

OLC PART 3

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Cc: Rice, K (Intelligence)
Subject: Discussion Drafts
Attachments: EAS07945(FISA Mod Packet 2 Ver 3).xml.pdf; HEN07G50_.xml.pdf; HEN07F61_.xml.pdf; HEN07D97_.xml.pdf; HEN07E61_.xml.pdf; HEN07G51_.xml.pdf

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I'm attaching the current discussion drafts on FISA modernization. The first one EAS07945 is what Senator Bond proposed to Senator Rockefeller about a week and half before recess. It is based on the DNI's original request. It drops the agent of a foreign power definition change and the mandatory transfer for review provisions. It makes a few changes to the streamlining provisions based on FISC legal advisor input, but otherwise uses almost all of the original text.

I'm attaching a bunch of drafts that Mike Davidson has circulated to Senate Judiciary counsel. One of them is based on the very last DNI proposal (the one that included prior judicial review). I'd appreciate it if DOJ, FBI, and NSA could review these and provide input in the next couple of weeks.

I'm particularly interested in arguments against court approval (either prior or post) related to targeting persons overseas.

Thanks.

73

110TH CONGRESS
1ST SESSION

S. _____

To amend the Foreign Intelligence Surveillance Act of 1978, to modernize the provisions of that Act.

IN THE SENATE OF THE UNITED STATES

Mr. BOND introduced the following bill; which was read twice and referred to the Committee on

A BILL

To amend the Foreign Intelligence Surveillance Act of 1978, to modernize the provisions of that Act.

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 “Foreign Intelligence Surveillance Modernization Act of
6 2007”.

7 (b) **TABLE OF CONTENTS.**—The table of contents for
8 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Definitions.

Sec. 3. Attorney General authorization for acquisition of certain foreign intel-
ligence information.

Sec. 4. Liability defense.

- Sec. 5. Use of information.
- Sec. 6. Applications for court orders.
- Sec. 7. Issuance of an order.
- Sec. 8. Amendments for physical searches.
- Sec. 9. Amendments for emergency pen registers and trap and trace devices.
- Sec. 10. Weapons of mass destruction.
- Sec. 11. Designation of Judges.
- Sec. 12. Technical and conforming amendments.
- Sec. 13. Effective date.

1 **SEC. 2. DEFINITIONS.**

2 (a) **ELECTRONIC SURVEILLANCE.**—Subsection (f) of
3 section 101 of the Foreign Intelligence Surveillance Act
4 of 1978 (50 U.S.C. 1801) is amended to read as follows:

5 “(f) ‘Electronic surveillance’ means—

6 “(1) the installation or use of an electronic, me-
7 chanical, or other surveillance device for acquiring
8 information by intentionally directing surveillance at
9 a particular, known person who is reasonably be-
10 lieved to be located within the United States under
11 circumstances in which that person has a reasonable
12 expectation of privacy and a warrant would be re-
13 quired for law enforcement purposes; or

14 “(2) the intentional acquisition of the contents
15 of any communication under circumstances in which
16 a person has a reasonable expectation of privacy and
17 a warrant would be required for law enforcement
18 purposes, if both the sender and all intended recipi-
19 ents are reasonably believed to be located within the
20 United States.”

1 (b) WIRE COMMUNICATION.—Such section is amend-
2 ed by striking subsection (l).

3 (c) CONTENTS.—Subsection (n) of such section is
4 amended to read as follows:

5 “(n) ‘Contents’, when used with respect to a commu-
6 nication, includes any information concerning the sub-
7 stance, purport, or meaning of that communication.”

8 **SEC. 3. ATTORNEY GENERAL AUTHORIZATION FOR ACQUI-**
9 **SITION OF CERTAIN FOREIGN INTELLIGENCE**
10 **INFORMATION.**

11 (a) **IN GENERAL.**—The Foreign Intelligence Surveil-
12 lance Act of 1978 (50 U.S.C. 1801 et seq.) is amended
13 by inserting the following after section 102:

14 **“AUTHORIZATION FOR ACQUISITION OF CERTAIN**
15 **FOREIGN INTELLIGENCE INFORMATION**

16 **“SEC. 102A. (a)** Notwithstanding any other provision
17 of law, the President, acting through the Attorney General
18 may, for periods of up to 1 year, authorize the acquisition
19 of foreign intelligence information concerning persons rea-
20 sonably believed to be outside the United States if the At-
21 torney General certifies in writing under oath that the At-
22 torney General has determined that—

23 “(1) the acquisition does not constitute elec-
24 tronic surveillance;

25 “(2) the acquisition involves obtaining the for-
26 eign intelligence information from or with the assist-

1 ance of a communications service provider, custo-
2 dian, or other person (including any officer, em-
3 ployee, agent, or other specified person of such serv-
4 ice provider, custodian, or other person) who has ac-
5 cess to communications, either as such communica-
6 tions are transmitted or while such communications
7 are stored, or equipment that is being or may be
8 used to transmit or store such communications;

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

11 “(4) the minimization procedures to be used
12 with respect to such acquisition activity meet the
13 definition of minimization procedures under section
14 101(h).

15 “(b) A certification under subsection (a) is not re-
16 quired to identify the specific facilities, places, premises,
17 or property at which the acquisition of foreign intelligence
18 information will be directed.

19 “(c) The Attorney General shall immediately trans-
20 mit under seal to the court established under section
21 103(a) a copy of a certification made under subsection (a).
22 Such certification shall be maintained under security
23 measures established by the Chief Justice of the United
24 States and the Attorney General, in consultation with the
25 Director of National Intelligence, and shall remain sealed

1 unless the certification is necessary to determine the legal-
2 ity of the acquisition under section 102B.

3 “(d) An acquisition under this section may be con-
4 ducted only in accordance with the certification of the At-
5 torney General and the minimization procedures adopted
6 by the Attorney General. The Attorney General shall as-
7 sess compliance with such procedures.

8 “DIRECTIVES RELATING TO ELECTRONIC SURVEILLANCE
9 AND OTHER ACQUISITIONS OF FOREIGN INTEL-
10 LIGENCE INFORMATION

11 “SEC. 102B. (a) With respect to an authorization of
12 electronic surveillance under section 102 or an authoriza-
13 tion of an acquisition under section 102A, the Attorney
14 General may direct a person to—

15 “(1) immediately provide the Government with
16 all information, facilities, or assistance necessary to
17 accomplish the electronic surveillance or acquisition
18 of foreign intelligence information in such a manner
19 as will protect the secrecy of the electronic surveil-
20 lance or acquisition and produce a minimum of in-
21 terference with the services that such person is pro-
22 viding to the target; and

23 “(2) maintain under security procedures ap-
24 proved by the Attorney General and the Director of
25 National Intelligence any records concerning the

1 electronic surveillance or acquisition or the aid fur-
2 nished that such person wishes to maintain.

3 “(b) The Government shall compensate, at the pre-
4 vailing rate, a person for providing information, facilities,
5 or assistance under subsection (a).

6 “(c) In the case of a failure to comply with a directive
7 issued under subsection (a), the Attorney General may in-
8 voke the aid of the court established under section 103(a)
9 to compel compliance with the directive. The court shall
10 issue an order requiring the person to comply with the
11 directive if it finds that the directive was issued in accord-
12 ance with subsection (a) and is otherwise lawful. Failure
13 to obey an order of the court may be punished by the court
14 as contempt of court. Any process under this section may
15 be served in any judicial district in which the person may
16 be found.

17 “(d)(1)(A) A person receiving a directive issued
18 under subsection (a) may challenge the legality of that di-
19 rective by filing a petition with the pool established under
20 section 103(e)(1).

