

Farris, Bette

From: [redacted]  
Sent: Saturday, December 15, 2007 11:13 AM  
To: Bradbury, Steve  
Subject: a chance to talk?

(b)(3)

(b)(6)

If you can spare a minute to call me on my cell I'd be grateful. [redacted] Cell no I have for you is out of date.  
thanks

(b)(3), (b)(6)

Berhanu, Tsedey

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**From:** Livingston, J (Intelligence) ] 56  
**Sent:** Wednesday, January 16, 2008 2:20 PM  
**To:** Demers, John; Eisenberg, John  
**Cc:** Rice, K (Intelligence)  
**Subject:** FW: Senator Feinstein's immunity amendment (SA 3858)  
**Attachments:** Revised immunity provision.doc

FYI. I told him that Senator Bond couldn't support his version because it still allows a court to second-guess the good faith determination made by the SSCI.

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**From:** Davidson, M (Intelligence)  
**Sent:** Wednesday, January 16, 2008 11:27 AM  
**To:** Livingston, J (Intelligence); Rice, K (Intelligence)  
**Cc:** Healey, C (Intelligence); Starzak, Alissa (Intelligence)  
**Subject:** Senator Feinstein's immunity amendment (SA 3858)

Jack and Kathleen:

I don't know whether you've had a chance to review Senator Feinstein's immunity amendment (SA 3858), but it's possible that it might gain traction.

I've described to David concerns about some of the procedures in the amendment (transfer to the FISC, en banc review there, possible involvement of the plaintiffs in proceedings that would involve classified information). However, the core idea that there ought to be a statutory good faith test that is applied by a court could gain adherents. Numbers of members who support immunity might nonetheless conclude that Feinstein's idea is aligned with the manner in which the Congress has legislated on immunity in other circumstances (e.g., good Samaritan statutes).

We've drafted an alternative way to get at the point that an immunity statute should have, in addition to the AG's certification, a provider submission that it acted in the reasonable belief that the directive was lawful, and a court determination, on the basis of the AG's certification and the provider's declaration, that the provider acted in good faith. The bottom line is that the statute should provide for immunity. The question is how to do it.

Let me know what you think and the suggestions that you might have, and then I'd like to invite Carl's observations, both technical and policy, so that we can advise Senator Rockefeller, in the next couple of days, what your thoughts and DOJ's thoughts might be.

Mike

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

(a) Limitations

(1) In general. — Notwithstanding any other provision of law, a covered civil action shall not lie or be maintained in a Federal or State court, and shall be promptly dismissed if —

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(A) (i) the Attorney General certifies to the court that any assistance by the relevant electronic communication provider was —

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

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

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

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(II) described in a written request or directive from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication provider indicating that the activity was—

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(aa) authorized by the President; and

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(bb) determined to be lawful;

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(ii) the electronic communications service provider submits a declaration to the Court under section 1746 of Title 28 of the U.S. Code that it provided the assistance

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(I) pursuant to the written request or directive referenced in paragraph (1)(A)(i)(II); and

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(II) with the reasonable belief that the written request or directive under paragraph (1)(A)(i)(II) was lawful; and

(iii) the court determines, on the basis of the certification provided in subparagraph (i) and the declaration provided in subparagraph (ii), that the provider undertook the assistance in good faith; or

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(B) The Attorney General certifies to the court that the electronic communication provider did not provide any of the alleged assistance.

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

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(b) Review of Certifications. - If the Attorney General files a declaration under section 1746 of title 28 that disclosure of the certification and declaration pursuant to subsection 102(a) would harm the national security of the United States, the court shall

(1) review such certification and declaration in camera and ex parte, and

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

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

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

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

(f) Effective Date and Application. - This title shall apply to any and all covered civil actions pending on or after the date of enactment of this Act.

**Berhanu, Tsedey**

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**From:** Livingston, J (Intelligence) [ - - - - - ] 266  
**Sent:** Wednesday, January 16, 2008 6:00 PM  
**To:** Demers, John; Eisenberg, John  
**Subject:** Will the world end if...  
**Attachments:** ManagersAmendmentTweaks.doc

we add this limited certification language to Section 705. It may help undercut complaints by Senator Wyden's staff. No rush on this. I'm out tomorrow, but I'm going to meet with Mike early Friday to start working through our final tweaks to the managers' amendment. Thanks.

EAS07D87

Page 14, line 14, strike "(2)" and insert "(b)"

Page 22, after line 23 insert the following new paragraph as follows: "(4) a certification made by the Attorney General or an official specified in section 104(a)(6) that the certifying official deems the information sought to be foreign intelligence information and a significant purpose of the acquisition is to obtain foreign intelligence information;"

Page 22, line 24, strike "(4)" and insert "(5)"

Page 23, line 5, strike "(5)" and insert "(6)"

Page 24, after line 16, insert "(D) REVIEW OF CERTIFICATION.—If the judge determines that an application required by subsection (b) does not contain all of the required elements, or that the certification is clearly erroneous on the basis of the information furnished under subsection (b)(1), the judge shall enter an order so stating and provide a written statement for the record of the reasons for such determination. The Government may appeal an order under this clause pursuant to subsection (e)."

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**Berhanu, Tsedey**

**From:** Starzak, Alissa (Intelligence) J 66  
**Sent:** Thursday, January 17, 2008 6:55 PM b 2  
**To:** Eisenberg, John; Demers, John; Livingston, J  
(Intelligence); Rice, K (Intelligence) b 6  
**Cc:** Healey, C (Intelligence); Davidson, M. (Intelligence)  
**Attachments:** EAS07D88\_XML redline changes.doc

Hi all –

Attached is a draft of the managers' amendment in substitute form with some proposed Rockefeller edits in redline. (Some of the edits are just corrections that we missed the last time around.) Although we haven't had the opportunity to speak with Jack or Kathleen about any of these changes yet, we thought it made a lot of sense to send them out to everyone at once to give everyone as much time as possible to review. If everyone is available, it might make sense to meet on Tuesday morning as well, to have some last discussions in person.

A few comments and questions about this draft:

- We added language on the section 703 authorization (p. 4 of this redline) to try to be upfront as possible about what this provision actually does. Given how clear we are in section 704 that we are talking about collection inside the US, it seemed to make sense to do the same thing here.
- Although we have a reference to stored electronic "data" in section 704 (p. 11), there is no similar mention in 703. Does that difference cause any problems?
- Should the agency assessment be prepared on a particular timetable? I added in a blank on page 10 line 5 with a bracketed question mark on this one.
- To address some of our colleagues' concerns that there could be collection under 705 on an employee of a foreign power that doesn't involve foreign intelligence, we added in a certification by the AG that the information is FI and a significant purpose of the acquisition is to obtain FI. Review on this certification is limited to whether the certification contains all required elements.

Given the limited review on this certification, this provision also might present an opportunity to address one of Mike's longstanding concerns. He has noted in the past that courts will want to know that 705 acquisitions are being conducted in accordance with EO 12333, even if we expressly give them have no ability to review that determination. Because this FI piece is just a certification, which involves no substantive court review, this topic could potentially be added here without granting the court any review over the issue. In other words, on p. 17 line 40, we could potentially add "(C) the acquisition will be conducted under guidelines approved by the Attorney General pursuant to Executive Order 12333 or any successor order."

- We added in the proposed section of 2511 from Senator Feinstein's exclusivity amendment that notes that the certification "shall identify the specific statutory provision." (p. 23, lines 8-12) Although there will obviously be more discussion about exclusivity, it seemed like this one might be able to stand on its own. We would be interested to hear your thoughts on this.
- It's probably worth doing a careful scrub of the transition procedures in Title III to make sure that they

fit with the changes in the managers' amendment.

- We're also interested to hear thoughts on a number of other proposals that seek to address various Senators' concerns:
  - Given the amount of judiciary committee concern on the stay pending appeal provision, we had proposed a compromise position that would strike lines 14-15 on p. 9 and insert the following:  
“(ii) if the Government appeals an order under this section, until the Court of Review enters an order under subsection (C).  
(C) IMPLEMENTATION PENDING APPEAL.—No later than 30 days after an appeal to it of an order under paragraph (5)(B) directing the correction of a deficiency, the Court of Review shall determine, and enter a corresponding order, whether all or any part of the correction order, as issued or modified, shall be implemented during the pendency of the appeal.”
  - Senator Feingold had proposed a bulk collection amendment in judiciary that had some operational problems. To address some of those concerns about bulk collection, however, would it be possible to change the targeting procedures requirement (p. 4 lines 25-29) to read:  
“The Attorney General, in consultation with the DNI, shall adopt targeting procedures that are reasonably designed to ensure that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States, and that at least one party to a communication acquired is a specific individual target reasonably believed to be outside the United States.”
  - Senator Kennedy has proposed a 2.5 related amendment, part of which includes the destruction of any collection obtained when all parties to the communication are known to be located in the United States. This idea seems to be generally consistent with NSA's practices in other kinds of collection, and requiring destruction of communications collected when targets were later determined to be in the US might help address some of the judiciary committee's concern about ensuring that there are consequences when collection is not conducted appropriately. What are your thoughts on adding this type of clause? To give you a sense of the language (and without considering exactly where in the bill it would go), the Kennedy provision reads as follows:  
“Persons in the United States. — The minimization procedures required by this subsection shall require the destruction, upon recognition, of any communication as to which the sender and all intended recipients are known to be located in the United States, a person has a reasonable expectation of privacy, and a warrant would be required for law enforcement purposes, unless the Attorney General determines that the communication indicates a threat of death or serious bodily harm to any person.”

