STUART F. DELERY
Acting Assistant Attorney General
JOSEPH H. HUNT
Director, Federal Programs Branch
VINCENT M. GARVEY
Deputy Branch Director
ANTHONY J. COPPOLINO
Special Litigation Counsel
tony.coppolino@usdoj.gov
MARCIA BERMAN
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Rm. 6102
Washington, D.C. 20001
Phone: (202) 514-4782
Fax: (202) 616-8460
Attorneys for the Government Defendants
Sued in their Official Capacity

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CAROLYN JEWEL, *et al.*, Plaintiffs, v. NATIONAL SECURITY AGENCY, *et al.* Defendants.	Case No. 3:08-cv-04373-JSW **GOVERNMENT DEFENDANTS' REPLY IN SUPPORT OF SECOND MOTION TO DISMISS AND FOR SUMMARY JUDGMENT** Date: December 14, 2012 Time: 9:00 a.m. Courtroom: 11 - 19th Floor Judge Jeffrey S. White

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INTRODUCTION

This lawsuit puts at issue alleged intelligence activities of the National Security Agency ("NSA") purportedly undertaken pursuant to presidential authorization since the terrorist attacks of September 11, 2001. Plaintiffs allege that the NSA engages in warrantless "dragnet" surveillance by collecting the content of millions of domestic communications, as well as communication transactional records.

For the past six years, the nation's most senior intelligence officials, in succeeding Administrations, have consistently advised this Court that litigation of plaintiffs' allegations would risk exceptional damage to national security, setting forth in detail the matters at issue. Renewed invocation of the state secrets privilege in this action by the Director of National Intelligence has undergone rigorous review within the Executive Branch under a process providing that privilege will only be asserted where necessary to protect against significant harm to national security. Contrary to plaintiffs' suggestion, in these circumstances dismissal would not constitute an abdication of judicial authority, but the exercise of judicial scrutiny of the privileged information at issue and the application of established law to protect compelling national security interests.

Plaintiffs' Opposition ("Opp.") to the Government's motion to dismiss and for summary judgment ("Gov. Br.") is built on a series of meritless propositions. First, plaintiffs wrongly assert that procedures set forth in subsection 1806(f) of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §1806(f), displace the privilege. Contrary to their argument, the procedures in that subsection apply only where electronic surveillance subject to the FISA is being used against someone already established as aggrieved. Second, plaintiffs argue, wholly in error, that Ninth Circuit precedent concerning the privilege has been effectively overruled by the Supreme Court and that, as a result, this Court may only consider a privilege assertion in response to specific discovery requests. Supreme Court and Ninth Circuit precedent are fully consistent and require dismissal of plaintiffs' claims. Finally, citing hearsay and speculation in media reports, plaintiffs wrongly contend that their case may proceed based on "non-privileged" evidence.

Plaintiffs' Opposition does not present a way forward, but a roadmap to why further proceedings would risk the disclosure of highly sensitive NSA sources and methods.

ARGUMENT

I. FISA DOES NOT DISPLACE THE STATE SECRETS PRIVILEGE IN THIS CASE.

From the outset of this litigation, plaintiffs have attempted to prevent application of the state secrets privilege to dismiss this case by arguing that the privilege has been displaced by § 1806(f) of the FISA, 50 U.S.C. § 1806(f). Neither the statutory text, nor judicial authority, nor legislative history supports plaintiffs' contention. *See* Gov. Br. (Dkt. 102) at 28-45.

A. Subsection 1806(f) Does Not Speak Directly to Displacing the Privilege Here.

Plaintiffs concede that the standard for assessing their displacement theory is whether the statutory provision speaks directly to the particular common law at issue, Opp. at 8, but they misapprehend that standard. The issue is not whether § 1806(f) "speaks directly to the question of the admission of national security evidence." *Id.* The fact that § 1806(f) serves a similar purpose of protecting national security information in its realm does not mean it overrides application of the state secrets privilege in the circumstances presented here. The proper inquiry is whether the statute speaks directly to foreclosing an assertion of the privilege to protect against disclosure in litigation of whether alleged electronic surveillance has occurred. The Government does not contend that the statute must incant the words "state secrets privilege" or "proscribe" use of the privilege in order for displacement to be found, as plaintiffs contend. *Id.* at 10. But Congress' purpose to foreclose the Government from asserting privilege in the circumstances presented here must be evident from the terms of the statute.

Plaintiffs' contention that the "plain language" of § 1806(f) "applies to Plaintiffs' claims," Opp. at 2, is meritless. Plaintiffs' textual analysis (and that of Amici, People for the American Way, *see* Dkt. 118) rests on extracting one clause concerning discovery motions from one subsection of a statutory provision governing the use of evidence (*see* 50 U.S.C. § 1806). *See* Opp. at 3 (utilizing indents, line breaks, bracketed numbers and italics). The "rule against surplusage" cited by plaintiffs, *id.* at 5, does not mean that "every clause and word of a statute"

may be read out of context. Viewed within its statutory framework, the "motion to discover clause" in § 1806(f) reasonably applies to proceedings where evidence derived from FISA electronic surveillance is being used against someone already established as aggrieved—not to permit discovery into whether alleged surveillance has occurred. Gov. Br. at 36-40.

Likewise, the phrase "notwithstanding any other law" in § 1806(f) does not speak directly to supplanting the privilege. Opp. at 4. A "notwithstanding" clause works in tandem with the substantive reach of the section it modifies. It does not dispense with all other law, but signals that the section overrides prior law that governs the same substantive matter. *See United States v. Novak*, 476 F.3d 1041, 1046-47 (9th Cir. 2007) (en banc) ("In examining statutes, we have not . . . always accorded universal effect to the 'notwithstanding' language, standing alone. Instead, we have determined the reach of each such 'notwithstanding' clause by taking into account the whole of the statutory context in which it appears.").[1] Thus, the presence of this clause serves only to focus on the question of whether § 1806(f) speaks directly to supplanting the privilege.[2]

Plaintiffs further contend that displacement of the privilege "makes sense given FISA's statutory scheme as a whole." Opp. at 4. That is nowhere apparent. Notably, plaintiffs do not explain how § 1806(f) operates to limit the Executive Branch's ability to protect national security information where the cause of action in the FISA for challenging alleged unlawful electronic surveillance —50 U.S.C. §§ 1809, 1810—does not apply to the United States.[3] Plaintiffs' reference to the interplay between § 1806(f) and other causes of action against the United States authorized under 18 U.S.C. § 2712(a) is unavailing. Opp. at 5. Plaintiffs point to

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[1] *See also Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996) (We have repeatedly held that the phrase 'notwithstanding any other law' is not always construed literally."); *Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers*, 619 F.3d 1289, 1299 (11th Cir. 2010).

[2] The "notwithstanding" language in § 1806(f) was intended to prevent its procedures from being bypassed by an "inventive litigant" seeking to bring a motion for discovery under some other rule or statutory provision. *See* S. Rep. 95-701 at 63, 1978 U.S.C.C.A.N. 4032.

[3] *See Al-Haramain Islamic Found. v. Obama*, 690 F.3d 1089, 1094-99 (9th Cir. 2012).

§ 2712(b)(4), which provides that, notwithstanding any other provision of law, the procedures set forth in FISA §§ 1806(f), 1825(f), and 1845(f) "shall be the exclusive means by which materials governed by those sections may be reviewed." 18 U.S.C. § 2712(b)(4). Opp. at 5. But subsection (b)(4) does not mention the Wiretap Act or SCA; rather, it links three FISA procedures for the review of materials to three corresponding FISA causes of action authorized by § 2712(a) (under 50 U.S.C. § 1806(a), 1825(a), 1845(a)). Accordingly, this provision does not speak directly to whether § 1806(f) displaces the privilege to "adjudicate" non-FISA claims authorized by § 2712(a).[4]

B. Legislative History Does Not Support Displacement of the Privilege.

Plaintiffs discount legislative history that describes how § 1806(f) applies to the use of surveillance evidence against a person already acknowledged to be aggrieved, and to motions to discover whether evidence being used is tainted, and which also recognizes the Government's choice to protect intelligence sources and methods by foregoing use of surveillance evidence. Gov. Br. at 41. Plaintiffs dismiss this history as "exemplary, not exclusive" and argue it pertains solely to the "use" aspects of the provision. Opp.at 13. But it is implausible that committee reports would discuss certain aspects of the provision at length, but disregard entirely a highly significant aspect of the legislation to foreclose other means for the Executive Branch to protect national security information. The failure of the legislative history to do so weighs against finding that the provision operates in that manner.

