

24 (2) in paragraph (2), by striking “105B(h) or
25 501(f)(1)” and inserting “501(f)(1) or 702”.

Ahmad, Usman



Not Responsive
EFF2OLA(2)-27

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

FOIA Exemption b(6)

From: Nielsen, Damion (Judiciary-Rep) [REDACTED]@judiciary-rep.senate.gov>
Sent: Wed Nov 07 16:34:43 2007
Subject: Substitute Amendment for Title I, S.2248

EFF2OLA(2)-28

Attached is a proposed amdt. for tomorrow's Senate Judiciary markup on FISA.

The attached is a proposed substitute amendment for Title I of S.2248 that Senator Leahy may offer at tomorrow's markup on behalf of himself and other Senators.

Below is a summary of the changes made to Title I by this amendment.

Proposed substitute for Title I of S.2248, the Senate Intel's FISA Amendments Act of 2007.

Summary of changes to Title I of the SSCI bill:

- 1) Strikes 701, the redefinition of electronic surveillance, and makes clear, in what is now Sec. 702, that FISA grants additional authority to target persons outside the U.S. to acquire foreign intelligence information without an individual court order
- 2) Revisions to (c) United States Persons Located Outside the United States, amendment regarding the acquisition of U.S. persons communications when those U.S. persons are outside the U.S. These revisions include: an emergency provision, an explicit grant of FISC jurisdiction, language ensuring the court is only issuing a probable cause determination and approving certain minimization procedures, and a transition provision.
- 3) (7) Compliance Review- amendment strengthening minimization by allowing the Court to assess compliance.
- 4) Strike section 102, the current exclusivity provision, and replace it with a stronger exclusivity provision, a provision that not only states that FISA is the exclusive means by which foreign intelligence surveillance may be conducted, but also requires certifications to the electronic service provider to identify the specific provisions of FISA that allow for an exception to providing a court order and certifies that the statutory requirements of that provision have been met.
- 5) (B) Stay pending appeal, allows the government to move for a stay of an order of the FISC pending appeal (p. 27 line 6-)
- 6) (ii) Limitation on Use of Information strengthens the restrictions on use and dissemination of acquired communications.
- 7) Striking the designation of the Deputy FBI Director for

3/13/2008

Fw: Substitute Amendment for Title I, S.2248
certifications

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