We look forward to your comments.

Thanks –  
Alissa



1 Purpose: To provide a complete substitute.

2

3

4 S. 2248

5

6 To amend the Foreign Intelligence Surveillance Act of  
7 1978, to modernize and streamline the provisions of that  
8 Act, and for other purposes.

9

10 Referred to the Committee on \_\_\_\_\_ and ordered to  
11 be printed

12 Ordered to lie on the table and to be printed

13 AMENDMENT IN THE NATURE OF A SUBSTITUTE INTENDED  
14 TO BE PROPOSED BY MR. ROCKEFELLER (for himself and  
15 Mr. BOND)

16 Viz:

17 Strike all after the enacting clause and insert the following:

18 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

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

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

22 Sec. 1. Short title; table of contents.

23 TITLE I—FOREIGN INTELLIGENCE SURVEILLANCE

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

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

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

29 Sec. 104. Applications for court orders.

30 Sec. 105. Issuance of an order.

31 Sec. 106. Use of information.

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- 1 Sec.107.Amendments for physical searches.
- 2 Sec.108.Amendments for emergency pen registers and trap and trace devices.
- 3 Sec.109.Foreign Intelligence Surveillance Court.
- 4 Sec.110.Technical and conforming amendments.

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

- 7 Sec.201.Definitions.
- 8 Sec.202.Limitations on civil actions for electronic communication service providers.
- 9 Sec.203.Procedures for implementing statutory defenses under the Foreign Intelligence
- 10 Surveillance Act of 1978.
- 11 Sec.204.Preemption of State investigations.
- 12 Sec.205.Technical amendments.

13 **TITLE III—OTHER PROVISIONS**

- 14 Sec.301.Severability.
- 15 Sec.302.Effective date; repeal; transition procedures.

16 **TITLE I—FOREIGN INTELLIGENCE SURVEILLANCE**

17 **SEC. 101. ADDITIONAL PROCEDURES REGARDING**  
18 **CERTAIN PERSONS OUTSIDE THE UNITED STATES.**

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

- 21 (1) by striking title VII; and
- 22 (2) by adding after title VI the following new title:

23 **“TITLE VII—ADDITIONAL PROCEDURES**  
24 **REGARDING CERTAIN PERSONS OUTSIDE THE**  
25 **UNITED STATES**

26 **“SEC. 701. LIMITATION ON DEFINITION OF**  
27 **ELECTRONIC SURVEILLANCE.**

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

31 **“SEC. 702. DEFINITIONS.**

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1 “(a) In General.—The terms ‘agent of a foreign power’, ‘Attorney General’, ‘contents’,  
2 ‘electronic surveillance’, ‘foreign intelligence information’, ‘foreign power’,  
3 ‘minimization procedures’, ‘person’, ‘United States’, and ‘United States person’ shall  
4 have the meanings given such terms in section 101, except as specifically provided in this  
5 title.

6 “(b) Additional Definitions.—

7 “(1) CONGRESSIONAL INTELLIGENCE COMMITTEES.—The term ‘congressional  
8 intelligence committees’ means—

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

10 “(B) the Permanent Select Committee on Intelligence of the House of  
11 Representatives.

12 “(2) FOREIGN INTELLIGENCE SURVEILLANCE COURT; COURT.—The terms ‘Foreign  
13 Intelligence Surveillance Court’ and ‘Court’ mean the court established by section  
14 103(a).

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

18 “(4) ELECTRONIC COMMUNICATION SERVICE PROVIDER.—The term ‘electronic  
19 communication service provider’ means—

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

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

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

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

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

31 “(5) ELEMENT OF THE INTELLIGENCE COMMUNITY.—The term ‘element of the  
32 intelligence community’ means an element of the intelligence community specified  
33 in or designated under section 3(4) of the National Security Act of 1947 (50 U.S.C.  
34 401a(4)).

35 “SEC. 703. PROCEDURES FOR TARGETING  
36 CERTAIN PERSONS OUTSIDE THE UNITED STATES  
37 OTHER THAN UNITED STATES PERSONS.

38 “(a) Authorization.—Notwithstanding any other provision of law, the Attorney

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1 General and the Director of National Intelligence may authorize jointly, for periods of up  
2 to 1 year, the targeting of persons reasonably believed to be located outside the United  
3 States to acquire foreign intelligence information when the acquisition is conducted  
4 within the United States with the assistance of an electronic communication service  
5 provider.

6 “(b) Limitations.—An acquisition authorized under subsection (a)—

7 “(1) may not intentionally target any person known at the time of acquisition to be  
8 located in the United States;

9 “(2) may not intentionally target a person reasonably believed to be located  
10 outside the United States if the purpose of such acquisition is to target a particular,  
11 known person reasonably believed to be in the United States, except in accordance  
12 with title I or title III;

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13 “(3) may not intentionally target a United States person reasonably believed to be  
14 located outside the United States, except in accordance with sections 704 or 705;  
15 and

16 “(4) shall be conducted in a manner consistent with the fourth amendment to the  
17 Constitution of the United States.

18 “(c) Conduct of Acquisition.—An acquisition authorized under subsection (a) may be  
19 conducted only in accordance with—

20 “(1) a certification made by the Attorney General and the Director of National  
21 Intelligence pursuant to subsection (f); and

22 “(2) the targeting and minimization procedures required pursuant to subsections  
23 (d) and (e).

24 “(d) Targeting Procedures.—

25 “(1) REQUIREMENT TO ADOPT.—The Attorney General, in consultation with the  
26 Director of National Intelligence, shall adopt targeting procedures that are  
27 reasonably designed to ensure that any acquisition authorized under subsection (a) is  
28 limited to targeting persons reasonably believed to be located outside the United  
29 States.

30 “(2) JUDICIAL REVIEW.—The procedures referred to in paragraph (1) shall be  
31 subject to judicial review pursuant to subsection (h).

32 “(e) Minimization Procedures.—

33 “(1) REQUIREMENT TO ADOPT.—The Attorney General, in consultation with the  
34 Director of National Intelligence, shall adopt, consistent with the requirements of  
35 section 101(h) or section 301(4), minimization procedures for acquisitions  
36 authorized under subsection (a).

37 “(2) JUDICIAL REVIEW.—The minimization procedures required by this subsection  
38 shall be subject to judicial review pursuant to subsection (h).

39 “(f) Certification.—

40 “(1) IN GENERAL.—

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1           “(A) REQUIREMENT.—Subject to subparagraph (B), prior to the initiation of  
2           an acquisition authorized under subsection (a), the Attorney General and the  
3           Director of National Intelligence shall provide, under oath, a written  
4           certification, as described in this subsection.

5           “(B) EXCEPTION.—If the Attorney General and the Director of National  
6           Intelligence determine that immediate action by the Government is required  
7           and time does not permit the preparation of a certification under this subsection  
8           prior to the initiation of an acquisition, the Attorney General and the Director of  
9           National Intelligence shall prepare such certification, including such  
10          determination, as soon as possible but in no event more than 168 hours after  
11          such determination is made.

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

13           “(A) attest that—

14           “(i) there are reasonable procedures in place for determining that the  
15           acquisition authorized under subsection (a) is targeted at persons  
16           reasonably believed to be located outside the United States and that such  
17           procedures have been approved by, or will be submitted in no more than  
18           five days for approval by, the Foreign Intelligence Surveillance Court  
19           pursuant to subsection (h);

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20           “(ii) the procedures referred to in clause (i) are consistent with the  
21           requirements of the fourth amendment to the Constitution of the United  
22           States and do not permit the intentional targeting of any person who is  
23           known at the time of acquisition to be located in the United States;

24           “(iii) a significant purpose of the acquisition is to obtain foreign  
25           intelligence information;

26           “(iv) the minimization procedures to be used with respect to such  
27           acquisition—

28           “(I) meet the definition of minimization procedures under section  
29           101(h) or section 301(4); and

30           “(II) have been approved by, or will be submitted in no more than  
31           five days for approval by, the Foreign Intelligence Surveillance Court  
32           pursuant to subsection (h);

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33           “(v) the acquisition involves obtaining the foreign intelligence  
34           information from or with the assistance of an electronic communication  
35           service provider; and

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

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

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

41           or

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

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

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

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

13           “(g) Directives and judicial review of directives.—

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

17           “(A) immediately provide the Government with all information, facilities, or  
18 assistance necessary to accomplish the acquisition in a manner that will protect  
19 the secrecy of the acquisition and produce a minimum of interference with the  
20 services that such electronic communication service provider is providing to the  
21 target; and

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

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

29           “(3) RELEASE FROM LIABILITY.—Notwithstanding any other law, no cause of  
30 action shall lie in any court against any electronic communication service provider  
31 for providing any information, facilities, or assistance in accordance with a directive  
32 issued pursuant to paragraph (1).