Plaintiffs and Amici also seek to support their displacement theory by arguing that the final version § 1806(f) incorporated House-passed procedures that purportedly applied solely to

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[4] Plaintiffs and Amici spend little time discussing judicial authority because none supports their theory. Plaintiffs dismiss persuasive contrary authority of the FISA Court of Review in *In re Sealed Case*, 310 F.3d 717 (For Intel. Surv. Rev. 2002). *Cf. United States v. El-Mezain*, 664 F.3d 467, 569 (5th Cir. 2011) (referring to the *In re Sealed* case opinion as an "exhaustive analysis"). Plaintiffs also cite *ACLU v. Barr*, 952 F.2d 457 (D.C. Cir. 1991), for the proposition that § 1806(f) applies in civil litigation, Opp. at 6, where that court rejected the use of this provision to discover whether surveillance had occurred, and noted that a civil injunction action is not a motion to "discover or obtain" surveillance materials. *See id*. at 468-69.

"civil" proceedings. This theory is inaccurate and irrelevant. The actual text of the House legislation did not distinguish between criminal and civil cases.[5] And, in any event, the Government does not contend that § 1806(f) applies only in criminal settings—indeed, we cited an example of where § 1806(f) was applied to the use of surveillance evidence in a deportation proceeding. *See United States v. Hamide*, 914 F.2d 1147 (9th Cir. 1990). But the fact that §1806(f) may apply in civil litigation does not support plaintiffs' broad inference that it serves to displace the state secrets privilege because it also arises in civil proceedings. Nothing in the House committee report suggests otherwise.[6]

Plaintiffs and Amici also ascribe great significance to the fact that the final version of § 1806(f) expanded the "motions to discover" clause in the Senate version (which authorized motions to "discover, obtain, or suppress evidence obtained or derived from electronic surveillance") to include language from the House provision that permitted motions "to discover or obtain applications or orders or other materials relating to electronic surveillance." Opp. at 11-12. But these few added words cannot be said to speak directly to displacing the Government's ability to assert a long-standing, well known privilege to protect national security information. Indeed, the final conference report indicates that the Senate version was adopted

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[5] The text of the House legislation established separate procedures depending on whether the Government intended to use evidence against someone. *See* H.R. 7308 § 106(f) and (g) as reprinted in H.R. Rep. No. 95-1283, Pt. 1, 95th Cong., 2d Sess., at 9-10 (submitted herewith). The reason for the separate procedures was to grant more extensive review where the Government intended to use the evidence, but the House report does not distinguish these provisions based on civil or criminal proceedings. *See* H.R. Rep. No. 95-1283, Pt. 1, at 91-94.

[6] The House report also indicates that subsection (g) would have applied where the use of surveillance evidence was at issue. *See* H.R. Rep. No. 95-1283 at 90-91 (indicating subsection (g) would apply to motions to "suppress" information, and that a court may order disclosure under this provision "to the person against whom the evidence is to be introduced."). The House report also indicates that, where the need to determine legality of surveillance may arise "incident to discovery in a civil trial," the court should grant the discovery motion only in accordance with the requirements of law" which, the report says, would include law "respecting civil discovery." *See id.* at 93 (citing FOIA and "other defenses against disclosure"). This suggests that the disclosure of information in civil proceedings would be governed by evidentiary privileges such as the state secrets privilege.

with only technical changes. *See* 1978 U.S.C.C.A.N 4061.

There is, in short, no basis on which to find that the privilege is displaced here. The Government has shown that proceeding under § 1806(f) would inherently risk disclosure of properly privileged information, *see* Gov. Br. at 45-47, and the Court should reject plaintiffs' invitation to do so.

II. THE STATE SECRETS PRIVILEGE REQUIRES DISMISSAL OF THIS CASE.

Plaintiffs also present a series of erroneous contentions that the state secrets privilege does not require dismissal at this stage. To begin with, plaintiffs' reading of *General Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011), as *sub silentio* overruling decades of state secrets privilege jurisprudence in the circuit courts, is specious. Opp. at 14-16. *General Dynamics* was a government-contracting dispute arising out of a fixed-price contract awarded by the Navy to defense contractors to build the A-12 Avenger stealth aircraft. Following cost overruns and delays, the Navy terminated the contract for default and sought the return of progress payments, and the contractors claimed as a defense that the Government failed to share its "superior knowledge" about stealth aircraft. During the litigation, the Navy asserted the state secrets privilege to bar discovery into certain aspects of stealth technology. The Supreme Court held that where liability depends on the validity of the superior knowledge defense, and where the state secrets privilege bars full litigation of that defense, the proper remedy was to leave the parties where they were before the lawsuit. 131 S. Ct. at 1907. The Court based its holding on dismissals of cases involving government espionage contract disputes—*Totten v. United States*, 92 U.S. 105 (1875), and *Tenet v. Doe*, 544 U.S. 1 (2005)—and the unfairness of allowing the Government's claim to proceed but not the contractors' defense. 131 S. Ct. at 1906-07.

The holding in *General Dynamics* is limited to the consequences of the use of the state secrets privilege "only where it precludes a valid defense in Government-contracting disputes . . . ." *Id*. at 1910. The Court did not opine on the consequences of the privilege in non-contracting disputes, and certainly did not "ma[k]e clear" that those cases were "error." Opp. at 15. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), and other Ninth

Circuit cases are fully consistent with *General Dynamics*' recognition of the need to bar litigation, rather than require or risk the disclosure of privileged information.[7]

A. This Case Cannot Proceed Based on Purportedly Non-Privileged Information.

Plaintiffs also assert that sufficient non-privileged information exists on which their claims may proceed to the discovery stage, citing an array of media reports, book excerpts and limited statements by Government officials. *See* Pls. "Summary of Evidence" (SOE).[8] But this proposition is entirely unfounded. While "'whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter,'" *Jeppensen* 614 F.3d at 1082, such a course is not appropriate where "as a practical matter, secret and nonsecret information cannot be separated" and "evidence or areas of questioning which press so closely upon highly sensitive material . . . create a high risk of inadvertent or indirect disclosures.'" *Id.* This is just such a case. Everything plaintiffs claim to be "non-privileged" *concerns* the subject areas of the privilege assertion—whether the NSA engaged in alleged activities that applied to the plaintiffs. The speculation and hearsay plaintiffs cite is little more than allegations that would be subject to exacting adversarial proceedings in order to adduce actual proof as to what may be true, partly true, or entirely false. And it is this very process that will inherently risk or require the disclosure of highly sensitive intelligence sources and methods. *See Jeppesen*, 614 F.3d at 1088-89 (discussing plaintiffs' incentive to probe into state secrets).[9]

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[7] *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (district court cannot find circuit panel decision is implicitly overruled under less higher court decision undercuts its theory and reasoning in such a way that the cases are clearly irreconcilable).

[8] *See* Government Defendants' Objections to Summary of Evidence and Judicial Notice.

[9] The authority on which plaintiffs' rely (Opp. at 18) is inapposite. In *Halkin v. Helms,* 598 F.2d 1 (D.C. Cir. 1978), plaintiffs were not granted discovery; indeed they objected where only three interrogatories written by the district court were allowed. *Id*. at 5-7. The D.C. Circuit ordered dismissal where the privilege foreclosed proof of standing despite extensive publicly available information about NSA activities. *See* 598 F.2d at 11. Likewise, in *Kasza v. Browner*,133 F.3d 1159 (9th Cir. 1998), the privilege was upheld after a single interrogatory was propounded, *see Frost v. Perry*, 161 F.R.D. 434 (D. Nevada 1995), and, before any further discovery, the district court denied motions to compel and dismissed the case. *Frost v. Perry*,

Moreover, nothing in plaintiffs' non-privileged "evidence" undercuts the Government's privilege assertion and justifies further discovery proceedings. The large majority of plaintiffs' exhibits are media reports and book excerpts, often citing anonymous sources. Aside from being double hearsay, this material does not constitute disclosures by the Executive Branch and, thus, cannot serve to undercut the Government's ability to protect national security information.[10] None of the cited statements purportedly made by Executive Branch officials disclose classified activities or information subject to the Government's privilege assertion, but at most constitute limited public statements, typically in connection with oversight investigations. For example, plaintiffs cite at length a 2010 Inspector General Report on the President's Surveillance Program (also cited in the DNI's state secrets privilege assertion). *See* SOE at 2-4; 30, 32-38 & Pls. Exh. 33; Public DNI Decl. ¶ 24, n.2. But, notably, this report indicates that, other than the existence of the publicly acknowledged "Terrorist Surveillance Program," certain other intelligence activities authorized by the President in the same order after the 9/11 attacks remain highly classified. *See* Pls. Exh. 33 at 5-6, 30-31. Thus, information on which plaintiffs seeks to rely itself demonstrates that intelligence activities remain properly classified.