21 “(B) The presiding judge designated under section
22 103(b) shall assign a petition filed under subparagraph
23 (A) to 1 of the judges serving in the pool established by
24 section 103(e)(1). Not later than 24 hours after the as-
25 signment of such petition, the assigned judge shall conduct

1 an initial review of the directive. If the assigned judge de-
2 termines that the petition is frivolous, the assigned judge
3 shall immediately deny the petition and affirm the direc-
4 tive or any part of the directive that is the subject of the
5 petition. If the assigned judge determines the petition is
6 not frivolous, the assigned judge shall, within 72 hours
7 of the initial review of the directive, consider the petition
8 in accordance with the procedures established under sec-
9 tion 103(e)(2) and provide a written statement for the
10 record of the reasons for any determination under this
11 subsection.

12 “(2) A judge considering a petition under this sub-
13 section to modify or set aside a directive may grant such
14 petition only if the judge finds that such directive does
15 not meet the requirements of this section or is otherwise
16 unlawful. If the judge does not modify or set aside the
17 directive, the judge shall immediately affirm such direc-
18 tive, and order the recipient to comply with such directive.

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

21 “(e) The Government or a person receiving a directive
22 reviewed under subsection (d) may file a petition with the
23 court of review established under section 103(b) for review
24 of the decision issued under subsection (d) not later than
25 7 days after the issuance of such decision. Such court of

1 review shall have jurisdiction to consider such petitions
2 and shall provide for the record a written statement of
3 the reasons for its decision. On petition for a writ of cer-
4 tiorari by the Government or any person receiving such
5 directive, the record shall be transmitted under seal to the
6 Supreme Court, which shall have jurisdiction to review
7 such decision.

8 “(f) Judicial proceedings under this section shall be
9 concluded as expeditiously as possible. The record of pro-
10 ceedings, including petitions filed, orders granted, and
11 statements of reasons for decision, shall be maintained
12 under security measures established by the Chief Justice
13 of the United States, in consultation with the Attorney
14 General and the Director of National Intelligence.

15 “(g) All petitions under this section shall be filed
16 under seal. In any proceedings under this section, the
17 court shall, upon request of the Government, review ex
18 parte and in camera any Government submission, or por-
19 tions of a submission, which may include classified infor-
20 mation.

21 “(h) No cause of action shall lie in any court against
22 any person for providing any information, facilities, or as-
23 sistance in accordance with a directive under this section.

24 “(i) A directive made or an order granted under this
25 section shall be retained for a period of not less than 10

1 years from the date on which such directive or such order
2 is made.

3 "USE OF INFORMATION ACQUIRED UNDER SECTION 102A

4 "SEC. 102C. (a) Information acquired from an acqui-
5 sition conducted under section 102A concerning any
6 United States person may be used and disclosed by Fed-
7 eral officers and employees without the consent of the
8 United States person only in accordance with the mini-
9 mization procedures required by section 102A. No other-
10 wise privileged communication obtained in accordance
11 with, or in violation of, the provisions of section 102A shall
12 lose its privileged character. No information from an ac-
13 quisition under section 102A may be used or disclosed by
14 Federal officers or employees except for lawful purposes.

15 "(b) Whenever the Government intends to enter into
16 evidence or otherwise use or disclose in any trial, hearing,
17 or other proceeding in or before any court, department,
18 officer, agency, regulatory body, or other authority of the
19 United States, against a person who was the target of,
20 or whose communications or activities were subject to, an
21 acquisition authorized under section 102A, any informa-
22 tion obtained or derived from such acquisition, the Gov-
23 ernment shall, prior to the trial, hearing, or other pro-
24 ceeding or at a reasonable time prior to an effort to dis-
25 close or so use that information or submit it in evidence,
26 notify such person and the court or other authority in

1 which the information is to be disclosed or used that the
2 Government intends to so disclose or so use such informa-
3 tion.

4 “(c) Whenever any State or political subdivision
5 thereof intends to enter into evidence or otherwise use or
6 disclose in any trial, hearing, or other proceeding in or
7 before any court, department, officer, agency, regulatory
8 body, or other authority of a State or a political subdivi-
9 sion thereof, against a person who was the target of, or
10 whose communications or activities were subject to, an ac-
11 quisition authorized under section 102A, any information
12 obtained or derived from such acquisition, the State or po-
13 litical subdivision thereof shall notify such person, the
14 court, or other authority in which the information is to
15 be disclosed or used, and the Attorney General that the
16 State or political subdivision thereof intends to so disclose
17 or so use such information.

18 “(d)(1) Any person against whom evidence obtained
19 or derived from an acquisition authorized under section
20 102A is to be, or has been, introduced or otherwise used
21 or disclosed in any trial, hearing, or other proceeding in
22 or before any court, department, officer, agency, regu-
23 latory body, or other authority of the United States, a
24 State, or a political subdivision thereof, may move to sup-

1 press the evidence obtained or derived from such acqui-
2 tion on the grounds that—

3 “(A) the information was unlawfully acquired;
4 or

5 “(B) the acquisition was not properly made in
6 conformity with an authorization under section
7 102A.

8 “(2) A person moving to suppress evidence under
9 paragraph (1) shall make such motion before the trial,
10 hearing, or other proceeding unless there was no oppor-
11 tunity to make such a motion or the person was not aware
12 of the grounds of the motion.

13 “(e) Whenever a court or other authority is notified
14 pursuant to subsection (b) or (c) of this section, or when-
15 ever a motion is made pursuant to subsection (d) of this
16 section, or whenever any motion or request is made pursu-
17 ant to any other statute or rule of the United States or
18 any State by a person who was the target of, or whose
19 communications or activities were subject to, an acquisi-
20 tion authorized pursuant to section 102A before any court
21 or other authority of the United States or any State—

22 “(1) to discover or obtain applications or orders
23 or other materials relating to an acquisition author-
24 ized pursuant to section 102A; or

1 “(2) to discover, obtain, or suppress evidence or
2 information obtained or derived from an acquisition
3 authorized pursuant to section 102A,
4 the United States district court or, where the motion
5 is made before another authority, the United States
6 district court in the same district as the authority,
7 shall, notwithstanding any other law, if the Attorney
8 General files an affidavit under oath that disclosure
9 or an adversary hearing would harm the national se-
10 curity of the United States, review in camera and ex
11 parte the application, order, and such other mate-
12 rials relating to the acquisition as may be necessary
13 to determine whether such acquisition was lawfully
14 authorized and conducted. In making this deter-
15 mination, the court may disclose to the person who
16 was the target of, or whose communications or ac-
17 tivities were subject to, an acquisition authorized
18 pursuant to section 102A, under appropriate secu-
19 rity procedures and protective orders, portions of the
20 application, order, or other materials relating to the
21 acquisition only where such disclosure is necessary
22 to make an accurate determination of the legality of
23 the acquisition.

24 “(f) If the United States district court, under sub-
25 section (e), determines that an acquisition authorized

1 under section 102A was not lawfully authorized or con-
2 ducted, it shall, in accordance with the requirements of
3 law, suppress the evidence which was unlawfully obtained
4 or derived from the acquisition or otherwise grant the mo-
5 tion of the person who was the target of, or whose commu-
6 nications or activities were subject to, an acquisition au-
7 thorized under section 102A. If the court determines that
8 such acquisition was lawfully authorized and conducted,
9 it shall deny the motion of the person who was the target
10 of, or whose communications or activities were subject to,
11 an acquisition authorized under section 102A except to the
12 extent that due process requires discovery or disclosure.

13 “(g) Orders granting motions or requests under sub-
14 section (f), decisions under this section that an acquisition
15 was not lawfully authorized or conducted, and orders of
16 the United States district court requiring review or grant-
17 ing disclosure of applications, orders, or other materials
18 relating to an acquisition shall be final orders and binding
19 upon all courts of the United States and the several
20 States, except a United States court of appeals and the
21 Supreme Court of the United States.