33           “(4) CHALLENGING OF DIRECTIVES.—

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

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

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1           “(C) STANDARDS FOR REVIEW.—A judge considering a petition to modify or  
2 set aside a directive may grant such petition only if the judge finds that the  
3 directive does not meet the requirements of this section or is otherwise  
4 unlawful. If the judge does not modify or set aside the directive, the judge shall  
5 immediately affirm such directive, and order the recipient to comply with the  
6 directive. The judge shall provide a written statement for the record of the  
7 reasons for a determination under this paragraph.

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

10           “(E) CONTEMPT OF COURT.—Failure to obey an order of the Court issued  
11 under this paragraph may be punished by the Court as contempt of court.

12           “(5) ENFORCEMENT OF DIRECTIVES.—

13           “(A) ORDER TO COMPEL.—In the case of a failure to comply with a directive  
14 issued pursuant to paragraph (1), the Attorney General may file a petition for an  
15 order to compel compliance with the directive with the Foreign Intelligence  
16 Surveillance Court, which shall have jurisdiction to review such a petition.

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

20           “(C) STANDARDS FOR REVIEW.—A judge considering a petition shall issue an  
21 order requiring the electronic communication service provider to comply with  
22 the directive if the judge finds that the directive was issued in accordance with  
23 paragraph (1), meets the requirements of this section, and is otherwise lawful.  
24 The judge shall provide a written statement for the record of the reasons for a  
25 determination under this paragraph.

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

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

31           “(6) APPEAL.—

32           “(A) APPEAL TO THE COURT OF REVIEW.—The Government or an electronic  
33 communication service provider receiving a directive issued pursuant to  
34 paragraph (1) may file a petition with the Foreign Intelligence Surveillance  
35 Court of Review for review of the decision issued pursuant to paragraph (4) or  
36 (5) not later than 7 days after the issuance of such decision. The Court of  
37 Review shall have jurisdiction to consider such a petition and shall provide a  
38 written statement for the record of the reasons for a decision under this  
39 paragraph.

40           “(B) CERTIORARI TO THE SUPREME COURT.—The Government or an  
41 electronic communication service provider receiving a directive issued pursuant  
42 to paragraph (1) may file a petition for a writ of certiorari for review of the

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

4 “(h) Judicial Review of certifications and procedures.—

5 “(1) IN GENERAL.—

6 “(A) REVIEW BY THE FOREIGN INTELLIGENCE SURVEILLANCE COURT.—The  
7 Foreign Intelligence Surveillance Court shall have jurisdiction to review any  
8 certification required by subsection (c) and the targeting and minimization  
9 procedures adopted pursuant to subsections (d) and (e).

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

14 “(2) CERTIFICATIONS.—The Court shall review a certification provided under  
15 subsection (f) to determine whether the certification contains all the required  
16 elements.

17 “(3) TARGETING PROCEDURES.—The Court shall review the targeting procedures  
18 required by subsection (d) to assess whether the procedures are reasonably designed  
19 to ensure that the acquisition authorized under subsection (a) is limited to the  
20 targeting of persons reasonably believed to be located outside the United States.

21 “(4) MINIMIZATION PROCEDURES.—The Court shall review the minimization  
22 procedures required by subsection (e) to assess whether such procedures meet the  
23 definition of minimization procedures under section 101(h) or section 301(4).

24 “(5) ORDERS.—

25 “(A) APPROVAL.—If the Court finds that a certification required by  
26 subsection (f) contains all of the required elements and that the targeting and  
27 minimization procedures required by subsections (d) and (e) are consistent with  
28 the requirements of those subsections and with the fourth amendment to the  
29 Constitution of the United States, the Court shall enter an order approving the  
30 continued use of the procedures for the acquisition authorized under subsection  
31 (a).

32 “(B) CORRECTION OF DEFICIENCIES.—If the Court finds that a certification  
33 required by subsection (f) does not contain all of the required elements, or that  
34 the procedures required by subsections (d) and (e) are not consistent with the  
35 requirements of those subsections or the fourth amendment to the Constitution  
36 of the United States, the Court shall issue an order directing the Government to,  
37 at the Government’s election and to the extent required by the Court’s order—

38 “(i) correct any deficiency identified by the Court’s order not later than  
39 30 days after the date the Court issues the order; or

40 “(ii) cease the acquisition authorized under subsection (a).

41 “(C) REQUIREMENT FOR WRITTEN STATEMENT.—In support of its orders

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1. under this subsection, the Court shall provide, simultaneously with the orders,  
2. for the record a written statement of its reasons.

3. **“(6) APPEAL.—**

4. **“(A) APPEAL TO THE COURT OF REVIEW.—**The Government may appeal any  
5. order under this section to the Foreign Intelligence Surveillance Court of  
6. Review, which shall have jurisdiction to review such order. For any decision  
7. affirming, reversing, or modifying an order of the Foreign Intelligence  
8. Surveillance Court, the Court of Review shall provide for the record a written  
9. statement of its reasons.

10. **“(B) CONTINUATION OF ACQUISITION PENDING REHEARING OR APPEAL.—**Any  
11. acquisitions affected by an order under paragraph (5)(B) may continue—

12. **“(i) during the pending of any rehearing of the order by the Court en**  
13. **ban; and**

14. **“(ii) during the pendency of any appeal of the order to the Foreign**  
15. **Intelligence Surveillance Court of Review.**

16. **“(D) CERTIORARI TO THE SUPREME COURT.—**The Government may file a  
17. petition for a writ of certiorari for review of a decision of the Court of Review  
18. issued under subparagraph (A). The record for such review shall be transmitted  
19. under seal to the Supreme Court of the United States, which shall have  
20. jurisdiction to review such decision.

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21. **“(i) Expedited Judicial Proceedings.—**Judicial proceedings under this section shall be  
22. conducted as expeditiously as possible.

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

24. **“(1) STANDARDS.—**A record of a proceeding under this section, including  
25. petitions filed, orders granted, and statements of reasons for decision, shall be  
26. maintained under security measures adopted by the Chief Justice of the United  
27. States, in consultation with the Attorney General and the Director of National  
28. Intelligence.

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

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

36. **“(k) Assessments and Reviews.—**

37. **“(1) SEMIANNUAL ASSESSMENT.—**Not less frequently than once every 6 months,  
38. the Attorney General and Director of National Intelligence shall assess compliance  
39. with the targeting and minimization procedures required by subsections (e) and (f)  
40. and shall submit each such assessment to—

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

2           “(B) the congressional intelligence committees.

3           “(2) AGENCY ASSESSMENT.—~~Not less frequently than [?],~~ the Inspectors General  
4 of the Department of Justice and of any element of the intelligence community  
5 authorized to acquire foreign intelligence information under subsection (a) with  
6 respect to their department, agency, or element—

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7           “(A) are authorized to review the compliance with the targeting and  
8 minimization procedures required by subsections (d) and (e);

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

15           “(C) with respect to acquisitions authorized under subsection (a), shall  
16 review the number of targets that were later determined to be located in the  
17 United States and, to the extent possible, whether their communications were  
18 reviewed; and

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

20           “(i) the Attorney General;

21           “(ii) the Director of National Intelligence; and

22           “(iii) the congressional intelligence committees.

23           “(3) ANNUAL REVIEW.—

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

30           “(i) an accounting of the number of disseminated intelligence reports  
31 containing a reference to a United States person identity;

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

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

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39           “(iv) a description of any procedures developed by the head of an  
40 element of the Intelligence Community and approved by the Director of

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1 National Intelligence to assess, in a manner consistent with national  
2 security, operational requirements and the privacy interests of United  
3 States persons, the extent to which the acquisitions authorized under  
4 subsection (a) acquire the communications of United States persons, as  
5 well as the results of any such assessment.

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

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

14 (i) the Foreign Intelligence Surveillance Court;

15 (ii) the Attorney General;

16 (iii) the Director of National Intelligence; and

17 (iv) the congressional intelligence committees.

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

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

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

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

36 “(b) Application.—

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

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1 criteria and requirements of such application, as set forth in this section, and shall  
2 include—

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

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

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

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

10 “(ii) a foreign power, an agent of a foreign power, or an officer or  
11 employee of a foreign power;

12 “(D) a statement of the proposed minimization procedures consistent with  
13 the requirements of section 101(h) or section 301(4);

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

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

18 “(i) the certifying official deems the information sought to be foreign  
19 intelligence information;

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

22 “(iii) such information cannot reasonably be obtained by normal  
23 investigative techniques;

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

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

27 “(I) the information sought is the type of foreign intelligence  
28 information designated; and

29 “(II) such information cannot reasonably be obtained by normal  
30 investigative techniques.

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

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

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

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1 taken on each previous application; and

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

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

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

11 “(c) Order.—

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

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

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

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

22 “(ii) a foreign power, an agent of a foreign power, or an officer or  
23 employee of a foreign power;

24 “(C) the proposed minimization procedures meet the definition of  
25 minimization procedures under section 101(h) or section 301(4); and

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

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

37 “(3) REVIEW.—

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

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1       “(B) REVIEW OF PROBABLE CAUSE.—If the judge determines that the facts  
2 submitted under subsection (b) are insufficient to establish probable cause to  
3 issue an order under paragraph (1), the judge shall enter an order so stating and  
4 provide a written statement for the record of the reasons for such determination.  
5 The Government may appeal an order under this clause pursuant to subsection  
6 (f).