In addition, nothing in the plaintiffs' submission, including the Klein and Marcus

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919 F. Supp. 1459 (D. Nevada 1996). In *Clift v. United States*, 808 F. Supp. 101 (D. Conn. 1991), the district court barred discovery on remand, rejected plaintiffs' prima face case based on limited public information, and dismissed the case based on the state secrets privilege. Other cases cited by plaintiffs are also inapposite. *See Crater Corporation v. Lucent Technologies*, 255 F.3d 1361 (Fed. Cir. 2001) and *DTM Research L.L.C. v. AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001) (in suit between private parties, state secrets privilege was upheld, and particular claims at issue proceeded on matters not involving government actions or privileged information); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001) (discovery barred on issues of privilege and as to government witnesses).

[10] *See Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 915 (N.D. Ill. 2006) (declining to rely on media reports concerning alleged NSA activities, noting that a "disclosure must be both official and public for the fact at issue to be considered a matter of public knowledge for FOIA purposes."); *Hepting v. AT&T*, 439 F. Supp. 2d 974, 990-91 (N.D. Cal. 2006) (declining to rely on media reports, noting that simply because statements have been publicly made "does not mean that the truth of those statements is a matter of public knowledge and that verification of the statement is harmless."). *See also Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990).

Declarations, establishes that plaintiffs have suffered a *personal* injury through the collection of their communications, but merely set forth speculation that certain communications transiting AT&T facilities were collected by the Government. Likewise, nothing in plaintiffs' submission establishes that the NSA has collected the content of millions of domestic communications or communication records, including that of plaintiffs. In particular, plaintiffs' assertion that statements by Executive Branch officials[11] or Members of Congress[12] purport to disclose the alleged records collection activity is simply wrong. Also incorrect is the assertion that the Government has disclosed whether particular telecommunications carriers have assisted the NSA in any alleged activity. For example, certain statements cited by plaintiffs were made in connection with urging Congress to *protect* that information through the enactment of the FISA Act Amendments of 2008, which barred a cause of action against specific telecommunication

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[11] Plaintiffs cite several statements by former Executive branch officials out of context, in particular omitting stated reservations that seek to protect classified information. For example, plaintiffs assert that then "Homeland Security Secretary Michael Chertoff confirmed that the government has employed 'data-mining,'" *see* SOE at 24, but the report cited actually states that Mr. Chertoff refused to discuss how a highly classified program works. Pls. Ex. 69 at 1753. Likewise a statement by then-DNI McConnell that communications records provide a "process for how you would find something you might be looking for. . . [t]hink of it as a roadmap" does not disclose classified activities. *See* Pls. Ex. 98 at 3209. Another statement by Mr. McConnell concerning the collection of information in a database likewise did not disclose classified activities. *See* SOE at 16, Ex. 98 at 3198 and SOE at 14, Ex. 98 at 3220. A statement by former Attorney General Gonzales that information is collected, retained and disseminated, concerned minimization procedures and disclosed no classified activity. *See id*. citing Ex. 104 at 3722. Another statement of Mr. Gonzales cited by plaintiffs concerning alleged business records collection, *see* SOE at 21, Ex. 82 at 2745, omits the very first sentence in which Attorney General states that "[t]here has been no confirmation about any details relating to" a *USA Today* story concerning the alleged activity.

[12] *See* Pls. Ex. 83 at 2749-50; Pls. Ex. 87 at 2800 (Senator Pat Roberts and Bill Frist clarify they are not commenting on classified program); Pls. Ex. 90 at 2843 (Rep. Jane Harman makes general reference to program concerning "*some* phone records" but declines to comment further on classified matters). In any event, statements by Members of Congress cannot abrogate the Executive Branch's decision to protect national security information. *Terkel*, 441 F. Supp. 2d at 914 (declining to find that congressional statements undermine the state secrets privilege); *see also Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) (discussions by Congress of NSA's methods generally "cannot be equated with disclosure by the agency itself of its methods of information gathering.").

providers brought by these plaintiffs in the *Hepting* action. *See* SOE at 25 and Pls. Ex. 28, 98 (discussing need to protect identities of private entities who assist the intelligence community).[13] Finally, plaintiffs do not establishes whether any alleged activity, if it existed, is ongoing.[14]

In short, plaintiffs' submission does not establish a prima facie case based on non-privileged information; they still must ascertain actual facts to establish their prima facie case and sustain their ultimate burden of proof. The declaration plaintiffs submit pursuant to Fed. R. Civ. P. 56(d) acknowledges as much by describing the discovery they would seek to prove their claims. This declaration is a roadmap as to why further proceedings would risk or require the disclosure of state secrets.[15] Indeed, the very goal of this discovery is to obtain "evidence regarding the nature and scope of the Government's surveillance program." Cohn Decl. ¶ 20.[16]

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[13] Speculation by the district court about alleged carrier assistance in the *Hepting* case (Opp. at 26) and was superceded by Congressional action barring that litigation and foreclosing the disclosure of such information. *See* Gov. Br. at 23. *Hepting* serves as an example of how courts should not proceed when faced with a state secrets privilege assertion.

[14] For this proposition, plaintiffs cite statements concerning the transition of the Terrorist Surveillance Program—which they do not challenge— to FISA authority in January 2007, as well as media reports concerning the FISA Amendments of 2008—also not challenged here. *See* SOE at 42-43; *see also id.* at 40. The 2010 Inspector General report also indicates that certain classified activities authorized by the President after 9/11 in the same order have been transitioned to authority of the FISA, again not challenged here. *See* Pls. Ex. 33 at 30-31.

[15] This includes depositions of current and former intelligence officials; discovery from the named sources in the published reports in plaintiffs' summary of evidence regarding those sources' personal knowledge of published or unpublished information or their discussions with or knowledge of other sources of information; attempts to obtain discovery from unnamed sources, quoted in news reports; discovery of whether their telecommunications carriers facilitated the interception and disclosure of the communications and communications records of the plaintiffs, including depositions and onsite inspections of an AT&T's facility in San Francisco and other AT&T facilities. *See* Declaration of Cindy A. Cohn (Dkt. 114) ¶¶ 7-19.

[16] Plaintiffs acknowledge that classified information is at risk of disclosure in discovery by suggesting that they be granted security clearances. Cohn Decl. ¶ 5. But that course is also plainly contrary to the state secrets doctrine. *See Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005); *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (rejecting clearance of private counsel in state secrets privilege cases). While plaintiffs cite the *Al-Haramain* litigation as precedent for this option, *see* Cohn Decl. ¶ 5 & n.1, the Government declined to grant any access to classified information in that case, as it would

As the foregoing should indicate, all of the circumstances supporting dismissal under the state secrets doctrine apply. This case may be dismissed on the ground that its very subject matter constitutes a state secret, *Jeppesen*, 614 F.3d at 1077-79, because this lawsuit is about whether NSA engaged in certain classified activities and applied them to the plaintiffs' communications. Similarly, dismissal is appropriate because properly privileged information concerning NSA operations is directly at risk of disclosure and cannot be extricated from purportedly non-privileged information. *Id.* at 1087-89. In addition, plaintiffs cannot establish their standing as a factual matter at the summary judgment stage without actually proving that the alleged NSA activities occurred with the assistance of particular telecommunications providers and that they were personally subject to them. *See Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1204-05 (9th Cir. 2007) (state secrets privilege forecloses proof of standing absent FISA displacement). Likewise, as shown above, plaintiffs' assertion that they can establish a prima facie case without risking or requiring the disclosure of privileged information cannot be credited. Lastly, any attempt to present a valid defense (including by the individual capacity defendants) would risk the disclosure of state secrets. *Jeppesen*, 614 F.3d at 1083.

Plaintiffs' effort to foreclose dismissal on these grounds is meritless. Contrary to their contention that the Government has not demonstrated why further proceedings would create an unjustifiable risk of disclosure, Opp. at 30, the Government has submitted detailed classified declarations that explain precisely the risks at stake. Also contrary to plaintiffs' contention, the Government is not required to prove that defendants would prevail on their defense in order for the case to be dismissed. Opp. at 28-29.[17] Here, the risk of proceeding alone warrants dismissal,

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here, and any order compelling such access would be subject to interlocutory appeal. *See In re Copley Press*, 518 F.3d 1022 (9th Cir. 2008); 50 U.S.C. § 1806(h).

[17] Plaintiffs cite a D.C. Circuit case for the proposition that the Court would have to decide that any privileged information proves a meritorious dispositive defense before a claim may be dismissed on the ground that privileged information was needed for a valid defense. Opp. at 28-29 (citing *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007)). The Ninth Circuit has not adopted that analysis. *See Jeppesen*, 614 F.3d at 1083 (citing *In re Sealed Case* only for

along with plaintiffs' inability to establish standing or prove their claims.