22 “(h)(1) Federal officers who acquire foreign intel-
23 ligence information under section 102A may consult with
24 Federal law enforcement officers or law enforcement per-
25 sonnel of a State or political subdivision of a State (includ-

1 ing the chief executive officer of that State or political sub-
2 division who has the authority to appoint or direct the
3 chief law enforcement officer of that State or political sub-
4 division) to coordinate efforts to investigate or protect
5 against—

6 “(A) actual or potential attack or other grave
7 hostile acts of a foreign power or an agent of a for-
8 eign power;

9 “(B) sabotage, international terrorism, or the
10 international proliferation of weapons of mass de-
11 struction by a foreign power or an agent of a foreign
12 power; or

13 “(C) clandestine intelligence activities by an in-
14 telligence service or network of a foreign power or by
15 an agent of a foreign power.

16 “(2) Coordination authorized under paragraph (1)
17 shall not preclude the certification required by section
18 102A.

19 “(i) Nothing in this section shall prevent the United
20 States from seeking protective orders or asserting privi-
21 leges ordinarily available to the United States to protect
22 against the disclosure of classified information.”

23 (b) TABLE OF CONTENTS.—The table of contents in
24 the first section of the Foreign Intelligence Surveillance

1 Act of 1978 (50 U.S.C. 1801 et seq.) is amended by in-
2 serting after the item relating to section 102 the following:

“102A. Authorization for acquisition of certain foreign intelligence information.

“102B. Directives relating to electronic surveillance and other acquisitions of
foreign intelligence information.

“102C. Use of information acquired under section 102A.”

3 **SEC. 4. LIABILITY DEFENSE.**

4 (a) **IN GENERAL.**—Notwithstanding any other provi-
5 sion of law, and in addition to the immunities, privileges,
6 and defenses provided by any other source of law, no ac-
7 tion shall lie or be maintained in any court, and no pen-
8 alty, sanction, or other form of remedy or relief shall be
9 imposed by any court or any other body, against any per-
10 son for the alleged provision to an element of the intel-
11 ligence community of any information (including records
12 or other information pertaining to a customer), facilities,
13 or any other form of assistance, during the period begin-
14 ning on September 11, 2001, and ending on the effective
15 date of this Act, in connection with any alleged classified
16 communications intelligence activity that the Attorney
17 General or a designee of the Attorney General certifies,
18 in a manner consistent with the protection of state secrets,
19 is, was, would be, or would have been intended to protect
20 the United States from a terrorist attack. This section
21 shall apply to all actions, claims, or proceedings pending
22 on or after the effective date of this Act.

1 (b) JURISDICTION.—Any action or claim described in
2 subsection (a) that is brought in a State court shall be
3 deemed to arise under the Constitution and laws of the
4 United States and shall be removable under section 1441
5 of title 28, United States Code.

6 (c) DEFINITIONS.—In this section:

7 (1) INTELLIGENCE COMMUNITY.—The term
8 “intelligence community” has the meaning given the
9 term in section 3(4) of the National Security Act of
10 1947 (50 U.S.C. 401a(4)).

11 (2) PERSON.—The term “person” has the
12 meaning given the term in section 2510(6) of title
13 18, United States Code.

14 **SEC. 5. USE OF INFORMATION.**

15 Section 106 of the Foreign Intelligence Surveillance
16 Act of 1978 (50 U.S.C. 1806) is amended—

17 (1) in subsection (i)—

18 (A) by striking “radio communication” and
19 inserting “communication”; and

20 (B) by striking “contents indicates” and
21 inserting “contents contain significant foreign
22 intelligence information or indicate”; and

23 (2) by adding at the end the following:

24 “(l) Nothing in this section shall prevent the United
25 States from seeking protective orders or asserting privi-

1 leges ordinarily available to the United States to protect
2 against the disclosure of classified information.”

3 **SEC. 6. APPLICATIONS FOR COURT ORDERS.**

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

6 (1) in subsection (a)—

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

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

11 (C) in paragraph (5), as redesignated by
12 subparagraph (B) of this paragraph, by striking
13 “detailed”;

14 (D) in paragraph (6), as redesignated by
15 subparagraph (B) of this paragraph, in the
16 matter preceding subparagraph (A)—

17 (i) by striking “Affairs or” and insert-
18 ing “Affairs,”; and

19 (ii) by striking “Senate—” and insert-
20 ing “Senate, or the Deputy Director of the
21 Federal Bureau of Investigation, if des-
22 ignated by the President as a certifying of-
23 ficial—”;

1 (E) in paragraph (7), as redesignated by
2 subparagraph (B) of this paragraph, by striking
3 “statement of” and inserting “listing of”;

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

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

10 (2) by striking subsection (b);

11 (3) by redesignating subsections (c) through (e)

12 as subsections (b) through (d), respectively; and

13 (4) in paragraph (1)(A) of subsection (d), as re-
14 designated by paragraph (3) of this subsection, by
15 striking “or the Director of National Intelligence”
16 and inserting “the Director of National Intelligence,
17 or the Director of the Central Intelligence Agency”.

18 **SEC. 7. ISSUANCE OF AN ORDER.**

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

21 (1) in subsection (a)—

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

23 (B) by redesignating paragraphs (2)
24 through (5) as paragraphs (1) through (4), re-
25 spectively;

1 (2) in subsection (c)(1)—

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

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

6 (C) by striking subparagraph (F);

7 (3) by striking subsection (d);

8 (4) by redesignating subsections (e) through (i)
9 as subsections (d) through (h), respectively;

10 (5) in subsection (d), as redesignated by para-
11 graph (4) of this section—

12 (A) in paragraph (1), by striking “120
13 days” and inserting “1 year”; and

14 (B) by amending paragraph (2) to read as
15 follows:

16 “(2) Extensions of an order issued under this title
17 may be granted on the same basis as an original order
18 upon an application for an extension and new findings
19 made in the same manner as required for an original order
20 and may be for a period not to exceed 1 year.”;

21 (6) by amending subsection (e), as redesignated
22 by paragraph (4) of this section, to read as follows:

23 “(e)(1) Notwithstanding any other provision of this
24 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 a judge having jurisdiction under
12 section 103 at the time of such authorization that
13 the decision has been made to employ emergency
14 electronic surveillance; and

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

20 “(2) If the Attorney General authorizes the emer-
21 gency employment of electronic surveillance under para-
22 graph (1), the Attorney General shall require that the
23 minimization procedures required by this title for the
24 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, which ever 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 is significant foreign intelligence infor-
24 mation or indicates a threat of death or serious bodily
25 harm to any person

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

3 (7) in subsection (h), as redesignated by para-
4 graph (4)—

5 (A) by striking “a wire or” and inserting
6 “an”; and

7 (B) by striking “physical search” and in-
8 serting “physical search or in response to a cer-
9 tification by the Attorney General or a designee
10 of the Attorney General seeking information,
11 facilities, or assistance from such person under
12 section 102B”; and

13 (8) by adding at the end the following:

14 “(i) In any case in which the Government makes an
15 application to a judge under this title to conduct electronic
16 surveillance involving communications and the judge
17 grants such application, upon the request of the applicant,
18 the judge shall also authorize the installation and use of
19 pen registers and trap and trace devices, and direct the
20 disclosure of the information set forth in section 402(d)(2).
21 such information shall not be subject to minimization pro-
22 cedures.”