7       “(C) REVIEW OF MINIMIZATION PROCEDURES.—If the judge determines that  
8 the proposed minimization procedures required under paragraph (1)(C) do not  
9 meet the definition of minimization procedures under section 101(h) or section  
10 301(4), the judge shall enter an order so stating and provide a written statement  
11 for the record of the reasons for such determination. The Government may  
12 appeal an order under this clause pursuant to subsection (f).

13       “(D) REVIEW OF CERTIFICATION.—If the judge determines that an application  
14 required by subsection (2) does not contain all of the required elements, or that  
15 the certification or certifications are clearly erroneous on the basis of the  
16 statement made under subsection (b)(1)(F)(v) and any other information  
17 furnished under subsection (b)(3), the judge shall enter an order so stating and  
18 provide a written statement for the record of the reasons for such determination.  
19 The Government may appeal an order under this clause pursuant to subsection  
20 (f).

21       “(4) SPECIFICATIONS.—An order approving an acquisition under this subsection  
22 shall specify—

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

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

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

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

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

34       “(5) DIRECTIONS.—An order approving acquisitions under this subsection shall  
35 direct—

36       “(A) that the minimization procedures be followed;

37       “(B) an electronic communication service provider to provide to the  
38 Government forthwith all information, facilities, or assistance necessary to  
39 accomplish the acquisition authorized under this subsection in a manner that  
40 will protect the secrecy of the acquisition and produce a minimum of  
41 interference with the services that such electronic communication service  
42 provider is providing to the target;

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1 “(C) an electronic communication service provider to maintain under  
2 security procedures approved by the Attorney General any records concerning  
3 the acquisition or the aid furnished that such electronic communication service  
4 provider wishes to maintain; and

5 “(D) that the Government compensate, at the prevailing rate, such electronic  
6 communication service provider for providing such information, facilities, or  
7 assistance.

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

12 “(7) COMPLIANCE.—At or prior to the end of the period of time for which an  
13 acquisition is approved by an order or extension under this section, the judge may  
14 assess compliance with the minimization procedures by reviewing the circumstances  
15 under which information concerning United States persons was acquired, retained,  
16 or disseminated.

17 “(d) Emergency Authorization.—

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

20 “(A) an emergency situation exists with respect to the acquisition of foreign  
21 intelligence information for which an order may be obtained under subsection  
22 (c) before an order authorizing such acquisition can with due diligence be  
23 obtained; and

24 “(B) the factual basis for issuance of an order under this subsection to  
25 approve such acquisition exists,

26 the Attorney General may authorize the emergency acquisition if a judge having  
27 jurisdiction under subsection (a)(1) is informed by the Attorney General, or a  
28 designee of the Attorney General, at the time of such authorization that the decision  
29 has been made to conduct such acquisition and if an application in accordance with  
30 this subsection is made to a judge of the Foreign Intelligence Surveillance Court as  
31 soon as practicable, but not more than 168 hours after the Attorney General  
32 authorizes such acquisition.

33 “(2) MINIMIZATION PROCEDURES.—If the Attorney General authorizes such  
34 emergency acquisition, the Attorney General shall require that the minimization  
35 procedures required by this subsection for the issuance of a judicial order be  
36 followed.

37 “(3) TERMINATION OF EMERGENCY AUTHORIZATION.—In the absence of a judicial  
38 order approving such acquisition, the acquisition shall terminate when the  
39 information sought is obtained, when the application for the order is denied, or after  
40 the expiration of 168 hours from the time of authorization by the Attorney General,  
41 whichever is earliest.

42 “(4) USE OF INFORMATION.—In the event that such application for approval is

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1 denied, or in any other case where the acquisition is terminated and no order is  
2 issued approving the acquisition, no information obtained or evidence derived from  
3 such acquisition, except under circumstances in which the target of the acquisition is  
4 determined not to be a United States person during the pendency of the 168-hour  
5 emergency acquisition period, shall be received in evidence or otherwise disclosed  
6 in any trial, hearing, or other proceeding in or before any court, grand jury,  
7 department, office, agency, regulatory body, legislative committee, or other  
8 authority of the United States, a State, or political subdivision thereof, and no  
9 information concerning any United States person acquired from such acquisition  
10 shall subsequently be used or disclosed in any other manner by Federal officers or  
11 employees without the consent of such person, except with the approval of the  
12 Attorney General if the information indicates a threat of death or serious bodily  
13 harm to any person.

14 “(e) Release From Liability.—Notwithstanding any other law, no cause of action shall  
15 lie in any court against any electronic communication service provider for providing any  
16 information, facilities, or assistance in accordance with an order or request for emergency  
17 assistance issued pursuant to subsections (c) or (d).

18 “(f) Appeal.—

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

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

29 “SEC. 705. OTHER ACQUISITIONS TARGETING  
30 UNITED STATES PERSONS OUTSIDE THE UNITED  
31 STATES.

32 “(a) Jurisdiction and Scope.—

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

35 “(2) SCOPE.—No element of the intelligence community may intentionally target,  
36 for the purpose of acquiring foreign intelligence information, a United States person  
37 reasonably believed to be located outside the United States under circumstances in  
38 which the targeted United States person has a reasonable expectation of privacy and  
39 a warrant would be required if the acquisition were conducted inside the United  
40 States for law enforcement purposes, unless a judge of the Foreign Intelligence  
41 Surveillance Court has entered an order or the Attorney General has authorized an

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1 emergency acquisition pursuant to subsections (c) or (d) or any other provision of  
2 this Act.

3 “(3) LIMITATIONS.—

4 “(A) MOVING OR MISIDENTIFIED TARGETS.—In the event that the targeted  
5 United States person is reasonably believed to be in the United States during  
6 the pendency of an order issued pursuant to subsection (c), such acquisition  
7 shall cease until authority is obtained pursuant to this Act or the targeted United  
8 States person is again reasonably believed to be located outside the United  
9 States during the pendency of an order issued pursuant to subsection (c).

10 “(B) APPLICABILITY.—If the acquisition could be authorized under section  
11 704, the procedures of section 704 shall apply, unless an order or emergency  
12 acquisition authority has been obtained under a provision of this Act other than  
13 under section 704.

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14 “(b) Application.—Each application for an order under this section shall be made by a  
15 Federal officer in writing upon oath or affirmation to a judge having jurisdiction under  
16 subsection (a)(1). Each application shall require the approval of the Attorney General  
17 based upon the Attorney General’s finding that it satisfies the criteria and requirements of,  
18 such application as set forth in this section and shall include—

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

21 “(2) a statement of the facts and circumstances relied upon to justify the  
22 applicant’s belief that the target of the acquisition is—

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

25 “(B) a foreign power, an agent of a foreign power, or an officer or employee  
26 of a foreign power;

27 “(3) a statement of the proposed minimization procedures consistent with the  
28 requirements of section 101(h) or section 301(4);

29 “(4) a certification made by the Attorney General or an official specified in  
30 section 104(a)(6) that—

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

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33 “(B) a significant purpose of the acquisition is to obtain foreign intelligence  
34 information.

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

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

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1 application.

2 “(c) Order.—

3 “(1) FINDINGS.—If, upon an application made pursuant to subsection (b), a judge  
4 having jurisdiction under subsection (a) finds that—

5 “(A) on the basis of the facts submitted by the applicant there is probable  
6 cause to believe that the United States person who is the target of the  
7 acquisition is—

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

10 “(ii) a foreign power, an agent of a foreign power, or an officer or  
11 employee of a foreign power;

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12 “(B) the proposed minimization procedures, with respect to their  
13 dissemination provisions, meet the definition of minimization procedures under  
14 section 101(h) or section 301(4), and

15 “(C) the certification provided under subsection (b)(4) contains all the  
16 required elements.

17 the Court shall issue an ex parte order so stating.

18 “(2) PROBABLE CAUSE.—In determining whether or not probable cause exists for  
19 purposes of an order under paragraph (1)(A), a judge having jurisdiction under  
20 subsection (a)(1) may consider past activities of the target, as well as facts and  
21 circumstances relating to current or future activities of the target. However, no  
22 United States person may be considered a foreign power, agent of a foreign power,  
23 or officer or employee of a foreign power solely upon the basis of activities  
24 protected by the first amendment to the Constitution of the United States.

25 “(3) REVIEW.—

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

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

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36 “(C) REVIEW OF MINIMIZATION PROCEDURES.—If the judge determines that  
37 the minimization procedures applicable to dissemination of information  
38 obtained through an acquisition under this subsection do not meet the definition  
39 of minimization procedures under section 101(h) or section 301(4), the judge  
40 shall enter an order so stating and provide a written statement for the record of  
41 the reasons for such determination. The Government may appeal an order under

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1 this clause pursuant to subsection (e).

2 “(D) REVIEW OF CERTIFICATION.—If the judge determines that the  
3 certification provided under subsection (b)(4) does not contain all the required  
4 elements, the judge shall enter an order so stating and provide a written  
5 statement for the record of the reasons for such determination. The  
6 Government may appeal an order under this clause pursuant to subsection (e).