The Government has also explained, however, why valid defenses could not be presented without privileged information. For example, to demonstrate that plaintiffs' alleged content dragnet did not occur under the TSP or otherwise, NSA would have to show what it has or has not done. Gov. Br. at 22. Similarly, any defense against the claim that NSA has collected communication records from particular telecommunications carriers would require disclosure of whether or not this allegation is true and whether it applied to plaintiffs. *Id*. Also, assuming plaintiffs' standing could be established, addressing particular elements of each claim would risk or require the disclosure of whether and how sources and methods were utilized. *Id*. at 26-27. Lastly, any defense to plaintiffs' claims for prospective relief would have to address whether any challenged activity, if it occurred, is ongoing. *See id*. at 28. Thus, in cases where privileged information concerns the very existence of an alleged activity and plaintiffs' standing, any attempt to litigate the merits of defenses would inherently reveal state secrets.

The judgment of the Director of National Intelligence as to the harm to national security at stake in this case is entitled to the "utmost" deference by this Court. *Kasza*, 133F.3d at 1166 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).[18] While dismissal may be considered a harsh result, the "results are harsh in either direction," and the "state secrets doctrine finds the greater public good—and ultimately less harsh remedy" to be dismissal. *Kasza*, 133 F.3d at 1166-67.

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the proposition that summary judgment may be granted for the defendant if the state secrets privilege deprives the defendant of information that would otherwise give it a valid defense); *Al-Haramain*, 507 F.3d at 1204 (citing *In re Sealed Case* only for the proposition that once the state secrets privilege is found to exist, it cannot be compromised by a showing of need on the part of the party seeking the information). No other circuit has adopted the approach described in *In re Sealed Case* concerning the "valid defense" ground for dismissal. *See In re Sealed Case*, 494 F.3d at 154, 156 (Brown, J., concurring and dissenting); *see also El-Masri v. United States*, 479 F.3d 296, 309-10 (4th Cir. 2007) (inability to *present* defense, not whether defense is dispositive, forecloses proceeding); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991).

[18] The DNI may assert privilege under *Reynolds* as the statutory head of the U.S. Intelligence Community, 50 U.S.C.§ 403(b)(1), which includes the NSA, *id*.§ 401a(4).

III. CONGRESS HAS NOT WAIVED SOVEREIGN IMMUNITY FOR PLAINTIFFS' STATUTORY CLAIMS AGAINST THE GOVERNMENT DEFENDANTS.

As set forth in our opening motion, the Court may narrow application of the state secrets privilege in this case by dismissing plaintiffs' statutory claims against the Government Defendants on sovereign immunity grounds. Plaintiffs concede that, to succeed on their statutory damages claims, Congress must have expressly waived sovereign immunity for those claims in 18 U.S.C. § 2712. However, that statute permits actions against the United States to recover money damages for the willful, unauthorized use and disclosure of information obtained from electronic surveillance, not its mere collection. Plaintiffs do not dispute that their suit is limited to the latter, and so § 2712 does not waive sovereign immunity for it. Gov. Br. at 5-9.

Plaintiffs argue that § 2712's use of the phrase "any willful violation" of the Wiretap Act or the Stored Communications Act precludes our argument that the waiver extends only to willful use or disclosure violations of those acts. But the Supreme Court has "[o]ver and over . . . stressed that "[i]n expounding a statute, [a court] must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (internal quotations and citation omitted). "Statutory construction 'is a holistic endeavor'" that, "at a minimum, must account for" a statute's full text, structure, subject matter, and purpose. *Id*. (citation omitted). Indeed, numerous cases have construed the word "any"—on which plaintiffs rely here—more narrowly in light of a statute's context, purpose, and legislative history. *See, e.g., Small v. United States*, 544 U.S. 385, 388 (2005) (holding that statutory phrase "convicted in any court" does not include a conviction entered in a foreign court); *Gutierrez v. Ada*, 528 U.S. 250, 254-57 (2000) (phrase "a majority of votes cast in any election" refers only to votes cast for Governor and Lieutenant Governor based on surrounding statutory provisions). [19]

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[19] In response to our argument that an examination of the section of the Patriot Act in which § 2712 was enacted, § 223, shows that Congress intended to limit the waiver of sovereign immunity to willful use or disclosure violations, plaintiffs point to § 2712(b)(4). As explained above, that provision, which was not enacted as part of § 223, provides that "the procedures set

Plaintiffs' response to § 223's legislative history is to claim, without any support, that the history shows that waiving sovereign immunity for disclosure claims was just *one* of Congress's purposes. Opp. at 33. Plaintiffs point to no legislative history showing a congressional purpose to waive immunity for collection claims, and the history instead shows that Congress was focused exclusively on preventing the use and disclosure of information obtained by electronic surveillance. Gov. Br. at 8-9. Similarly unavailing is plaintiffs' reliance on a DOJ manual. Opp. at 33 n.9. The portion they quote relates to liability of individual officers or employees of the United States under 18 U.S.C. § 2707, not to the United States's liability under § 2712.[20]

Plaintiffs cannot rely on § 702 of the Administrative Procedure Act or the *Larson* doctrine for a waiver of sovereign immunity for their statutory claims for equitable relief. Gov. Br. at 10-14. Section 702 waives sovereign immunity except when another statute limits judicial review, or when another statute "that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Whatever the reach of § 2712 (which the parties dispute), it is a statute that grants consent to suit (its title is "Civil actions against the United States"), as plaintiffs admit. Opp. at 40.[21] And by authorizing monetary damages only, it impliedly forbids the equitable relief plaintiffs seek. *See* Gov. Br. at 11. Remarkably, plaintiffs rely in their opposition on § 2712(d), which provides that an action under § 2712 shall be the exclusive remedy against the United States for any claims "within the purview" of § 2712 – a provision

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forth in sections 106(f), 305(g), or 405(f) of the Foreign Intelligence Surveillance Act . . . shall be the exclusive means by which materials governed by those sections may be reviewed." It does not "direct[]" that section 106(f) (codified at 50 U.S.C. § 1806(f)) be used "to determine the legality of the surveillance in the Wiretap Act and SCA," Opp. at 32; indeed, it says nothing at all about the Wiretap Act or the SCA, or about the application of these FISA sections to claims for violations of the Wiretap Act or the SCA.

[20] Plaintiffs' fail in their attempt to divorce § 2712 from the Ninth Circuit's statement in *Al-Haramain*, 690 F.3d at 1096-97 (9th Cir. 2012), that "[u]nder this scheme, Al–Haramain can bring a suit for damages against the United States for *use* of the collected information, but cannot bring suit against the government for collection of the information itself." The scheme to which the court referred was "[s]ection 1806(f), combined with 18 U.S.C. § 2712." *Id*.

[21] To the extent that § 2712 does not grant consent to suit for plaintiffs' FISA claim, brought under 50 U.S.C. § 1809, such claim fails on the merits under *Al-Haramain*. *See Al-Haramain*, 690 F.3d at 1094-99; Gov. Br. at 7 & n.5.

that comes close to expressly forbidding remedies not delineated in § 2712. Plaintiffs' argument that only damages claims, not equitable relief claims, are "within the purview" of § 2712, and thus § 2712 does not forbid equitable relief claims, is circular. Regarding 18 U.S.C. §§ 2520(a), 2707(a), even if those statutes are not grants of consent to suit, they are limitations on judicial review under the first exception under § 702. *See Hughes v. United States*, 953 F.2d 531, 537 (9th Cir. 1992).

Plaintiffs label as "nonsense" our argument that Congress intended § 702 to provide the waiver of sovereign immunity for equitable relief claims, subject to the limitations therein, instead of the complicated legal fictions that allowed suit, such as the *Larson* doctrine. Opp. at 36. But plaintiffs fail to respond to the clear legislative history on this point (*see* Gov. Br. at 12-13); ignore the Ninth Circuit's clear statement that, although it followed the *Larson ultra vires* legal fiction prior to the APA's enactment, federal courts have since looked to § 702 to serve the purposes of legal fictions in cases against federal officers, *see, e.g.*, *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1085 (9th Cir. 2010); and ignore similar case law from other circuits. Gov. Br. at 13. And even if *Larson* were still viable, it would not apply here. *Id*. at 13-14.

CONCLUSION

For the foregoing reasons, and those set forth in the Government's opening brief, this action should be dismissed as to all claims against all defendants.