1 **SEC. 8. AMENDMENTS FOR PHYSICAL SEARCHES.**

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

5 (1) in subsection (a)—

6 (A) by striking paragraph (2);

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

10 (C) in paragraph (2), as redesignated by
11 subparagraph (B) of this paragraph, by striking
12 “detailed”;

13 (D) in paragraph (3)(C), as redesignated
14 by subparagraph (B) of this paragraph, by in-
15 serting “or is about to be” before “owned”;

16 (E) in paragraph (6), as redesignated by
17 subparagraph (B) of this paragraph in the mat-
18 ter preceding subparagraph (A)—

19 (i) by striking “Affairs or” and insert-
20 ing “Affairs,”; and

21 (ii) by striking “Senate—” and insert-
22 ing “Senate, or the Deputy Director of the
23 Federal Bureau of Investigation, if des-
24 ignated by the President as a certifying of-
25 ficial—”; and

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

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

8 (1) in subsection (a)—

9 (A) by striking paragraph (1);

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

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

16 (2) by amending subsection (e) to read as fol-
17 lows:

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

21 “(A) determines that an emergency situation
22 exists with respect to the employment of a physical
23 search to obtain foreign intelligence information be-
24 fore an order authorizing such physical search can
25 with due diligence be obtained;

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

4 “(C) informs a judge having jurisdiction under
5 section 103 at the time of such authorization that
6 the decision has been made to employ an emergency
7 physical search; and

8 “(D) makes an application in accordance with
9 this title to a judge having jurisdiction under section
10 103 as soon as practicable, but not more than 168
11 hours after the Attorney General authorizes such
12 physical search.

13 “(2) If the Attorney General authorizes the emer-
14 gency employment of a physical search under paragraph
15 (1), the Attorney General shall require that the minimiza-
16 tion procedures required by this title for the issuance of
17 a judicial order be followed.

18 “(3) In the absence of a judicial order approving such
19 physical search, the physical search shall terminate when
20 the information sought is obtained, when the application
21 for the order is denied, or after the expiration of 168
22 hours from the time of authorization by the Attorney Gen-
23 eral, whichever is earliest.

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

1 “(5)(A) In the event that such application for ap-
2 proval is denied, or in any other case where the physical
3 search is terminated and no order is issued approving the
4 physical search, no information obtained or evidence de-
5 rived from such physical search shall be received in evi-
6 dence or otherwise disclosed in any trial, hearing, or other
7 proceeding in or before any court, grand jury, department,
8 office, agency, regulatory body, legislative committee, or
9 other authority of the United States, a State, or political
10 subdivision thereof, and no information concerning any
11 United States person acquired from such physical search
12 shall subsequently be used or disclosed in any other man-
13 ner by Federal officers or employees without the consent
14 of such person, except with the approval of the Attorney
15 General if the information is significant foreign intel-
16 ligence information or indicates a threat of death or seri-
17 ous bodily harm to any person.

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

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

23 (1) in section 304(a)(4), as redesignated by
24 subsection (b) of this section, by striking
25 “303(a)(7)(E)” and inserting “303(a)(6)(E)”; and

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

3 **SEC. 9. AMENDMENTS FOR EMERGENCY PEN REGISTERS**
4 **AND TRAP AND TRACE DEVICES.**

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

7 (1) in subsection (a)(2) by striking “48 hours”
8 and inserting “168 hours”; and

9 (2) in subsection (c)(1)(C) by striking “48
10 hours” and inserting “168 hours”.

11 **SEC. 10. WEAPONS OF MASS DESTRUCTION.**

12 (a) **DEFINITIONS.—**

13 (1) **FOREIGN POWER.—**Subsection (a)(4) of sec-
14 tion 101 of the Foreign Intelligence Surveillance Act
15 of 1978 (50 U.S.C. 1801(a)(4)) is amended by in-
16 serting “or the international proliferation of weapons
17 of mass destruction” after “international terrorism”.

18 (2) **AGENT OF A FOREIGN POWER.—**Subsection
19 (b)(1) of such section, as amended by section 2 of
20 this Act, is amended—

21 (A) in subparagraph (C), by striking “or”
22 at the end; and

23 (B) by adding at the end the following:

1 “(E) engages in the international prolifera-
2 tion of weapons of mass destruction, or activi-
3 ties in preparation therefor; or

4 “(F) engages in the international prolifera-
5 tion of weapons of mass destruction, or activi-
6 ties in preparation therefor, for or on behalf of
7 a foreign power; or”.

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

14 (4) TERM.—Such section, as amended by sec-
15 tion 2 of this Act, is amended by inserting after sub-
16 section (o) the following:

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

18 “(1) any destructive device (as such term is de-
19 fined in section 921 of title 18, United States Code)
20 that is intended or has the capability to cause death
21 or serious bodily injury to a significant number of
22 people;

23 “(2) any weapon that is designed or intended to
24 cause death or serious bodily injury through the re-

1 lease, dissemination, or impact of toxic or poisonous
2 chemicals or their precursors;

3 “(3) any weapon involving a biological agent,
4 toxin, or vector (as those terms are defined in sec-
5 tion 178 of title 18, United States Code); or

6 “(4) any weapon that is designed to release ra-
7 diation or radioactivity at a level dangerous to
8 human life.”

9 (b) USE OF INFORMATION.—

10 (1) IN GENERAL.—Section 106(k)(1)(B) of the
11 Foreign Intelligence Surveillance Act of 1978 (50
12 U.S.C. 1806(k)(1)(B)) is amended by striking “sab-
13 otage or international terrorism” and inserting “sab-
14 otage, international terrorism, or the international
15 proliferation of weapons of mass destruction”.

16 (2) PHYSICAL SEARCHES.—Section
17 305(k)(1)(B) of such Act (50 U.S.C. 1825(k)(1)(B))
18 is amended by striking “sabotage or international
19 terrorism” and inserting “sabotage, international
20 terrorism, or the international proliferation of weap-
21 ons of mass destruction”.

22 SEC. 11. DESIGNATION OF JUDGES.

23 Section 103 of the Foreign Intelligence Surveillance
24 Act of 1978 (50 U.S.C. 1803) is amended in subsection

1 (a), by inserting “at least” before “seven of the United
2 States judicial circuits”.

3 **SEC. 12. TECHNICAL AND CONFORMING AMENDMENTS.**

4 The Foreign Intelligence Surveillance Act of 1978
5 (50 U.S.C. 1801 et seq.) is amended—

6 (1) in section 103(e)—

7 (A) in paragraph (1), by striking
8 “501(f)(1)” and inserting “102B(d) or
9 501(f)(1)”; and

10 (B) in paragraph (2), by striking
11 “501(f)(1)” and inserting “102B(d) or
12 501(f)(1)”;
13

14 (2) in section 105—

15 (A) in subsection (a)(4), as redesignated
16 by section 6—

17 (i) by striking “104(a)(7)(E)” and in-
18 serting “104(a)(6)(D)”; and

19 (ii) by striking “104(d)” and inserting
20 “104(c)”;
21

22 (B) in subsection (c)(1)(A), by striking
23 “104(a)(3)” and inserting “104(a)(2)”;
24

25 (3) in section 106—

(A) in subsection (j), in the matter pre-
ceding paragraph (1), by striking “105(e)” and
inserting “105(d)”; and

1 (B) in subsection (k)(2), by striking
2 “104(a)(7)(B)” and inserting “104(a)(6)(B)”;
3 and
4 (4) in section 108(a)(2)(C), by striking
5 “105(f)” and inserting “105(e)”.

6 **SEC. 13. EFFECTIVE DATE.**

7 (a) **IN GENERAL.**—Except as otherwise provided in
8 this Act, the amendments made by this Act shall take ef-
9 fect 90 days after the date of the enactment of this Act.

10 (b) **PENDING ORDERS.**—Notwithstanding any other
11 provision of this Act, any order in effect on the date of
12 enactment of this Act issued under the Foreign Intel-
13 ligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.)
14 shall remain in effect until the date of expiration of such
15 order, and, at the request of the applicant, the court estab-
16 lished under section 103(a) of such Act (50 U.S.C.
17 1803(a)) may reauthorize such order if the facts and cir-
18 cumstances continue to justify issuance of such order
19 under the provisions of the Foreign Intelligence Surveil-
20 lance Act of 1978, as in effect on the day before the effec-
21 tive date of this Act. The court established under section
22 103(a) of such Act shall extinguish any such order at the
23 request of the applicant.