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

10 “(5) COMPLIANCE.—At or prior to the end of the period of time for which an order  
11 or extension is granted under this section, the judge may assess compliance with the  
12 minimization procedures by reviewing the circumstances under which information  
13 concerning United States persons was disseminated, provided that the judge may not  
14 inquire into the circumstances relating to the conduct of the acquisition.

15 “(d) Emergency Authorization.—

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

18 “(A) an emergency situation exists with respect to the acquisition of foreign  
19 intelligence information for which an order may be obtained under subsection  
20 (c) before an order under that subsection may, with due diligence, be obtained;  
21 and

22 “(B) the factual basis for issuance of an order under this section exists,  
23 the Attorney General may authorize the emergency acquisition if a judge having  
24 jurisdiction under subsection (a)(1) is informed by the Attorney General or a  
25 designee of the Attorney General at the time of such authorization that the decision  
26 has been made to conduct such acquisition and if an application in accordance with  
27 this subsection is made to a judge of the Foreign Intelligence Surveillance Court as  
28 soon as practicable, but not more than 168 hours after the Attorney General  
29 authorizes such acquisition.

30 “(2) MINIMIZATION PROCEDURES.—If the Attorney General authorizes such  
31 emergency acquisition, the Attorney General shall require that the minimization  
32 procedures required by this subsection be followed.

33 “(3) TERMINATION OF EMERGENCY AUTHORIZATION.—In the absence of an order  
34 under subsection (c), the acquisition shall terminate when the information sought is  
35 obtained, if the application for the order is denied, or after the expiration of 168  
36 hours from the time of authorization by the Attorney General, whichever is earliest.

37 “(4) USE OF INFORMATION.—In the event that such application is denied, or in any  
38 other case where the acquisition is terminated and no order is issued approving the  
39 acquisition, no information obtained or evidence derived from such acquisition,  
40 except under circumstances in which the target of the acquisition is determined not  
41 to be a United States person during the pendency of the 168-hour emergency  
42 acquisition period, shall be received in evidence or otherwise disclosed in any trial,

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

8 “(e) Appeal.—

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

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

19 “SEC. 706. JOINT APPLICATIONS AND  
20 CONCURRENT AUTHORIZATIONS

21 “(a) Joint Applications and Orders.—If an acquisition targeting a United States person  
22 under section 704 or this section is proposed to be conducted both inside and outside the  
23 United States, a judge having jurisdiction under subsection (a)(1) or section 704(a)(1)  
24 may issue simultaneously, upon the request of the Government in a joint application  
25 complying with the requirements of subsection (b) or section 704(b); orders under  
26 subsection (b) or section 704(b), as applicable.

27 “(b) Concurrent Authorization.—If an order authorizing electronic surveillance or  
28 physical search has been obtained under section 105 or 304 and that order is still in  
29 effect, the Attorney General may authorize, without an order under this section or section  
30 704, an acquisition of foreign intelligence information targeting that United States person  
31 while such person is reasonably believed to be located outside the United States.

32 “SEC. 707. USE OF INFORMATION ACQUIRED  
33 UNDER TITLE VII.

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

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

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1 "SEC. 708. CONGRESSIONAL OVERSIGHT.

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2 "(a) Semiannual Report.—Not less frequently than once every 6 months, the Attorney  
3 General shall fully inform, in a manner consistent with national security, the  
4 congressional intelligence committees, the Committee on the Judiciary of the Senate, and  
5 the Committee on the Judiciary of the House of Representatives, concerning the  
6 implementation of this title.

7 "(b) Content.—Each report made under subparagraph (a) shall include—

8 "(1) with respect to section 703—

9 "(A) any certifications made under subsection 703(f) during the reporting  
10 period;

11 "(B) any directives issued under subsection 703(g) during the reporting  
12 period;

13 "(C) a description of the judicial review during the reporting period of any  
14 such certifications and targeting and minimization procedures utilized with  
15 respect to such acquisition, including a copy of any order or pleading in  
16 connection with such review that contains a significant legal interpretation of  
17 the provisions of this section;

18 "(D) any actions taken to challenge or enforce a directive under paragraphs  
19 (4) or (5) of section 703(g);

20 "(E) any compliance reviews conducted by the Department of Justice or the  
21 Office of the Director of National Intelligence of acquisitions authorized under  
22 subsection 703(a);

23 "(F) a description of any incidents of noncompliance with a directive issued  
24 by the Attorney General and the Director of National Intelligence under  
25 subsection 703(g), including—

26 "(i) incidents of noncompliance by an element of the intelligence  
27 community with procedures adopted pursuant to subsections (d) and (e) of  
28 section 703; and

29 "(ii) incidents of noncompliance by a specified person to whom the  
30 Attorney General and Director of National Intelligence issued a directive  
31 under subsection 703(g); and

32 "(G) any procedures implementing this section; "(2) with respect to section  
33 704—

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conducted pursuant to section 703(k)(3); ¶

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

35 "(B) the total number of such orders either granted, modified, or denied; and

36 "(C) the total number of emergency acquisitions authorized by the Attorney  
37 General under section 704(d) and the total number of subsequent orders  
38 approving or denying such acquisitions; and

39 "(3) with respect to section 705—

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- 1           “(A) the total number of applications made for orders under 705(b);  
2           “(B) the total number of such orders either granted, modified, or denied; and  
3           “(C) the total number of emergency acquisitions authorized by the Attorney  
4           General under subsection 705(d) and the total number of subsequent orders  
5           approving or denying such applications.”.

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

- 8           (1) by striking the item relating to title VII;  
9           (2) by striking the item relating to section 701; and  
10          (3) by adding at the end the following:

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

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

15       “Sec. 702. Definitions.

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

18       “Sec. 704. Certain acquisitions inside the United States of United States persons outside  
19       the United States.

20       “Sec. 705. Other acquisitions targeting United States persons outside the United States.

21       “Sec. 706. Joint applications and concurrent authorizations.

22       “Sec. 707. Use of information acquired under title VII.

23       “Sec. 708. Congressional oversight.”

24       (c) Technical and Conforming Amendments.—

25           (1) TITLE 18, UNITED STATES CODE.—

26           (A) SECTION 2232.—Section 2232(e) of title 18, United States Code, is  
27           amended by inserting “(as defined in section 101(f) of the Foreign Intelligence  
28           Surveillance Act of 1978, regardless of the limitation of section 701 of that  
29           Act)” after “electronic surveillance”.

30           (B) SECTION 2511.—Section 2511 of title 18, United States Code, is amended  
31           by

32           (i) in subsection (2)(a)(ii)(A), inserting “or a court order pursuant to  
33           section 705 of the Foreign Intelligence Surveillance Act of 1978” after  
34           “assistance,” and

35           (ii) in subsection (2)(a), by adding at the end the following:

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1 “(iii) If a certification under subparagraph (ii)(B) for assistance to obtain foreign  
2 intelligence information is based on statutory authority, the certification shall identify the  
3 specific statutory provision, and shall certify that the statutory requirements have been  
4 met.”.

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5 (2) FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978.—

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

8 “(e) Definition.—For the purpose of this section, the term ‘electronic surveillance’  
9 means electronic surveillance as defined in section 101(f) of this Act regardless of the  
10 limitation of section 701 of this Act.”

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11 (B) Section 110.—Section 110 of the Foreign Intelligence Surveillance Act of  
12 1978 (50 U.S.C. 1810) is amended by

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13 (i) adding an “(a)” before “Civil Action”;

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

16 (v) adding at the end the following:

17 “(b) Definition.—For the purpose of this section, the term ‘electronic surveillance’  
18 means electronic surveillance as defined in section 101(f) of this Act regardless of the  
19 limitation of section 701 of this Act.”

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20 (C) SECTION 601.—Section 601(a)(1) of the Foreign Intelligence  
21 Surveillance Act of 1978 (50 U.S.C. 1871(a)(1)) is amended by striking  
22 subparagraphs (C) and (D) and inserting the following:

23 “(C) pen registers under section 402;

24 “(D) access to records under section 501;

25 “(E) acquisitions under section 704; and

26 “(F) acquisitions under section 705;”.

27 (d) Termination of Authority.—

28 (1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by  
29 subsections (a)(2) and (b) shall cease to have effect on December 31, 2013.

30 (2) CONTINUING APPLICABILITY.—Section 703(h)(3) of the Foreign Intelligence  
31 Surveillance Act of 1978 (as amended by subsection (a)) shall remain in effect with  
32 respect to any directive issued pursuant to section 703(h) of that Act (as so  
33 amended) during the period such directive was in effect. Section 704(e) of the  
34 Foreign Intelligence Surveillance Act of 1978 (as amended by subsection (a)) shall  
35 remain in effect with respect to an order or request for emergency assistance under  
36 that section. The use of information acquired by an acquisition conducted under  
37 section 703 of that Act (as so amended) shall continue to be governed by the  
38 provisions of section 704 of that Act (as so amended).

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39 SEC. 102. STATEMENT OF EXCLUSIVE MEANS BY

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

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

7 "STATEMENT OF EXCLUSIVE MEANS BY WHICH ELECTRONIC  
8 SURVEILLANCE AND INTERCEPTION OF DOMESTIC COMMUNICATIONS  
9 MAY BE CONDUCTED

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

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

17 "Sec. 112. Statement of exclusive means by which electronic surveillance and interception  
18 of domestic communications may be conducted."