October 19, 2012

Respectfully Submitted,

STUART F. DELERY
Acting Assistant Attorney General

JOSEPH H. HUNT
Director, Federal Programs Branch

VINCENT M. GARVEY
Deputy Branch Director

/s/ Anthony J. Coppolino
ANTHONY J. COPPOLINO
Special Litigation Counsel
tony.coppolino@usdoj.gov

/s/ Marcia Berman
MARCIA BERMAN
Senior Trial Counsel

U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Rm. 6102
Washington, D.C. 20001
Phone: (202) 514-4782
Fax: (202) 616-8460

Attorneys for the Official Capacity Government Defendants

STUART F. DELERY
Acting Assistant Attorney General
JOSEPH H. HUNT
Director, Federal Programs Branch
VINCENT M. GARVEY
Deputy Branch Director
ANTHONY J. COPPOLINO
Special Litigation Counsel
tony.coppolino@usdoj.gov
MARCIA BERMAN
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Rm. 6102
Washington, D.C. 20001
Phone: (202) 514-4782
Fax: (202) 616-8460
Attorneys for the Government Defendants
Sued in their Official Capacity

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CAROLYN JEWEL, *et al.*, Plaintiffs, v. NATIONAL SECURITY AGENCY, *et al.* Defendants.	Case No. 3:08-cv-04373-JSW **EXHIBIT TO GOVERNMENT DEFENDANTS' REPLY IN SUPPORT OF SECOND MOTION TO DISMISS AND FOR SUMMARY JUDGMENT** Date: December 14, 2012 Time: 9:00 a.m. Courtroom: 11 - 19th Floor Judge Jeffrey S. White

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT 95-
2d Session } { 1283, Pt. I

FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

JUNE 8, 1978.—Ordered to be printed

Mr. BOLAND, from the Permanent Select Committee on Intelligence, submitted the following

REPORT

together with

SUPPLEMENTAL, ADDITIONAL, AND DISSENTING VIEWS

[To accompany H.R. 7308 which on November 4, 1977, was referred jointly to the Committee on the Judiciary and the Permanent Select Committee on Intelligence]

The Permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 7308) to amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

AMENDMENTS

Strike all after the enacting clause and insert in lieu thereof:

That this act may be cited as the "Foreign Intelligence Surveillance Act of 1978".

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(2) determine the existence and capability of electronic surveillance equipment being used by persons not authorized to conduct electronic surveillance, if—

(A) it is not reasonable to obtain the consent of persons incidentally subjected to the surveillance;

(B) such electronic surveillance is limited in extent and duration to that necessary to determine the existence and capability of such equipment; and

(C) any information acquired by such surveillance is used only to enforce chapter 119 of title 18, United States Code, or section 605 of the Communications Act of 1934, or to protect information from unauthorized surveillance; or

(3) train intelligence personnel in the use of electronic surveillance equipment, if—

(A) it is not reasonable to—

(i) obtain the consent of the persons incidentally subjected to the surveillance;

(ii) train persons in the course of surveillance otherwise authorized by this title; or

(iii) train persons in the use of such equipment without engaging in electronic surveillance;

(B) such electronic surveillance is limited in extent and duration to that necessary to train the personnel in the use of the equipment; and

(C) no contents of any communication acquired are retained or disseminated for any purpose, but are destroyed as soon as reasonably possible.

(g) Certifications made by the Attorney General pursuant to section 102(a) and applications made and orders granted under this title shall be retained in accordance with the security procedures established pursuant to section 103 for a period of at least ten years from the date of the application.

USE OF INFORMATION

SEC. 106. (a) Information acquired from an electronic surveillance conducted pursuant to this title concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this title. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this title shall lose its privileged character. No information acquired from an electronic surveillance pursuant to this title may be used or disclosed by Federal officers or employees except for lawful purposes.

(b) No information acquired pursuant to this title shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

(c) Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this title, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

(d) Whenever any State or political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision thereof, against an aggrieved person any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this title, the State or political subdivision thereof shall notify the aggrieved person, the court or other authority in which the information is to be disclosed or used, and the Attorney General that the State or political subdivision thereof intends to so disclose or so use such information.

(e) Any person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that—

(1) the information was unlawfully acquired; or

(2) the surveillance was not made in conformity with an order of authorization or approval.

Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(f) Whenever a court or other authority is notified pursuant to subsection (c) or (d), or whenever a motion is made pursuant to subsection (e) and the Government concedes that information obtained or derived from an electronic surveillance pursuant to the authority of this title as to which the moving party is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding, the Government may make a motion before the Special Court to determine the lawfulness of the electronic surveillance. Unless all the judges of the Special Court are so disqualified, the motion may not be heard by a judge who granted or denied an order or extension involving the surveillance at issue. Such motion shall stay any action in any court or authority to determine the lawfulness of the surveillance. In determining the lawfulness of the surveillance, the Special Court shall, notwithstanding any other law, if the Attorney General files an affidavit under oath with the Special Court that disclosure would harm the national security of the United States or compromise foreign intelligence sources and methods, review in camera the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the Special Court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials if there is a reasonable question as to the legality of the surveillance and if disclosure would likely promote a more accurate determination of such legality, or if such disclosure would not harm the national security.

(g) Except as provided in subsection (f), whenever any motion or request is made pursuant to any statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to surveillance pursuant to the authority of this title or to discover, obtain, or suppress any information obtained from electronic surveillance pursuant to the authority of this title, and the court or other authority determines that the moving pary is an aggrieved person, if the Attorney General files with the Special Court of Appeals an affidavit under oath that an adversary hearing would harm the national security or compromise foreign intelligence sources and methods and that no information obtained from electronic surveillance pursuant to the authority of this title, and this title has been or is about to be used by the Government in the case before the court or other authority, the Special Court of Appeals shall, notwithstanding any other law, stay the proceeding before the other court or authority and review in camera and ex parte the application, order, and such other materials as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, and the Special Court of Appeals still disclose, under appropriate security procedures and protective orders, to the aggrieved person or his attorney portions of the application, order, or other materials relating to the surveillance only if necessary to afford due process to the aggrieved person.

(h) If the Special Court pursuant to subsection (f) or the Special Court of Appeals pursuant to subsection (g) determines the surveillance was not lawfully authorized and conducted, it shall, in accordance with the requirements of the law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the Special Court pursuant to subsection (f) or the Special Court of Appeals pursuant to subsection (g) determines the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

(i) Orders granting or denying motions or requests under subsection (h), decisions under this section as to the lawfulness of electronic surveillance, and, absent a finding of unlawfulness, orders of the Special Court or Special Court of Appeals granting or denying disclosure of applications, orders, or other materials relating to a surveillance shall be final orders and binding upon all courts of the United States and the several States except the Special Court of Appeals and the Supreme Court.

(j) In circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents may indicate a threat of death or serious bodily harm to any person.

(k) If an emergency employment of electronic surveillance is authorized under section 105(e) and a subsequent order approving the surveillance is not obtained, the judge shall cause to be served on any United States person named in the application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice, of—

(1) the fact of the application;

(2) the period of the surveillance; and

(3) the fact that during the period information was or was not obtained.

On an ex parte showing of good cause to the judge the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

REPORT OF ELECTRONIC SURVEILLANCE

SEC. 107. In April of each year, the Attorney General shall transmit to the Administrative Office of the United States Courts and to Congress a report setting forth with respect to the preceding calendar year—

(a) the total number of applications made for orders and extensions of orders approving electronic surveillance under this title; and

(b) the total number of such orders and extensions either granted, modified, or denied.

CONGRESSIONAL OVERSIGHT

SEC. 108. On a semiannual basis the Attorney General shall fully inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence concerning all electronic surveillance under this title. Nothing in this title shall be deemed to limit the authority and responsibility of thosec ommittees to obtain such additional information as they may need to carry out their respective functions and duties.

PENALTIES

SEC. 109. (a) OFFENSE.—A person is guilty of an offense if he intentionally—

(1) engages in electronic surveillance under color of law except as authorized by statute; or

(2) violates section 102(a)(2), 105(e), 105(f), 105(g), 106(a), 106(b), or 106(j) or any court order issued pursuant to this title, knowing his conduct violates an order or this title.

(b) DEFENSE.—(1) It is a defense to a prosecution under subsection (a)(1) that the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction.

(2) It is a defense to a prosecution under subsection (a)(2) that the defendant acted in good faith belief that his actions did not violate any provisions of this title or any court order issued pursuant to this title, under circumstances where that belief was reasonable.

(c) PENALTY.—An offense described in this section is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both.

restriction, but the problems and circumstances of overseas surveillance demand separate treatment, and this bill, dealing with the area where most abuses have occurred, should not be delayed pending the development of that separate legislation. The committee notes the administration's commitment to the development of a separate bill governing overseas surveillances and expects to work closely with the administration on that bill.

SECTION-BY-SECTION ANALYSIS

Title I of the Foreign Intelligence Surveillance Act contains the substantive provisions governing the conduct of electronic surveillance for foreign intelligence purposes. Title II of the act contains certain amendments to chapter 119 of title 18, United States Code, governing the interception of wire and oral communications for law enforcement purposes, title III of the act contains the effective date and implementing provisions of the act.