110TH CONGRESS
1ST SESSION

S. _____

To provide for an authorization of an order to collect foreign intelligence for targets reasonably believed to be located outside of the United States.

IN THE SENATE OF THE UNITED STATES

introduced the following bill; which was read twice
and referred to the Committee on

A BILL

To provide for an authorization of an order to collect foreign intelligence for targets reasonably believed to be located outside of the United States.

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.**

4 This Act may be cited as the [“ Act
5 of 2007”].

6 **SEC. 2. PURPOSE.**

7 The purpose of this Act is to provide for an author-
8 ization of an order to collect foreign intelligence for targets
9 reasonably believed to be located outside of the United
10 States.

1 SEC. 3. ADDITIONAL PROCEDURE FOR AUTHORIZING CER-
2 TAIN ACQUISITIONS OF FOREIGN INTEL-
3 LIGENCE INFORMATION.

4 The Foreign Intelligence Surveillance Act of 1978
5 (50 U.S.C. 1801 et seq.) is amended by striking sections
6 105A, 105B, and 105C and inserting the following:

7 "CLARIFICATION OF SURVEILLANCE OF PERSONS
8 OUTSIDE THE UNITED STATES

9 "SEC. 105A. Notwithstanding any other provision of
10 this Act, nothing in the definition of electronic surveillance
11 under section 101(f) shall be construed to encompass sur-
12 veillance directed at a person reasonably believed to be lo-
13 cated outside of the United States.

14 "ADDITIONAL PROCEDURE FOR COURT APPROVAL FOR
15 AUTHORIZING CERTAIN ACQUISITIONS OF FOREIGN
16 INTELLIGENCE INFORMATION

17 "SEC. 105B. (a) The Attorney General, upon the au-
18 thorization of the President, may apply to a judge of the
19 court established under section 103(a) for an ex parte
20 order, or an extension of an order, authorizing the Govern-
21 ment to acquire foreign intelligence information con-
22 cerning a person reasonably believed to be outside the
23 United States for a period of not more than 1 year, in
24 accordance with this section.

1 “(b)(1) An application for an order, or an extension
2 of an order, submitted under subsection (a) shall in-
3 clude—

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

6 “(B) a written certification made under oath by
7 the Attorney General that—

8 “(i) there are reasonable procedures in
9 place for determining that the acquisition of
10 foreign intelligence information under this sec-
11 tion concerns a person reasonably believed to be
12 located outside the United States;

13 “(ii) there are reasonable procedures in
14 place to audit the implementation of the proce-
15 dures described in clause (i), to achieve the ob-
16 jective described in that clause;

17 “(iii) the acquisition will not constitute
18 electronic surveillance;

19 “(iv) a significant purpose of the acquisi-
20 tion is to obtain foreign intelligence informa-
21 tion;

22 “(v) the minimization procedures to be
23 used with respect to such acquisition meet the
24 definition of minimization procedures under sec-
25 tion 101(h); and

1 “(vi) the acquisition involves obtaining for-
2 eign intelligence information from or with the
3 assistance of a communications service provider,
4 custodian, or other person (including any offi-
5 cer, employee, agent or other specified person of
6 such service provider, custodian, or other per-
7 son) who has access to communications, either
8 as they are transmitted or while they are
9 stored, or equipment that is being or may be
10 used to transmit or store such communications;

11 “(C) a general description of the nature of the
12 foreign intelligence information sought; and

13 “(D) a general statement of the means by
14 which the acquisition will be effected.

15 “(2)(A) An application for an order, or an extension
16 of an order, submitted under subsection (a) shall not be
17 required to identify—

18 “(i) the person against whom the acquisition
19 will be directed; or

20 “(ii) the specific facilities, places, premises, or
21 property at which the acquisition will be directed or
22 conducted.

23 “(B) In describing the purpose of an acquisition
24 under paragraph (1)(B)(iv) or the nature of the foreign
25 intelligence information sought under paragraph (1)(C),

1 no particularization is required and a general statement
2 of the general category of foreign intelligence information
3 shall be considered sufficient.

4 “(C) The minimization procedures described in para-
5 graph (1)(B)(v) shall not require individualized showings
6 regarding facilities, locations, places, or persons.

7 “(c)(1) Notwithstanding any other provision of law,
8 a judge considering an application for an order, or an ex-
9 tension of an order, submitted under subsection (a) shall
10 approve such application if the judge determines that the
11 Attorney General’s certification under subsection
12 (b)(1)(B) is not clearly erroneous.

13 “(2) A judge approving an application pursuant to
14 paragraph (1) shall issue an order that—

15 “(A) authorizes the acquisition as requested;

16 “(B) directs the applicant to follow the proce-
17 dures referred to in subsection (b)(1)(B)(i) and the
18 minimization procedures submitted by the applicant;

19 “(C) at the request of the applicant, requires a
20 specified communications service provider, custodian,
21 or other specified person to furnish the applicant
22 forthwith with all information, facilities, or technical
23 assistance necessary to accomplish the acquisition in
24 a manner that will protect the secrecy of the acqui-
25 sition and produce a minimum of interference with the

1 services that provider, custodian, or other person is
2 providing; and

3 “(D) at the request of the applicant, requires
4 such communications provider, custodian, or other
5 specified person to maintain under security proce-
6 dures approved by the Attorney General and the Di-
7 rector of National Intelligence any records con-
8 cerning the acquisition or the aid furnished that
9 such person wishes to maintain.

10 “(3) An application for an extension of an order
11 issued under this section shall contain a description of the
12 minimization procedures used by the Government.

13 “(d) The Government shall compensate, at the pre-
14 vailing rate, a person for providing information, facilities,
15 or assistance pursuant to an order of the court under this
16 section or pursuant to a directive under section 105C.

17 “(e)(1) Notwithstanding any other provision of law,
18 no action, claim, or proceeding shall lie or be maintained,
19 in any court or before a judge or justice, or in an adminis-
20 trative body or before any member thereof, and no penalty,
21 sanction, or other form of remedy or relief shall be im-
22 posed, against any person for providing any information,
23 facilities, or assistance in accordance with an order issued
24 under this section or a directive issued under 105C. Any
25 such action, claim, or proceeding that is brought in a court

1 of a State, district or territory shall be deemed to arise
2 under the Constitution and laws of the United States and
3 shall be removable pursuant to section 1441 of title 28,
4 United States Code.

5 “(2) No law enacted after the date of enactment of
6 this section shall be construed to repeal, modify or super-
7 sede this subsection unless such law specifically refers to
8 this subsection and states that it repeals, modifies or su-
9 persedes this subsection.

10 “(f) An order granted under this section and a direc-
11 tive made under section 105C shall be retained for a pe-
12 riod of not less than 10 years from the date on which such
13 order or directive is granted or made.

14 “(g)(1) If a judge of the court established under sec-
15 tion 103(a) denies an application for an order under this
16 section, such judge shall provide immediately for the
17 record a written statement of each reason for the judge’s
18 decision and, on motion of the Government, the record
19 shall be transmitted, under seal, to the court of review
20 established under section 103(b).

21 “(2) The Government may appeal any denial of an
22 application submitted under this section to the court es-
23 tablished under section 103(b). If such court determines
24 that the denial was properly entered, the court shall imme-
25 diately provide for the record a written statement of each

1 reason for its decision, and, on petition of the Government
2 for a writ of certiorari, the record shall be transmitted
3 under seal to the Supreme Court of the United States,
4 which shall have jurisdiction to review such decision.