19 (c) Conforming Amendments.—Section 2511(2) of title 18, United States Code, is  
20 amended in paragraph (f), by striking ", as defined in section 101 of such Act," and  
21 inserting "(as defined in section 101(f) of such Act regardless of the limitation of section  
22 701 of such Act)".

23 SEC. 103. SUBMITTAL TO CONGRESS OF CERTAIN  
24 COURT ORDERS UNDER THE FOREIGN  
25 INTELLIGENCE SURVEILLANCE ACT OF 1978.

26 (a) Inclusion of Certain Orders in Semi-Annual Reports of Attorney General.—  
27 Subsection (a)(5) of section 601 of the Foreign Intelligence Surveillance Act of 1978 (50  
28 U.S.C. 1871) is amended by striking "(not including orders)" and inserting "; orders,".

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

31 "(c) The Attorney General shall submit to the committees of Congress referred to in  
32 subsection (a) a copy of any decision, order, or opinion issued by the Foreign Intelligence  
33 Surveillance Court or the Foreign Intelligence Surveillance Court of Review that includes  
34 significant construction or interpretation of any provision of this Act not later than 45  
35 days after such decision, order, or opinion is issued."

36 (d) Definitions.—

37 "(1) FOREIGN INTELLIGENCE SURVEILLANCE COURT; COURT.—The term 'Foreign  
38 Intelligence Surveillance Court' means the court established by section 103(a).

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section 103(a) or the court of review  
established under section 103(b)

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1        "(2) FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW: COURT OF  
2        REVIEW.—The term 'Foreign Intelligence Surveillance Court of Review' means the  
3        court established by section 103(b).

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#### 4        SEC. 104. APPLICATIONS FOR COURT ORDERS.

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

7        (1) in subsection (a)—

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

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

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

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

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

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

19            (E) in paragraph (7), as redesignated by subparagraph (B) of this paragraph,  
20            by striking "statement of" and inserting "summary statement of";

21            (F) in paragraph (8), as redesignated by subparagraph (B) of this paragraph,  
22            by adding "and" at the end; and

23            (G) in paragraph (9), as redesignated by subparagraph (B) of this paragraph,  
24            by striking "; and" and inserting a period;

25        (2) by striking subsection (b);

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

28        (4) in paragraph (1)(A) of subsection (d), as redesignated by paragraph (3) of this  
29        subsection, by striking "or the Director of National Intelligence" and inserting "the  
30        Director of National Intelligence, or the Director of the Central Intelligence  
31        Agency".

#### 32        SEC. 105. ISSUANCE OF AN ORDER.

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

35        (1) in subsection (a)—

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

37            (B) by redesignating paragraphs (2) through (5) as paragraphs (1) through

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- 1 (4), respectively;
- 2 (2) in subsection (b), by striking “(a)(3)” and inserting “(a)(2)”;
- 3 (3) in subsection (c)(1)—
- 4 (A) in subparagraph (D), by adding “and” at the end;
- 5 (B) in subparagraph (E), by striking “, and” and inserting a period; and
- 6 (C) by striking subparagraph (F);
- 7 (4) by striking subsection (d);
- 8 (5) by redesignating subsections (e) through (i) as subsections (d) through (h),
- 9 respectively;
- 10 (6) by amending subsection (e), as redesignated by paragraph (5) of this section,
- 11 to read as follows:
- 12 “(e)(1) Notwithstanding any other provision of this title, the Attorney General may
- 13 authorize the emergency employment of electronic surveillance if the Attorney General
- 14 reasonably—
- 15 “(A) determines that an emergency situation exists with respect to the
- 16 employment of electronic surveillance to obtain foreign intelligence information
- 17 before an order authorizing such surveillance can with due diligence be obtained;
- 18 “(B) determines that the factual basis for issuance of an order under this title to
- 19 approve such electronic surveillance exists;
- 20 “(C) informs, either personally or through a designee, a judge having jurisdiction
- 21 under section 103 at the time of such authorization that the decision has been made
- 22 to employ emergency electronic surveillance; and
- 23 “(D) makes an application in accordance with this title to a judge having
- 24 jurisdiction under section 103 as soon as practicable, but not later than 168 hours
- 25 after the Attorney General authorizes such surveillance.
- 26 “(2) If the Attorney General authorizes the emergency employment of electronic
- 27 surveillance under paragraph (1), the Attorney General shall require that the minimization
- 28 procedures required by this title for the issuance of a judicial order be followed.
- 29 “(3) In the absence of a judicial order approving such electronic surveillance, the
- 30 surveillance shall terminate when the information sought is obtained, when the
- 31 application for the order is denied, or after the expiration of 168 hours from the time of
- 32 authorization by the Attorney General, whichever is earliest.
- 33 “(4) A denial of the application made under this subsection may be reviewed as
- 34 provided in section 103.
- 35 “(5) In the event that such application for approval is denied, or in any other case
- 36 where the electronic surveillance is terminated and no order is issued approving the
- 37 surveillance, no information obtained or evidence derived from such surveillance shall be
- 38 received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or
- 39 before any court, grand jury, department, office, agency, regulatory body, legislative

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1 committee, or other authority of the United States, a State, or political subdivision  
2 thereof, and no information concerning any United States person acquired from such  
3 surveillance shall subsequently be used or disclosed in any other manner by Federal  
4 officers or employees without the consent of such person, except with the approval of the  
5 Attorney General if the information indicates a threat of death or serious bodily harm to  
6 any person.

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

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

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

## 15 SEC. 106. USE OF INFORMATION.

16 Subsection (i) of section 106 of the Foreign Intelligence Surveillance Act of 1978 (8  
17 U.S.C. 1806) is amended by striking “radio communication” and inserting  
18 “communication”.

## 19 SEC. 107. AMENDMENTS FOR PHYSICAL 20 SEARCHES.

21 (a) Applications.—Section 303 of the Foreign Intelligence Surveillance Act of 1978  
22 (50 U.S.C. 1823) is amended—

23 (1) in subsection (a)—

24 (A) by striking paragraph (2);

25 (B) by redesignating paragraphs (3) through (9) as paragraphs (2) through  
26 (8), respectively;

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

29 (D) in paragraph (3)(C), as redesignated by subparagraph (B) of this  
30 paragraph, by inserting “or is about to be” before “owned”; and

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

33 (i) by striking “Affairs or” and inserting “Affairs.”; and

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

37 (2) in subsection (d)(1)(A), by striking “or the Director of National Intelligence”  
38 and inserting “the Director of National Intelligence, or the Director of the Central

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1 Intelligence Agency”.

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

4 (1) in subsection (a)—

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

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

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

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

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

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

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

20 “(D) makes an application in accordance with this title to a judge of the Foreign  
21 Intelligence Surveillance Court as soon as practicable, but not more than 168 hours  
22 after the Attorney General authorizes such physical search.

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

26 “(3) In the absence of a judicial order approving such physical search, the physical  
27 search shall terminate when the information sought is obtained, when the application for  
28 the order is denied, or after the expiration of 168 hours from the time of authorization by  
29 the Attorney General, whichever is earliest.

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

32 “(5)(A) In the event that such application for approval is denied, or in any other case  
33 where the physical search is terminated and no order is issued approving the physical  
34 search, no information obtained or evidence derived from such physical search shall be  
35 received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or  
36 before any court, grand jury, department, office, agency, regulatory body, legislative  
37 committee, or other authority of the United States, a State, or political subdivision  
38 thereof, and no information concerning any United States person acquired from such  
39 physical search shall subsequently be used or disclosed in any other manner by Federal  
40 officers or employees without the consent of such person, except with the approval of the

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1 Attorney General if the information indicates a threat of death or serious bodily harm to  
2 any person.

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

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

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

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

## 10 SEC. 108. AMENDMENTS FOR EMERGENCY PEN 11 REGISTERS AND TRAP AND TRACE DEVICES.

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

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

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

## 16 SEC. 109. FOREIGN INTELLIGENCE SURVEILLANCE 17 COURT.

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

21 (b) En Banc Authority.—

22 (1) IN GENERAL.—Subsection (a) of section 103 of the Foreign Intelligence  
23 Surveillance Act of 1978, as amended by subsection (a) of this section, is further  
24 amended—

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

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

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

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

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

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

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

3 (2) CONFORMING AMENDMENTS.—The Foreign Intelligence Surveillance Act of  
4 1978 is further amended—

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

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

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

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

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

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

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

25 **SEC. 110. TECHNICAL AND CONFORMING**  
26 **AMENDMENTS.**

27 Section 103(e) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.  
28 1803(e)) is amended—

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

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

33 **TITLE II—PROTECTIONS FOR ELECTRONIC**  
34 **COMMUNICATION SERVICE PROVIDERS**

35 **SEC. 201. DEFINITIONS.**

36 In this title:

37 (1) ASSISTANCE.—The term “assistance” means the provision of, or the provision

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1 of access to, information (including communication contents, communications  
2 records, or other information relating to a customer or communication), facilities, or  
3 another form of assistance.

4 (2) CONTENTS.—The term “contents” has the meaning given that term in section  
5 101(n) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(n)).