As introduced, H.R. 7308 would have amended title 18 (Crimes and Criminal Procedure), United States Code, by creating a new chapter following chapter 119 which deals with law enforcement electronic surveillance. In the committee's view, the placement of title I in title 18 would be misleading. Nothing in title I relates to law enforcement procedures, and the one provision creating a criminal offense for intentional violations of the other provisions is pendent to the other provisions. Placing title I in title 18 would wrongly suggest either that the bill's procedures deal with law enforcement or that the thrust of the bill is to create a Federal crime. Because the bill instead establishes authorities and procedures dealing with the collection of foreign intelligence, the committee believes that its proper placement would be in title 50 (War and National Defense), United States Code. Title 50 has traditionally been the title in which laws relating to this Nation's intelligence activities have been placed, for example, the National Security Act of 1947 and the CIA Act of 1949.

This change from the bill as introduced, however, is not intended to affect in any way the jurisdiction of congressional committees with respect to electronic surveillance for foreign intelligence purposes. Rather, the purpose of the change is solely to allow the placement of title I in that portion of the United States Code which most directly relates to its subject matter.

Section 101

This section contains all the definitions of terms used in the bill. Because most of the substantive aspects of the bill derive from the definition of particular terms, this section is critical to the bill as a whole.

(*a*) "*Foreign power*"

Subsection (a) defines "foreign power" in six separate ways. These definitions are crucial because surveillances may only be targeted against foreign powers or agents of foreign powers.

It is expected that certain of the defined "foreign powers" will be found in the United States and targeted directly; others are not likely to be found in the United States but are included in the definition more to enable certain persons who are their agents, and who may be in the United States, to be targeted as "agents of a foreign power,"

in West Berlin) are not under the territorial sovereignty of the United States.

In the bill terms such as "foreign-based" and "foreign territory" refer to places outside the "United States," as defined here.

(*k*) *Aggrieved person*

Section 101(k) defines the term "aggrieved person" as a person who has been the target of an electronic surveillance or any other person who, although not a target, has been incidentally subjected to electronic surveillance. As defined, the term is intended to be coextensive, but no broader than, those persons who have standing to raise claims under the Fourth Amendment with respect to electronic surveillance. See *Alderman* v. *United States*, 394 U.S. 316 (1968).

The term specifically does not include persons, not parties to a communication, who may be mentioned or talked about by others. The Supreme Court has specifically held in *Alderman* that such persons have no fourth amendment privacy right in communications about them which the Government may intercept. While under this bill minimization procedures require minimization of communications about U.S. persons, even though they are not parties to the communication, there is no intent to create a statutory right in such persons which they may enforce. Suppression of relevant criminal evidence and civil suit are particularly inappropriate tools to insure compliance with this part of minimization. Review by judges pursuant to section 105(d), Executive oversight and congressional oversight by the Senate and House Intelligence Committees are intended to be the exclusive means by which compliance with minimization procedures governing minimization of "mentions of" U.S. persons is to be monitored under this or any other law.

(*l*) *Wire communication*

Section 101(l) defines "wire communication" to mean any communication (whether oral, verbal, or otherwise) while it is being carried by a wire, cable, or other like connection furnished or operated by a communications common carrier. This definition of wire communication differs from the definition of the same term in chapter 119 of title 18, United States Code. There the term is defined to include any communication carried in whole or in part by a wire furnished by a common carrier. This has led to anomalous results such as where a woman listening to an ordinary FM radio has intercepted radio-telephone communications and thereby technically violated chapter 119. See *United States* v. *Hall*, 488 F. 2d 193 (9th Cir. 1973). Also, ordinary marine band communications, which do not have a reasonable expectation of privacy or require a warrant for law enforcement interception, can be "patched into" telephone systems, becoming a "wire communication" under chapter 119.

The definition here makes clear that communications are "wire communications" under the bill only while they are carried by a wire furnished or operated by a common carrier. The term "common carrier" means a U.S. common carrier and not a common carrier in a foreign country. Moreover, the word "furnished" means furnished in the ordinary course of the common carrier's provision of communications facilities. It does not refer to equipment sold outright to a

The committee also recognizes that training in laboratory conditions may not be sufficient; field training in almost all areas of endeavor is considered necessary. Finally, communications acquired in the course of training personnel are barred from being retained or disseminated. There is no need for anyone other than the trainees and their instructor to have any knowledge of what might or might not have been intercepted.

The authorization in this subsection is a narrow one made necessary by the broad definition of "electronic surveillance." It is not intended to authorize electronic surveillances to gather foreign intelligence information generally. Thus the provision is phrased in terms of the purpose being "solely to test the capability of electronic equipment . . . , determine the existence and capability of electronic surveillance equipment being used by persons not authorized to conduct electronic surveillance . . . or training intelligence personnel in the use of electronic surveillance equipment." Where, for example, the existence and capability of unauthorized electronic surveillance equipment has been established, this provision does not authorize further surveillance to determine the targets of the surveillance or the information being acquired by the unauthorized surveillance.

All tests, "sweeps" and training conducted pursuant to this provision must be in the normal course of official business by the Government agent conducting the test, sweep, or training. The committee contemplates that such testing, "sweeps," and training will be approved by a senior official prior to the commencement of the activity.

Subsection (g) was not in H.R. 7308, as introduced. Its effect is self-explanatory. It's purpose is to assure accountability by requiring that applications and orders be maintained for 10 years. Under chapter 119 of title 18, U.S.C., there is a similar 10 year recordkeeping requirement.

Section 106

This section places additional constraints on Government use of information obtained from electronic surveillance and establishes detailed procedures under which such information may be received in evidence, suppressed, or discovered.

Subsection (a) requires that information concerning U.S. persons acquired from electronic surveillance pursuant to this title may be used and disclosed by Federal officers and employees, without the consent of the U.S. person, only in accordance with the minimization procedures defined in section 101(h). This provision ensures that the use of such information is carefully restricted to actual foreign intelligence or law enforcement purposes.

This subsection also notes that no otherwise privileged communication obtained in accordance with or in violation of this chapter shall lose its privileged character. This provision is identical to 18 U.S.C. 2517(4) and is designed, like its title III predecessor, to change existing law as to the scope and existence of privileged communications only to the extent that it provides that otherwise privileged communications do not lose their privileged character because they are intercepted by a person not a party to the conversation.

Subsection (a) further states that no information (whether or not it concerns a U.S. person) acquired from an electronic surveillance

pursuant to this title may be used or disclosed except for lawful purposes. This provision did not appear in H.R. 7308, as introduced. It was added by the committee to insure that information concerning foreign visitors and other non-U.S. persons, the use of which is not restricted to foreign intelligence or law enforcement purposes, is not used for illegal purposes.

There is no specific restriction in the bill regarding to whom Federal officers may disclose information concerning U.S. persons acquired pursuant to this title although specific minimization procedures might require specific restrictions in particular cases. First, the committee believes that dissemination should be permitted to State and local law enforcement officials. If Federal agents monitoring a foreign intelligence surveillance authorized under this title were to overhear information relating to a violation of State criminal law, such as homicide, the agents could hardly be expected to conceal such information from the appropriate local officials. Second, the committee can conceive of situations where disclosure should be made outside of Government channels. For example, Federal agents may learn of a terrorist plot to kidnap a business executive. Certainly in such cases they should be permitted to disclose such information to the executive and his company in order to provide for the executive's security.

Finally, the committee believes that foreign intelligence information relating to crimes, espionage activities, or the acts and intentions of foreign powers may, in some circumstances, be appropriately disseminated to cooperating intelligence services of other nations. So long as all the procedures of this title are followed by the Federal officers, including minimization and the limitations on dissemination, this cooperative relationship should not be terminated by a blanket prohibition on dissemination to foreign intelligence services. The committee wishes to stress, however, that any such dissemination be reviewed carefully to ensure that there is a sufficient reason why disclosure of information to foreign intelligence services is in the interests of the United States.

Disclosure, in compelling circumstances, to local officials for the purpose of enforcing the criminal law, to the targets of clandestine intelligence activity or planned violence, and to foreign intelligence services under the circumstances described above are generally the only exceptions to the rule that dissemination should be limited to Federal officials.

It is recognized that these strict requirements only apply to information known to concern U.S. persons. Where the information in the communication is encoded or otherwise not known to concern U.S. persons, only the requirement that the information be disclosed for lawful purposes applies. There is no requirement that before disclosure can be made information be decoded or otherwise processed to determine whether information concerning U.S. persons is indeed present. Of course, the restrictions on use and disclosure still apply, so that if any Government agency received coded information from the intercepting agency, were it to break the code, the limitations on use and disclosure would apply to it.