5 “(h) The Government may continue any acquisition
6 during the pendency of consideration of an application for
7 an order or an extension of an order submitted under this
8 section, and any appeal process, including the period dur-
9 ing which a petition for writ of certiorari may be pending
10 and the period of any review by the Supreme Court of
11 the United States.

12 “IMMEDIATE AUTHORIZATION OF CERTAIN ACQUISITIONS
13 OF FOREIGN INTELLIGENCE INFORMATION

14 “SEC. 105C. (a) Notwithstanding any other provision
15 of law, the Director of National Intelligence and the Attor-
16 ney General may, under circumstances in which the Attor-
17 ney General intends to file an application under section
18 105B, prior to the submission of such application, author-
19 ize the immediate acquisition of foreign intelligence infor-
20 mation concerning a person reasonably believed to be out-
21 side the United States if the Director of National Intel-
22 ligence and the Attorney General make a certification in
23 accordance with section 105B(b)(1)(B) and determine
24 that it is in the interest of the national security to begin
25 the acquisition of foreign intelligence information prior to
26 the entry of an order.

1 “(b)(1) If the Director of National Intelligence and
2 the Attorney General authorize the immediate acquisition
3 of foreign intelligence information under subsection (a),
4 the Attorney General shall—

5 “(A) transmit as soon as practicable under seal
6 to the court established under section 103(a) a copy
7 of a certification made under subsection (a) of this
8 section; and

9 “(B) submit an application for the approval of
10 such acquisition to such court not later than 90 days
11 after the date of the initiation of the acquisition.

12 “(2) A certification transmitted to the court estab-
13 lished under section 103(a) pursuant to paragraph (1)(A)
14 of this subsection shall be maintained under security
15 measures established by the Chief Justice of the United
16 States and the Attorney General, in consultation with the
17 Director of National Intelligence, and shall remain sealed
18 except upon motion of the Government.

19 “(c) A certification under subsection (a) is not re-
20 quired to identify—

21 “(1) the person against whom the acquisition
22 will be directed; or

23 “(2) the specific facilities, places, premises, or
24 property at which the acquisition of foreign intel-
25 ligence information will be directed or conducted.

1 “(d) With respect to an authorization of an acqui-
2 sion under this section, the Attorney General may direct
3 a specified communications service provider, custodian, or
4 other specified person to—

5 “(1) furnish the Government forthwith with all
6 information, facilities, or technical assistance nec-
7 essary to accomplish the acquisition in a manner
8 that will protect the secrecy of the acquisition and
9 produce a minimum of interference with the services
10 that provider, custodian, or other person is pro-
11 viding; and

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

17 “(e)(1) A person receiving a directive issued under
18 subsection (d) shall comply with such a directive.

19 “(2) In the case of a failure to comply with a directive
20 issued under subsection (d), the Attorney General may in-
21 voke the aid of the court established under section 103(a)
22 to compel compliance with the directive, and the court
23 shall issue an order requiring the person to comply with
24 the directive. Failure to obey an order of the court issued

1 under this subsection may be punished by the court as
2 contempt of court.

3 “(3) Any process under this section may be served
4 in any judicial district in which the person may be found.

5 “(f) The Government may continue any acquisition
6 under this section, and any directive shall remain in force,
7 during the pendency of consideration of an application
8 submitted under section 105B and any appeal process, in-
9 cluding the period during which a petition for writ of cer-
10 tiorari may be pending and the period of any review by
11 the Supreme Court of the United States.

12 “REPORT TO CONGRESS

13 “SEC. 105D. (a) Not later than 6 months after the
14 date of enactment of this section, and every 6 months
15 thereafter, the Attorney General shall inform, in a manner
16 consistent with the national security, the Select Committee
17 on Intelligence and the Committee on the Judiciary of the
18 Senate and the Permanent Select Committee on Intel-
19 ligence and the Committee on the Judiciary of the House
20 of Representatives concerning acquisitions under section
21 105B or 105C during the previous 6-month period.

22 “(b) Each report made under this section shall in-
23 clude—

24 “(1) a description of the incidents of non-com-
25 pliance with an order issued under section 105B or

1 a directive issued by the Attorney General under sec-
2 tion 105C(d), to include—

3 “(A) incidents of noncompliance by an ele-
4 ment of the intelligence community (within the
5 meaning of section 3(4) of the National Secu-
6 rity Act of 1947 (50 U.S.C. 401a(4))) with
7 guidelines or procedures established for deter-
8 mining that the acquisition of foreign intel-
9 ligence authorized by the Attorney General and
10 Director of National Intelligence concerns per-
11 sons reasonably believed to be outside the
12 United States; and

13 “(B) incidents of noncompliance by a spec-
14 ified person to whom the Attorney General
15 issued a directive under section 105C; and

16 “(2) the number of certifications and directives
17 issued under section 105C during the reporting pe-
18 riod.”

19 **SEC. 4. TECHNICAL AND CONFORMING AMENDMENTS.**

20 (a) **IN GENERAL.**—Sections 4 and 6 of the Protect
21 America Act of 2007 (Public Law 110–55) are repealed.

22 (b) **FOREIGN INTELLIGENCE SURVEILLANCE ACT OF**
23 **1978.**—

1 (1) IN GENERAL.—Section 103(e) of the For-
2 eign Intelligence Surveillance Act of 1978 (50
3 U.S.C. 1803(e)) is amended—

4 (A) in paragraph (1), by striking
5 “105B(h) or”; and

6 (B) in paragraph (2), by striking
7 “105B(h) or”.

8 (2) TABLE OF CONTENTS.—The table of con-
9 tents in the first section of the Foreign Intelligence
10 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.)
11 is amended by striking the items relating to section
12 105A, 105B, and 105C and inserting the following:

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

“Sec. 105B. Additional procedure for court approval for authorizing certain ac-
quisitions of foreign intelligence information.

“Sec. 105C. Immediate authorization of certain acquisitions of foreign intel-
ligence information.

“Sec. 105D. Report to Congress.”.

13 **SEC. 5. EFFECTIVE DATE; TRANSITION PROCEDURES.**

14 (a) EFFECTIVE DATE.—Except as otherwise provided
15 in this Act, this Act and the amendments made by this
16 Act shall take effect on the day after the date of enact-
17 ment of this Act.

18 (b) TRANSITION PROCEDURES.—

19 (1) EXISTING ORDERS AND EXTENSIONS OF OR-
20 DERS.—Notwithstanding any other provision of this
21 Act, any order in effect on the date of enactment of
22 this Act issued pursuant to the Foreign Intelligence

1 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.)
2 shall remain in effect until the date of expiration of
3 such order, and, at the request of the applicant, the
4 court established under section 103(a) of such Act
5 (50 U.S.C. 1803(a)) shall reauthorize such order as
6 long as the facts and circumstances continue to jus-
7 tify issuance of such order under the provisions of
8 the Foreign Intelligence Surveillance Act of 1978, as
9 in effect on the day before the effective date of this
10 Act.

11 (2) NEW APPLICATIONS.—The Government may
12 file new applications, and the court established
13 under section 103(a) of the Foreign Intelligence
14 Surveillance Act of 1978 (50 U.S.C. 1803(a)) shall
15 enter orders granting such applications pursuant to
16 such Act, as long as the application meets the re-
17 quirements set forth under the provisions of such
18 Act, as in effect on the day before the effective date
19 of this Act.

20 (3) EXTANT AUTHORIZATIONS.—At the request
21 of the applicant, the court established under section
22 103(a) of the Foreign Intelligence Surveillance Act
23 of 1978 (50 U.S.C. 1803(a)), shall extinguish any
24 extant authorization to conduct electronic surveil-

1 lance or physical search entered pursuant to such
2 Act.

3 (4) APPLICABLE PROVISIONS.—Any electronic
4 surveillance or physical search conducted pursuant
5 to an order entered under this subsection shall be
6 subject to the provisions of the Foreign Intelligence
7 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.),
8 as in effect on the day before the effective date of
9 this Act.