6 (3) COVERED CIVIL ACTION.—The term “covered civil action” means a civil action  
7 filed in a Federal or State court that—

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

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

12 (4) ELECTRONIC COMMUNICATION SERVICE PROVIDER.—The term “electronic  
13 communication service provider” means—

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

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

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

20 (D) any other communication service provider who has access to wire or  
21 electronic communications either as such communications are transmitted or as  
22 such communications are stored;

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

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

27 (5) ELEMENT OF THE INTELLIGENCE COMMUNITY.—The term “element of the  
28 intelligence community” means an element of the intelligence community specified  
29 in or designated under section 3(4) of the National Security Act of 1947 (50 U.S.C.  
30 401a(4)).

31 **SEC. 202. LIMITATIONS ON CIVIL ACTIONS FOR**  
32 **ELECTRONIC COMMUNICATION SERVICE**  
33 **PROVIDERS.**

34 (a) Limitations.—

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

38 (A) the assistance alleged to have been provided by the electronic

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1 communication service provider was—

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

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

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

8 (ii) described in a written request or directive from the Attorney General  
9 or the head of an element of the intelligence community (or the deputy of  
10 such person) to the electronic communication service provider indicating  
11 that the activity was—

12 (I) authorized by the President; and

13 (II) determined to be lawful; or

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

16 (2) REVIEW.—A certification made pursuant to paragraph (1) shall be subject to  
17 review by a court for abuse of discretion.

18 (b) Review of Certifications.—If the Attorney General files a declaration under section  
19 1746 of title 28, United States Code, that disclosure of a certification made pursuant to  
20 subsection (a) would harm the national security of the United States, the court shall—

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

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

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

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

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

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

36 SEC. 203. PROCEDURES FOR IMPLEMENTING  
37 STATUTORY DEFENSES UNDER THE FOREIGN  
38 INTELLIGENCE SURVEILLANCE ACT OF 1978.

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

4 **“TITLE VIII—PROTECTION OF PERSONS ASSISTING**  
5 **THE GOVERNMENT**

6 **“SEC. 801. DEFINITIONS.**

7 “In this title:

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

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

14 “(3) CONTENTS.—The term ‘contents’ has the meaning given that term in section  
15 101(n).

16 “(4) ELECTRONIC COMMUNICATION SERVICE PROVIDER.—The term ‘electronic  
17 communication service provider’ means—

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

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

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

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

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

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

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

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

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

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

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

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

5           “(iii) a directive under section 102(a)(4), 105B(e), as in effect on the  
6 day before the date of the enactment of the FISA Amendments Act of  
7 2008 or 703(h).

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

## 12 “SEC. 802. PROCEDURES FOR IMPLEMENTING 13 STATUTORY DEFENSES.

### 14 “(a) Requirement for Certification.—

15           “(1) IN GENERAL.—Notwithstanding any other provision of law, no civil action  
16 may lie or be maintained in a Federal or State court against any person for providing  
17 assistance to an element of the intelligence community, and shall be promptly  
18 dismissed, if the Attorney General certifies to the court that—

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

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

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

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

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

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

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

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

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

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

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

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9 **SEC. 204. PREEMPTION OF STATE**  
10 **INVESTIGATIONS.**

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

14 **“SEC. 803. PREEMPTION.**

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

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

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

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

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

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

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

30 “(d) Application.—This section shall apply to any investigation, action, or proceeding  
31 that is pending on or filed after the date of enactment of the FISA Amendments Act of  
32 2008.”

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33 **SEC. 205. TECHNICAL AMENDMENTS.**

34 The table of contents in the first section of the Foreign Intelligence Surveillance Act of  
35 1978 (50 U.S.C. 1801 et seq.), as amended by section 101(b), is further amended by  
36 adding at the end the following:

37 **“TITLE VIII—PROTECTION OF PERSONS ASSISTING**

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1 THE GOVERNMENT

2 "Sec.801.Definitions.

3 "Sec.802.Procedures for implementing statutory defenses.

4 "Sec.803.Preemption."

5 TITLE III—OTHER PROVISIONS

6 SEC. 301. SEVERABILITY.

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

11 SEC. 302. EFFECTIVE DATE; REPEAL; TRANSITION  
12 PROCEDURES.

13 (a) In General.—Except as provided in subsection (c), the amendments made by this  
14 Act shall take effect on the date of the enactment of this Act.

15 (b) Repeal.—

16 (1) IN GENERAL.—Except as provided in subsection (c), sections 105A, 105B, and  
17 105C of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805a, 1805b,  
18 and 1805c) are repealed.

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

22 (c) Transitions Procedures.—

23 (1) PROTECTION FROM LIABILITY.—Notwithstanding subsection (b)(1), subsection  
24 (l) of section 105B of the Foreign Intelligence Surveillance Act of 1978 shall remain  
25 in effect with respect to any directives issued pursuant to such section 105B for  
26 information, facilities, or assistance provided during the period such directive was or  
27 is in effect.

28 (2) ORDERS IN EFFECT.—

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

31 (i) any order in effect on the date of enactment of this Act issued  
32 pursuant to the Foreign Intelligence Surveillance Act of 1978 or section  
33 6(b) of the Protect America Act of 2007 (Public Law 110-55; 121 Stat.  
34 556) shall remain in effect until the date of expiration of such order; and

35 (ii) at the request of the applicant, the court established under section  
36 103(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.  
37 1803(a)) shall reauthorize such order if the facts and circumstances

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1 continue to justify issuance of such order under the provisions of such Act,  
2 as in effect on the day before the date of the enactment of the Protect  
3 America Act of 2007, except as amended by sections 102, 103, 104, 105,  
4 106, 107, 108, and 109 of this Act.

5 (B) ORDERS IN EFFECT ON DECEMBER 31, 2013.—Any order issued under title  
6 VII of the Foreign Intelligence Surveillance Act of 1978, as amended by  
7 section 101 of this Act, in effect on December 31, 2013, shall continue in effect  
8 until the date of the expiration of such order. Any such order shall be governed  
9 by the applicable provisions of the Foreign Intelligence Surveillance Act of  
10 1978, as so amended.

11 (3) AUTHORIZATIONS AND DIRECTIVES IN EFFECT.—

12 (A) AUTHORIZATIONS AND DIRECTIVES IN EFFECT ON DATE OF ENACTMENT.—  
13 Notwithstanding any other provision of this Act or of the Foreign Intelligence  
14 Surveillance Act of 1978, any authorization or directive in effect on the date of  
15 the enactment of this Act issued pursuant to the Protect America Act of 2007,  
16 or any amendment made by that Act, shall remain in effect until the date of  
17 expiration of such authorization or directive. Any such authorization or  
18 directive shall be governed by the applicable provisions of the Protect America  
19 Act of 2007 (121 Stat. 552), and the amendment made by that Act, and, except  
20 as provided in paragraph (4) of this subsection, any acquisition pursuant to such  
21 authorization or directive shall be deemed not to constitute electronic  
22 surveillance (as that term is defined in section 101(f) of the Foreign Intelligence  
23 Surveillance Act of 1978 (50 U.S.C. 1801(f)), as construed in accordance with  
24 section 105A of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.  
25 1805a)).

26 (B) AUTHORIZATIONS AND DIRECTIVES IN EFFECT ON DECEMBER 31, 2013.—  
27 Any authorization or directive issued under title VII of the Foreign Intelligence  
28 Surveillance Act of 1978, as amended by section 101 of this Act, in effect on  
29 December 31, 2013, shall continue in effect until the date of the expiration of  
30 such authorization or directive. Any such authorization or directive shall be  
31 governed by the applicable provisions of the Foreign Intelligence Surveillance  
32 Act of 1978, as so amended, and, except as provided in section 707 of the  
33 Foreign Intelligence Surveillance Act of 1978, as so amended, any acquisition  
34 pursuant to such authorization or directive shall be deemed not to constitute  
35 electronic surveillance (as that term is defined in section 101(f) of the Foreign  
36 Intelligence Surveillance Act of 1978, to the extent that such section 101(f) is  
37 limited by section 701 of the Foreign Intelligence Surveillance Act of 1978, as  
38 so amended).

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

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1 (5) NEW ORDERS.—Notwithstanding any other provision of this Act or of the  
2 Foreign Intelligence Surveillance Act of 1978—

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

7 (B) the court established under section 103(a) of the Foreign Intelligence  
8 Surveillance Act of 1978 shall enter an order granting such an application if the  
9 application meets the requirements of such Act, as in effect on the day before  
10 the date of the enactment of the Protect America Act of 2007, except as  
11 amended by sections 102, 103, 104, 105, 106, 107, 108, and 109 of this Act.

12 (6) EXTANT AUTHORIZATIONS.—At the request of the applicant, the court  
13 established under section 103(a) of the Foreign Intelligence Surveillance Act of  
14 1978 shall extinguish any extant authorization to conduct electronic surveillance or  
15 physical search entered pursuant to such Act.

16 (7) APPLICABLE PROVISIONS.—Any surveillance conducted pursuant to an order  
17 entered pursuant to this subsection shall be subject to the provisions of the Foreign  
18 Intelligence Surveillance Act of 1978, as in effect on the day before the date of the  
19 enactment of the Protect America Act of 2007, except as amended by sections 102,  
20 103, 104, 105, 106, 107, 108, and 109 of this Act.