Subsection (b) requires that disclosure of information for law enforcement purposes must be accompanied by a statement that such

evidence, or any information derived therefrom, may be used in a criminal proceeding only with the advance authorization of the Attorney General. This provision is designed to eliminate circumstances in which a local prosecutor has no knowledge that evidence was obtained through foreign intelligence electronic surveillance. In granting approval of the use of evidence the Attorney General would alert the prosecutor to the surveillance and he, in turn, could alert the court in accordance with subsection (c) or (d).

Subsections (c) through (i) set forth the procedures under which information acquired by means of electronic surveillance may be received in evidence or otherwise used or disclosed in any trial, hearing or other Federal or State proceeding. Although the primary purpose of electronic surveillance conducted pursuant to this chapter is not likely to be the gathering of criminal evidence, it is contemplated that such evidence will be acquired and these subsections establish the procedural mechanisms by which such information may be used in formal proceedings.

At the outset the committee recognizes that nothing in these subsections abrogates the rights afforded a criminal defendant under *Brady* v. *Maryland*,[43] and the Jencks Act.[44] These legal principles inhere in any such proceeding and are wholly consistent with the procedures detailed here. Furthermore, nothing contained in this section is intended to alter the traditional principle that the Government cannot use material at trial against a criminal defendant, and then withhold from him such material at trial.[45]

Subsection (c) states that no information acquired from an electronic surveillance (or any fruits thereof) may be used against an aggrieved person, as defined, unless prior to the trial, hearing, or other proceeding, or at a reasonable time prior to an effort to disclose the information or submit it in evidence, the United States notifies the court or other authority and the aggrieved person of its intent.

Subsection (d) places the same requirements upon the states and their political subdivisions, and also requires notice to the Attorney General.

Subsection (e) provides a separate statutory vehicle by which an aggrieved person against whom evidence derived or obtained from an electronic surveillance is to be or has been introduced or otherwise used or disclosed in any trial, hearing or proceeding may move to suppress the information acquired by electronic surveillance or evidence derived therefrom. The grounds for such a motion would be that (1) the information was unlawfully acquired, or (2) the surveillance was not made in conformity with the order of authorization or approval.

A motion under this subsection must be made before the trial, hearing, or proceeding unless there was no opportunity to make such a motion or the movant was not aware of the grounds for the motion.

It should be noted that the term "aggrieved person", as defined in section 101(k) does not include those who are mentioned in an intercepted communication. The committee wishes to make it clear that

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[43] 373 U.S. 83 (1963).
[44] 18 U.S.C. 3500 et seq.
[45] *United States* v. *Andolschek*, 142 F.2d 503 (2nd Cir. 1944)

such persons do not have standing to file a motion under section 106 or under any other provision. The minimization procedures do apply to such persons and, to the extent that such persons lack standing, the committee recognizes that it has created a right without a remedy. However, it is felt that the Attorney General's regulations concerning the minimization procedures, judicial review of such procedures, and criminal penalties for intentional violation of them, will provide sufficient protection.

Section (f) sets out special judicial procedures to be followed when the Government concedes that it intends to use or has used evidence obtained or derived from electronic surveillance. Where, in any trial or proceeding, the Government concedes, either pursuant to the notification [46] requirements of subsection (c) and (d) or after a motion is filed by the defendant pursuant to subsection (e), that it intends to use or has used evidence obtained or derived from electronic surveillance, it may make a motion before the special court to determine the lawfulness of the surveillance. The special court must then determine whether the surveillance was lawful or not. In so doing, no judge who granted an order or extension involving the surveillance at issue could make the determination, unless all the judges of the special court would be so disqualified.

The determination would be made in camera if the Attorney General certifies under oath that disclosure would harm the national security or compromise foreign intelligence sources and methods.[47] However, when the special court determines that there is a reasonable question as to the legality of the surveillance and disclosure would likely promote a more accurate determination thereof (or when the court determines that disclosure would not harm the national security) the defendant should be provided relevant portions of the application, order, or other materials. Whenever there is a reasonable question of legality, it is hoped that disclosure, with an in camera adversary hearing, will be the usual practice. The committee considered requiring an adversary hearing in all cases, but was persuaded by the Department of Justice that in those instances where there is no reasonable question as to the legality of the surveillance security considerations should prevail. In ordering disclosure, the special court must provide for appropriate security procedures and protective orders.

Subsection (f), outlined above, deals with those rare situations in which the Government states it will use evidence obtained or derived from an electronic surveillance.

Subsection (g) states in detail the procedures to be followed when, in any court or other authority of the United States or a state, a motion or request is made to discover or obtain applications or orders, or other materials relating to surveillance under this title, or to dis-

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[46] It should be emphasized that notification by the Government triggers the special court procedures whether or not the defense has filed a suppression or discovery motion. Thus, if, before the filing of such motions, the Government concedes use of evidence obtained from electronic surveillance, and the Court determines that the surveillance was lawful, a discovery or suppression motion would be moot because of the requirements of subsection (h).

[47] In many, if not most cases, the Attorney General's affidavit will have to be based on information supplied to him by other Executive officers. It is perfectly proper for the Attorney General in making his affidavit to rely on conclusions and beliefs held by others in the Executive Branch who are responsible for national security or intelligence sources and methods.

cover, obtain or suppress any information obtained from electronic surveillance, and the Government certifies that no information obtained or derived from an electronic surveillance has been or is about to be used by the Government before that court or other authority.

When such a motion or request is made, it will be heard by the Special Court of Appeals if:

The court or other authority in which the motion is filed determines that the moving party is an aggrieved person, as defined;

The Attorney General certifies to the Special Court of Appeals that an adversary hearing would harm the national security or compromise intelligence sources or methods; and;

The Attorney General certifies to the Special Court of Appeals that no information obtained or derived from an electronic surveillance has been or is to be used.

If the above findings and certifications are made, the special court of appeals will stay the proceedings before the court or other authority and conduct an ex parte, in camera inspection of the application, order or other relevant material to determine whether the surveillance was lawfully authorized and conducted.

The subsection further provides that in making such a determination, the court may order disclosed to the person against whom the evidence is to be introduced the court order or accompanying application, or portions thereof, or other materials relating to the surveillance, only if it finds that such disclosure is necessary to afford due process to the aggrieved person.

It is to be emphasized that, although a number of different procedures might be used to attack the legality of the surveillance, it is the procedures set out in subsections (f) and (g) "notwithstanding any other law" that must be used to resolve the question. The committee wishes to make very clear that these procedures apply whatever the underlying rule or statute referred to in the motion. This is necessary to prevent these carefully drawn procedures from being bypassed by the inventive litigant using a new statute, rule or judicial construction.

Subsections (f) and (g) effect substantial changes from H.R. 7308, as introduced. The committee has adopted a suggestion of the General Counsel of the Administrative Office of the U.S. Courts in providing that judicial determinations with respect to challenges to the legality of foreign intelligence surveillances and motions for discovery concerning such surveillances, where the Government believes that adversary hearings or disclosure would harm the national security, will be made by the special court or the special court of appeals. Given the sensitive nature of the information involved and the fact any judge might otherwise be involved in situations where there would be no mandated security procedures, the committee feels it appropriate for such matters to be considered solely by the special courts.

Moreover, judges of the special courts are likely to be able to put claims of national security in a better perspective and to have greater confidence in interpreting this bill than judges who do not have occasion to deal with the surveillances under this bill, and the Government is likely to be less fearful of disclosing information even to the judge where is knows there are special security procedures and the judge already is cognizant of other foreign intelligence surveillances. These

considerations, it is believed, suggest that—given the in camera procedure—the private party will be more thoroughly protected by having the special courts determine the legality of the surveillances under the bill.

The most significant change is contained in the subsection (f) provision authorizing disclosure and an adversary hearing in certain circumstances. This provision has been adopted only after lengthy discussion within the committee and a careful consideration of the suggested risk to security involved. The narrow reach of the provision should be emphasized: the adversary hearing procedures can arise only in those instances where the Government concedes that it intends to use evidence obtained or derived from an electronic surveillance (which the Government had not done in the last 10 years until the case of *U.S. v. Humphrey*, crim. no. 78–25–A, E.D. Va.).

Furthermore, the decision to remove a proceeding to one of the special courts (under subsection (f) or (g)), is entirely up to the Government in the first instance, as, of course, is the decision to prosecute. With these limitations, the committee believes that the adversary hearing provision is fully protective of those legitimate security interests which the Congress, no less than the executive branch, has a duty to safeguard.