1 SEC. IMMUNITY.

2 (a) DEFINITIONS.—In this section—

3 (1) the term “assistance” means information
4 (including records or other information relating to a
5 customer), facilities, or another form of assistance;

6 (2) the term “covered civil action” means a civil
7 action filed in any Federal or State court alleging
8 that a provider provided assistance to an element of
9 the intelligence community during the period begin-
10 ning on September 11, 2001, and ending on the date
11 of enactment of this Act;

12 (3) the term “element of the intelligence com-
13 munity” means an element of the intelligence com-
14 munity specified in or designated under section 3(4)
15 of the National Security Act of 1947 (50 U.S.C.
16 401a(4)); and

17 (4) the term “provider”—

18 (A) means—

19 (i) a telecommunications carrier, as
20 that term is defined in section 3 of the
21 Communications Act of 1934 (47 U.S.C.
22 153);

1 (ii) an electronic communication serv-
2 ice, as that term is defined in section 2510
3 of title 18, United States Code; or

4 (iii) a remote computing service, as
5 that term is defined in section 2711 of title
6 18, United States Code; and

7 (B) includes an officer, employee, or agent
8 of an entity described in subparagraph (A).

9 (b) LIMITATION ON CIVIL ACTIONS.—Notwith-
10 standing any other provision of law, a covered civil action
11 may not be filed or maintained in any court, if the Attor-
12 ney General certifies to that court that—

13 (1) the relevant provider did not provide any of
14 the alleged assistance; or

15 (2) any assistance provided by that provider,
16 was provided pursuant to a written request or direc-
17 tive from the head of an element of the intelligence
18 community indicating that such assistance was
19 sought—

20 (A) in connection with a communications
21 intelligence program authorized by the Presi-
22 dent after September 11, 2001, designed to
23 identify or intercept the communications of
24 international terrorism organizations in order to
25 detect or prevent terrorist attacks or activities

1 in preparation of a terrorist attack against the
2 United States; and

3 (B) had been determined to be lawful.

4 (c) CERTIFICATIONS.—

5 (1) IN GENERAL.—A certification under sub-
6 section (b) may be provided in a manner consistent
7 with the protection of state secrets.

8 (2) NONDELEGATION.—The authority and du-
9 ties of the Attorney General under this section shall
10 be performed by the Attorney General or a designee
11 in a position not lower than the Deputy Attorney
12 General.

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

18 (e) RULE OF CONSTRUCTION.—Nothing in this sec-
19 tion may be construed to limit any immunity, privilege,
20 or defense under any other provision of law.

21 (f) EFFECTIVE DATE AND APPLICATION.—This sec-
22 tion shall apply to any covered civil action pending on or
23 after the date of enactment of this Act.

1 SEC. . SUBSTITUTION OF THE UNITED STATES IN CER-
2 TAIN ACTIONS.

3 (a) DEFINITIONS.—In this section—

4 (1) the term “assistance” means information
5 (including records or other information relating to a
6 customer), facilities, or another form of assistance;

7 (2) the term “covered civil action” means a civil
8 action in any Federal or State court alleging that a
9 provider provided assistance to an element of the in-
10 telligence community during the period beginning on
11 September 11, 2001, and ending on the date of en-
12 actment of this Act;

13 (3) the term “element of the intelligence com-
14 munity” means an element of the intelligence com-
15 munity specified in or designated under section 3(4)
16 of the National Security Act of 1947 (50 U.S.C.
17 401a(4)); and

18 (4) the term “provider”—

19 (A) means—

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

1 (ii) an electronic communication serv-
2 ice, as that term is defined in section 2510
3 of title 18, United States Code; or

4 (iii) a remote computing service, as
5 that term is defined in section 2711 of title
6 18, United States Code; and

7 (B) includes an officer, employee, or agent
8 of an entity described in subparagraph (A).

9 (b) SUBSTITUTION OF PARTIES.—

10 (1) CERTIFICATION.—Notwithstanding any
11 other provision of law, a Federal or State court shall
12 substitute the United States for a provider in a cov-
13 ered civil action as provided in this subsection, if the
14 Attorney General certifies to that court that—

15 (A) the relevant provider did not provide
16 any of the assistance alleged; or

17 (B) any assistance provided by that pro-
18 vider, was provided—

19 (i) under a written authorization from
20 the head of an element of the intelligence
21 community indicating that such assist-
22 ance—

23 (I) had been approved by the
24 President; and

25 (II) was lawful; and

1 (ii) in connection with a communica-
2 tions intelligence program authorized by
3 the President after September 11, 2001,
4 designed to identify or intercept the com-
5 munications of international terrorist orga-
6 nizations in order to detect or prevent ter-
7 rorist attacks against the United States.

8 (2) SUBSTITUTION.—

9 (A) IN GENERAL.—Except as provided in
10 subparagraph (B), upon receiving a certification
11 under paragraph (1), a Federal or State court
12 shall—

13 (i) substitute the United States for
14 the provider as party-defendant as to all
15 claims designated by the Attorney General
16 in that certification; and

17 (ii) as to that provider—

18 (I) dismiss all claims designated
19 by the Attorney General in that cer-
20 tification; and

21 (II) enter a final judgment relat-
22 ing to those claims.

23 (B) CONTINUATION OF CERTAIN
24 CLAIMS.—If a certification by the Attorney
25 General under paragraph (1) states that not all

1 of the assistance was provided under a written
2 authorization described in paragraph (1)(B)(i),
3 the provider shall remain as a defendant, unless
4 the Attorney General certifies that the United
5 States should be the sole defendant.

6 (3) PROCEDURES.—Upon a substitution under
7 paragraph (2), a covered civil action—

8 (A) shall proceed in the same manner as
9 any action against the United States filed
10 under section 1346(b) of title 28, United States
11 Code; and

12 (B) shall be deemed a tort action brought
13 against the United States under the provisions
14 of section 1346(b), 2401(b), or 2402, or sec-
15 tions 2671 through 2680 of title 28, except that
16 section 2680(a) of that title shall not apply.

17 (c) CERTIFICATIONS.—

18 (1) IN GENERAL.—A certification under sub-
19 section (b) may be provided in a manner consistent
20 with the protection of state secrets.

21 (2) NONDELEGATION.—The authority and du-
22 ties of the Attorney General under this section shall
23 be performed by the Attorney General or a designee
24 in a position not lower than the Deputy Attorney
25 General.

1 (d) LIMITATIONS.—

2 (1) SOVEREIGN IMMUNITY.—This section con-
3 stitutes the sole waiver of sovereign immunity with
4 respect to any covered civil action.

5 (2) DAMAGES.—In any covered civil action in
6 which the United States is substituted under sub-
7 section (b)—

8 (A) damages may be awarded for actual
9 injury; and

10 (B) statutory damages may be awarded in
11 an amount not to exceed \$10,000,000.

12 (e) PROTECTION OF INFORMATION.—A Federal or
13 State court—

14 (1) shall not disclose the substance of a certifi-
15 cation under subsection (b)(1); and

16 (2) shall conduct proceedings under this section
17 in a manner consistent with the protection of state
18 secrets.

19 (f) CIVIL ACTIONS IN STATE COURT.—Any covered
20 civil action that is brought in a State court shall be
21 deemed to arise under the Constitution and laws of the
22 United States and shall be removable under section 1441
23 of title 28, United States Code.

24 (g) RULE OF CONSTRUCTION.—Nothing in this sec-
25 tion may be construed to limit any immunity, privilege,

1 or defense under any other provision of law, including any
2 privilege, immunity, or defense (including the state secrets
3 privilege) that would otherwise have been available to the
4 United States absent its substitution as party-defendant
5 or had the United States been the named defendant.