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

28 (A) the date that authorization expires; or

29 (B) the date that is 90 days after the date of the enactment of this Act.

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**Farris, Bette**

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**Subject:** Updated: Congressional Calls  
**Start:** Wed 1/23/2008 12:00 PM  
**End:** Wed 1/23/2008 2:00 PM  
**Recurrence:** (none)  
**Meeting Status:** Accepted  
**Required Attendees:** Gerry, Brett ; Benczkowski, Brian A (OLA); Demers, John; Eisenberg, John

AG's Office  
AO: Brett Gerry . DOJ: Brian Benczkowski, John Demers, John Eisenberg  
AG will call:  
12:00n Sen. Susan Collins POC: Holly [redacted]  
12:15p Sen. Jim Webb POC: Lisa [redacted] (Sen. Webb will call)  
12:30p Sen. Dan Inouye POC: Jessica [redacted] (Tentative)  
2:00p Sen. Bill Nelson POC: Sara [redacted]  
2:15p Sen. Amy Klobuchar POC: Bonnie (Sen. Klobuchar will call)

b6

**Berhanu, Tsedey**

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**From:** Starzak, Alissa (Intelligence) [redacted] @ssci.senate.gov] b6  
**Sent:** Thursday, January 24, 2008 4:09 PM  
**To:** Demers, John; [redacted] Ben Powell; Potenza, Vito; [redacted] Lynch, William P.;  
Eisenberg, John; [redacted]  
**Cc:** Healey, C (Intelligence); Davidson, M (Intelligence)  
**Subject:** FISA

b3  
b6

Another question for you. Senator Kennedy is planning on proposing an amendment (a small piece of the amendment that was offered in December) that adds the following to the 703(b) limitation in the bill:

“(5) shall not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.”

Do you see any operational concerns with this limitation?



(b)(3)

Farris, Bette

From: Bradbury, Steve  
Sent: Monday, January 28, 2008 5:13 PM  
To:  
Subject: Re: Testimony

(b)(3)

Thx. You're correct. She's overreading.

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

From: Bradbury, Steve  
To: Bradbury, Steve  
Sent: Mon Jan 28 17:05:14 2008  
Subject: Testimony

(b)(3)

She sent me the excerpts. Tho certainly could have been more clearly drafted, I told her she was over-reading. The impasse in the senate is causing her to reach.

~~XXXXXXXXXX~~

**Berhanu, Tsedey**

**From:** Davidson, M (Intelligence) [mailto: ] @ssci.senate.gov] b6  
**Sent:** Thursday, January 31, 2008 4:02 PM  
**To:** Demers, John  
**Cc:** Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Eisenberg, John  
**Subject:** RE: Challenges/Enforcement -- Directives b6

John,

Are there circumstances in which the Government may wish to have more time (to negotiate, await a ruling in another case, etc.), or even to effectuate a mutual accommodation with the carrier? Should we add, "or at the request of the Government" to prevent rigidity in a circumstance in which that is not in the Government's interest?

Mike

**From:** Demers, John [mailto: ] @usdoj.gov  
**Sent:** Thursday, January 31, 2008 2:30 PM  
**To:** Davidson, M (Intelligence)  
**Cc:** Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Eisenberg, John  
**Subject:** RE: Challenges/Enforcement -- Directives b6

Mike,

Thanks. It would be a real help to have this provision in there. I do think that 30 days would be more than enough time to see a challenge through. The pressure is on us after all to get the briefing done. As for the escape hatch language, Congress has placed such limitations on courts in the past (like AEDPA), and courts assume that they can extend the time if Due Process requires. So why not track that concept directly rather than using the more ambiguous "informed and fair decision"? So it would say something like, "unless the judge, by order for the reasons stated, extends that time as necessary to comport with the Due Process Clause of the Fifth Amendment to the Constitution."

Thanks,  
John

**From:** Davidson, M (Intelligence) [mailto: ] @ssci.senate.gov] b6  
**Sent:** Thursday, January 31, 2008 12:37 PM  
**To:** Demers, John  
**Cc:** Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Eisenberg, John  
**Subject:** FW: Challenges/Enforcement -- Directives b6

John:

We've been working with Jack and Kathleen to try to resolve various amendments.

One of those is an amendment that Senator Bond filed last Friday, Senate Amendment (SA) 3941, on expedited review of challenges to directives. It would take the PAA provision on the disposition of frivolous challenges,

and the further time limit on the consideration of challenges on the merits, and insert it into the paragraph in the pending bill on challenges.

In our conversations here, one thing we have discussed, apart from anything on frivolous challenges (and a word in a moment about the use of the term frivolous), that there is no reason to have a disparity between the challenge paragraph and the enforcement paragraph on time rules for the plenary consideration of petitions. (Of course, there is no reason to have a provision on frivolous government enforcement petitions, which would never happen, right?)

Jack and Kathleen are now looking at the attached draft which I've prepared with Alissa. The thinking behind the draft is described in my e-mail below to Jack and Kathleen. Even while it is being reviewed here, we'd like to ask for your thoughts.

One question that we've received from other colleagues has been about the use of the word frivolous, such as what does it really mean. That leads to a thought, not included in the attached but one that we'd like to consider, to import all or part of the Rule 11 standard, one that the district judges who comprise the FISC have experience in applying, as follows:

“(D) PROCEDURES FOR INITIAL REVIEW. – The judge shall conduct an initial review within 5 days after being assigned the petition. If the judge determines that the petition consists of claims, defenses, or other legal contentions that are not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, the judge shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition and order the recipient to comply with the directive or any part of it. Upon making the determination or promptly thereafter, the judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

“(E) PROCEDURES FOR PLENARY REVIEW. – If the judge determines that the petition does not meet the standard in paragraph (D) and instead warrants plenary review, the judge shall affirm, modify, or set aside the directive within 45 days of being assigned the petition, unless the judge, by order for reasons stated, extends that time if necessary to render an informed and fair decision. Unless the judge sets aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the records of the reasons for a determination under this paragraph.

So, please take a look at the attached, as well as the alternative paragraphs above, and let us know. This is something that we're trying to resolve in the next couple of hours. Much appreciated as always.

Mike

---

**From:** Davidson, M (Intelligence)  
**Sent:** Thursday, January 31, 2008 10:49 AM  
**To:** Livingston, J (Intelligence); Rice, K (Intelligence)  
**Cc:** Healey, C (Intelligence); Starzak, Alissa (Intelligence)  
**Subject:** Challenges/Enforcement -- Directives

Jack and Kathleen,

Here is proposed language. In addition to timing matters, there are a couple of small changes to make consistent the provisions governing challenges and enforcement. For example, in the challenge paragraph there had been specific reference to the modification of directives, but not in the enforcement paragraph. It should be in both. In the enforcement paragraph, there is specific reference to reviewing for compliance with paragraph (1) as well as section 703 as a whole; that's not in the challenge paragraph. The specific reference to paragraph (1) is superfluous because it is subsumed in the general requirement of meeting the requirements of the section.

On the main matter --

I took home last night the FISC rules, marked draft but nonetheless public, released in October, on the rules for PAA directive challenge cases.

The FISC obviously was troubled by the rigidity of the PAA provision requiring a decision at a fixed time. Its draft rules have an escape: "The 72 hour period may be extended if necessary to provide due process of law or otherwise comport with the Constitution of the United States."

In other words, Congress should not be instructing an Article III Court to act so quickly that it can't provide due process. Rather than bringing the Constitution into this, the proposal below simply provides that that the judge may provide for additional time for the plenary decision (not the is-it-frivolous one) if by order, with reasons stated, the judge determines that additional time is needed for an informed and fair decision.

In drafting this, I also think we need to be practical about the time needed to receive briefs, hold a hearing, and render a decision on the plenary issue, which could involve both significant statutory and constitutional issues. The proposal below is for 45 days.

Let's discuss.

Mike

#### (4) CHALLENGING OF DIRECTIVES

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

(D) PROCEDURES FOR INITIAL REVIEW. -- The judge shall conduct an initial review within 5 days after being assigned the petition. If the judge determines that the petition is frivolous, the judge shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition and order the recipient to comply with the directive or any part of it. Upon making the determination or promptly thereafter, the judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

(E) PROCEDURES FOR PLENARY REVIEW. -- If the judge determines that the petition is not frivolous, the judge shall affirm, modify, or set aside the directive within 45 days of being assigned the petition, unless the judge, by order for reasons stated, extends that time if necessary to render an informed and fair decision. Unless the judge sets aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the records of the reasons for a

determination under this paragraph.

(5) ENFORCEMENT OF DIRECTIVES

(C) STANDARDS FOR REVIEW. – A judge considering a petition shall issue an order requiring the electronic communication service provider to comply with the directive or any part of it, as issued or as modified, if the judge finds that the directive meets the requirements of this section, and is otherwise lawful.

(D) PROCEDURES FOR REVIEW. – The judge shall render a determination within 45 days of being assigned the petition, unless the judge, by order for reasons stated, extends that time if necessary to render an informed and fair decision. The judge shall provide a written statement for the record of the reasons for a determination under this paragraph.