The Congress has an equally compelling duty to insure that trials are conducted according to traditional American concepts of fair play and substantial justice. In this context, the committee believes that when the Government intends to use information against a criminal defendant obtained or derived from an electronic surveillance, and there is a reasonable question as to the legality of a surveillance, simple justice dictates that the defendant not be denied the use of our traditional means for reaching the truth—the adversary process.[49]

Where the Government states under oath that it does not intend to use evidence or information obtained or derived from electronic surveillance, the case for an adversary hearing is less persuasive and the bill does not provide for it. In such cases, however, in order to provide additional protection to the defendant, the bill (if the case is removed from the trial court) states that the matter be heard by three judges of the special court of appeals, rather than by a single judge of the special court.

It should be emphasized that in determining the legality of a surveillance under subsection (f) or (g), the judges of the special courts (or the trial judge if the matter is not removed to the special courts) are not to make determinations which the issuing judge is not authorized to make. Where the bill specifies the scope or nature of judicial review in the consideration of an application, any review under these subsections is similarly constrained. For example, when reviewing the certifications required by section 104(a)(7), unless there is a prima facie

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[49] The committee is aware that the Supreme Court has never decided that an adversary hearing is constitutionally required to determine the legality of a surveillance. See *Alderman v. United States*, 394 U.S. 165 (1968); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc), cert. denied sub nom. *Ivanov v. United States*, 419 U.S. 881 (1974); *Giordano v. United States*, 394 U.S. 310, 314 (1968) (concurring opinion of Justice Stewart.) This fact does not lessen the importance of an adversary hearing in searching for the truth and assuring a fair trial, and if the court should so decide, the procedures for an adversary hearing would already be in place. It should also be noted that in neither *Alderman* nor *Butenko* did the Government concede use of information obtained or derived from a surveillance.

showing of a fraudulent statement by a certifying officer, procedural regularity is the only determination to be made if a non-U.S. person is the target, and the "clearly erroneous" standard is to be used where a U.S. person is targeted. Of course, the judge is also free to review the constitutionality of the law itself.

Subsection (h) states what procedures the special courts are to follow after a determination of legality or illegality is made pursuant to subsection (f) or (g). The committee wishes to emphasize that its intent in this provision is not to legislate new procedures or in any other manner alter existing procedures with respect to what should be ordered after a finding of illegality is made. In such circumstances, the judge is directed to suppress the evidence or otherwise grant the motion "in accordance with the requirements of law." Existing case law requires the Government, in the case of an illegal surveillance, to surrender to the defendant all the information illegally acquired in order for the defendant to make an intelligent motion on the question of taint. The Supreme Court in *Alderman* v. *United States*, *supra*, held that once a defendant claiming evidence against him was the fruit of unconstitutional electronic surveillance has established the illegality of such surveillance (and his "standing" to object), he must be given those materials illegally acquired in the Government's files to assist him in establishing the existence of "taint." The Court rejected the Government's contention that the trial court could be permitted to screen the files in camera and give the defendant only material which was "arguably relevant" to his claim, saying such screening would be sufficiently subject to error to interfere with the effectiveness of adversary litigation of the question of "taint." The Supreme Court has refused to reconsider the *Alderman* rule and, in fact reasserted its validity in its *Keith* decision. (*United States* v. *U.S. District Court*, *supra*, at 393).

As the language of the bill makes clear, only that evidence which was obtained unlawfully or derived from information obtained unlawfully would be suppressed. If, for example, some information should have been minimized but was not, only that information should be suppressed; the other information obtained lawfully should not be suppressed.

A decision of illegality may not always arise in the context of suppression; rather it may, for example, arise incident to a discovery motion in a civil trial. Here, again, the bill does not specify what the court should order. Again, the court should grant the motion only "in accordance with requirements of law." Here, however, the requirements of law would be those respecting civil discovery. In other words, once the surveillance is determined to be unlawful, the intent of this section is to leave to otherwise existing law the resolution of what, if anything, is to be disclosed. For instance, under the Freedom of Information Act, other defenses against disclosure may be able to be made.

Where the court determines pursuant to subsections (f) or (g) that the surveillance was lawfully authorized and conducted, it would, of course, deny any motion to suppress. In addition, once a judicial determination is made that the surveillance was lawful, any motion or request to discover or obtain materials relating to a surveillance must

be denied unless disclosure or discovery is required by due process.[5]

Subsection (i) states for purposes of appeal that orders or decisions of the special courts granting or denying motions, deciding the lawfulness of a surveillance or ordering or denying disclosure shall be final orders, and shall be binding upon all courts of the United States and the States except the special court of appeals and the Supreme Court. As final orders they will be immediately appealable, by the private party or the government. The committee recognizes that the usual practice is to consider such orders interlocutory and not immediately appealable.

In the particular circumstances of cases handled pursuant to subsections (c)–(i), however, the committee believes that substantial considerations militate in favor of immediate appeal. Requirements to disclose certain information, whether before or after a finding of illegality, might force the Government to dismiss the case (or concede the case, if it were a civil suit against it) to avoid disclosure it thought not required. This is not the situation in normal cases, and therefore it is appropriate here to allow immediate appeal of such an order. Similarly, given the in camera and to a greater or lesser extent ex parte proceedings under subsections (f) and (g), it is appropriate to afford a more expeditious form of appeal for the private litigant. Because cases under these subsections are not expected to occur often, there is no meaningful added burden placed on the courts by allowing such interlocutory orders.

New subsection (j) has been added to the bill for the purpose of restricting the use of unintentionally acquired private domestic radio communications. The new subsection is needed because "electronic surveillance" as defined in 101(f)(3) covers only the intentional acquisition of the contents of private domestic radio communications. Such communications may include telephone calls and other wire communications transmitted by radio microwaves. Concern has been expressed that unless the use of such unintentionally acquired communications is restricted, there would be a potential for abuse if the Government acquired those kinds of domestic communications, even without intentionally targeting any particular communication. The amendment forecloses this possibility by restricting the use of any information acquired in this manner.

In circumstances involving the unintentional acquisition, by an electronic, mechanical, or other surveillance device of the contents of any radio communication, where a persons has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and where both the sender and all intended recipients are located within the United States, the contents must be destroyed upon recognition. The only exception is with the approval of the Attorney General where the contents indicate a threat of death or serious bodily harm to any person. This restriction is not intended to prevent the Government from maintaining a record of the radio frequency of the communication for later collection avoidance purposes.

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[5] The committee recognizes that this provision alters existing law and is a limitation on existing discovery practice. It is felt that where the special court has determined that the surveillance is lawful, security considerations should preclude any disclosure unless due process requires disclosure.

Subsection (k) provides for notice to be served on U.S. citizens and permanent resident aliens who were targets of an emergency surveillance and, in the judge's discretion, on other citizens and resident aliens who are incidentally overheard, where a judge denies an application for an order approving an emergency electronic surveillance. Such notice shall be limited to the fact that an application was made, the period of the emergency surveillance, and the fact that during the period information was or was not obtained. This notice may be postponed for a period of up to 90 days upon a showing of good cause to the judge. Thereafter the judge may forego the requirement of notice upon a second showing of good cause.

The fact which triggers the notice requirement—the failure to obtain approval of an emergency surveillance—need not be based on a determination by the court that the target is not an agent of a foreign power engaged in clandestine intelligence activities, sabotage, or terrorist activities or a person aiding such agent. Failure to secure a court order could be based on a number of other factors, such as an improper certification. A requirement of notice in all cases would have the potential of compromising the fact that the Government has focused an investigation on the target. Even where the target is not, in fact, an agent of a foreign power, giving notice to the person may result in compromising an ongoing foreign intelligence investigation because of the logical inferences a foreign intelligence service might draw from the targeting of the individual. For these reasons, the Government is given the opportunity to present its case to the judge for initially postponing notice. After 90 days, during which time the Government may be able to gather more facts, the Government may seek the elimination of the notice requirement altogether.

It is the intent of the committee that if the Government can initially show that there is a reason to believe that notice might compromise an ongoing investigation, or confidential sources or methods, notice should be postponed. Thereafter, if the Government can show a likelihood that notice would compromise an ongoing investigation, or confidential sources or methods, notice should not be given.

Section 107

Section 107 requires the submission of annual reports to both the Congress and the Administrative Office of the U.S. Courts containing statistical information relating to electronic surveillance under this title. The reports must include the total number of applications made for orders and extensions and the total number of orders or extensions granted, modified, and denied, The statistics in these reports should present a quantitative indication of the extent to which surveillance under this title is used. The committee intends that such statistics will be public.

Section 108

Congressional oversight is particularly important in monitoring the operation of this statute. By its very nature foreign intelligence surveillance must be conducted in secret. The bill reflects the need for such secrecy: judicial review is limited to a select panel and routine notice to the target is avoided. In addition, contrary to the premises which underlie the provisions of title III of the Omnibus Crime Con-