6 (h) **EFFECTIVE DATE AND APPLICATION.**—This sec-
7 tion shall apply to any covered civil action pending on or
8 after the date of enactment of this Act.

1 SEC. . . CLARIFICATION OF EXCLUSIVE AUTHORITIES
2 FOR THE CONDUCT OF ELECTRONIC SUR-
3 VEILLANCE.

4 (a) AMENDMENT TO FOREIGN INTELLIGENCE SUR-
5 VEILLANCE ACT OF 1978.—Section 109(a) of the Foreign
6 Intelligence Surveillance Act of 1978 (50 U.S.C. 1809(a))
7 is amended by striking “authorized by statute” each place
8 that term appears and inserting “authorized by this title
9 or chapter 119, 121, or 206 of title 18, United States
10 Code”.

11 (b) AMENDMENT TO TITLE 18, UNITED STATES
12 CODE.—Section 2511(2)(a)(ii)(B) of title 18, United
13 States Code, is amended by striking “statutory require-
14 ments” and inserting “requirements under the Foreign In-
15 telligence Surveillance Act of 1978 (50 U.S.C. 1801 et
16 seq.), this chapter, or chapter 121 or 206 of this title”.

1 **SEC. . JURISDICTION OF FISA COURT.**

2 Section 103(a) of the Foreign Intelligence Surveil-
3 lance Act of 1978 (50 U.S.C. 1803(a)) is amended by in-
4 serting “at least” before “seven of the United States judi-
5 cial circuits”.

6 **SEC. . APPLICATIONS FOR COURT ORDERS.**

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

9 (1) in subsection (a)—

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

11 (B) by redesignating paragraphs (3)
12 through (10) as paragraphs (2) through (9), re-
13 spectively;

14 (C) in paragraph (5), as redesignated by
15 subparagraph (B) of this paragraph, by striking
16 “detailed description” and inserting “descrip-
17 tion”;

18 (D) in paragraph (8), as redesignated by
19 subparagraph (B) of this paragraph, by adding
20 “and” at the end; and

21 (E) in paragraph (9), as redesignated by
22 subparagraph (B) of this paragraph, by striking
23 “; and” and inserting a period;

24 (2) by striking subsection (b);

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

3 (4) in paragraph (1)(A) of subsection (d), as re-
4 designated by paragraph (3) of this subsection, by
5 striking "or the Director of National Intelligence"
6 and inserting "the Director of National Intelligence,
7 or the Director of the Central Intelligence Agency".

8 **SEC. . ISSUANCE OF AN ORDER.**

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

11 (1) in subsection (a)—

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

13 (B) by redesignating paragraphs (2)
14 through (5) as paragraphs (1) through (4), re-
15 spectively;

16 (2) in subsection (c)(1)—

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

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

21 (C) by striking subparagraph (F);

22 (3) by striking subsection (d);

23 (4) by redesignating subsections (e) through (i)
24 as subsections (d) through (h), respectively;

1 (5) in subsection (d), as redesignated by para-
2 graph (4) of this section, by amending paragraph
3 (2) to read as follows:

4 “(2)(A) Except as provided in subparagraph (B), an
5 extension of an order issued under this title may be grant-
6 ed on the same basis as an original order upon an applica-
7 tion for an extension and new findings made in the same
8 manner as required for an original order and may be for
9 a period not to exceed 1 year.

10 “(B) An extension of an order issued under this title
11 for electronic surveillance targeted against an agent of a
12 foreign power who is a United States person may be for
13 a period not longer than the period authorized under para-
14 graph (1) for such an order.”;

15 (6) by amending subsection (e), as redesignated
16 by paragraph (4) of this section, to read as follows:

17 “(e)(1) Notwithstanding any other provision of this
18 title, the Attorney General may authorize the emergency
19 employment of electronic surveillance if the Attorney Gen-
20 eral—

21 “(A) determines that an emergency situation
22 exists requiring the employment of electronic surveil-
23 lance to obtain foreign intelligence information be-
24 fore an order authorizing such surveillance can with
25 due diligence be obtained;

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

4 “(C) informs a judge having jurisdiction under
5 section 103 at the time of such authorization that
6 the decision has been made to employ emergency
7 electronic surveillance; and

8 “(D) makes an application in accordance with
9 this title to a judge having jurisdiction under section
10 103 as soon as practicable, but not later than 168
11 hours after the Attorney General authorizes such
12 surveillance.

13 “(2) If the Attorney General authorizes the emer-
14 gency employment of electronic surveillance under para-
15 graph (1), the Attorney General shall require that the
16 minimization procedures required by this title for the
17 issuance of a judicial order be followed.

18 “(3) In the absence of a judicial order approving such
19 electronic surveillance, the surveillance shall terminate
20 when the information sought is obtained, when the appli-
21 cation for the order is denied, or 168 hours after the au-
22 thorization by the Attorney General, whichever is earliest.

23 “(4) A denial of an application made under this sub-
24 section may be reviewed as provided in section 103.

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

17 “(B) The Attorney General shall assess compliance
18 with the requirements of subparagraph (A) and include
19 such an assessment in each semiannual report to the Per-
20 manent Select Committee on Intelligence of the House of
21 Representatives and the Select Committee on Intelligence
22 of the Senate under section 108(a).”;

23 (7) in subsection (h), as redesignated by para-
24 graph (4), by striking “a wire or” and inserting
25 “an”; and

1 (8) by adding at the end the following:

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

10 SEC. . EN BANC AUTHORITY.

11 (a) IN GENERAL.—Section 103(a) of the Foreign In-
12 telligence Surveillance Act of 1978 (50 U.S.C. 1803(a))
13 is amended—

14 (1) by inserting after the first sentence the fol-
15 lowing: “The court established under this subsection
16 may hold a hearing, or rehearing, en banc, when or-
17 dered by a majority of the judges sitting on such
18 court. The court en banc shall consist of all judges
19 designated under this subsection who are in regular
20 active service on the court established under this
21 subsection.”; and

22 (2) in the last sentence—

23 (A) by inserting “, or the en banc court,”
24 after “designated”;

1 (B) by inserting “, or the en banc court,”
2 after “such judge”; and

3 (C) by striking “his” and inserting “such”.

4 (b) CONFORMING AMENDMENTS.—The Foreign In-
5 telligence Surveillance Act of 1978 (50 U.S.C. 1801 et
6 seq.) is amended—

7 (1) in the last sentence of section 302(c)—

8 (A) by inserting “, or the en banc court,”
9 after “designated”; and

10 (B) by inserting “, or the en banc court,”
11 after “such judge”;

12 (2) in section 402(d)(1), by inserting “, or the
13 court sitting en banc,” after “judge” each place that
14 term appears; and

15 (3) in section 501(c)(1), by inserting “, or the
16 court sitting en banc,” after “judge” each place that
17 term appears.

18 SEC. TECHNICAL AND CONFORMING AMENDMENTS.

19 The Foreign Intelligence Surveillance Act of 1978
20 (50 U.S.C. 1801 et seq.) is amended—

21 (1) in section 105—

22 (A) in subsection (a)(4), as redesignated
23 by section _____

24 (i) by striking “104(a)(7)(E)” and in-
25 serting “104(a)(6)(E)”; and

1 (ii) by striking "104(d)" and inserting
2 "104(e)"; and

3 (B) in subsection (c)(1)(A), by striking
4 "104(a)(3)" and inserting "104(a)(2)";
5 (2) in section 106—

6 (A) in subsection (j), in the matter pre-
7 ceding paragraph (1), by striking "105(e)" and
8 inserting "105(d)"; and

9 (B) in subsection (k)(2), by striking
10 "104(a)(7)(B)" and inserting "104(a)(6)(B)";
11 and

12 (3) in section 108(a)(2)(C), by striking
13 "105(f)" and inserting "105(e)".