

AMENDMENT NO. \_\_\_\_\_ Calendar No. \_\_\_\_\_

Purpose: To provide a complete substitute.

**IN THE SENATE OF THE UNITED STATES—109th Cong., 2d Sess.**

**S. 2453**

To establish procedures for the review of electronic  
surveillance programs.

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

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by \_\_\_\_\_

Viz:

1 In lieu of the matter proposed to be inserted, insert  
2 the following:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “\_\_\_\_\_ Act of  
5 2006”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) After the terrorist attacks of September 11,  
9 2001, President Bush authorized the National Secu-  
10 rity Agency to intercept communications between

1 people inside the United States, including American  
2 citizens, and terrorism suspects overseas.

3 (2) One of the lessons learned from September  
4 11, 2001, is that the enemies who seek to greatly  
5 harm and terrorize our Nation utilize technologies  
6 and techniques that defy conventional law enforce-  
7 ment practices.

8 (3) For days before September 11, 2001, the  
9 Federal Bureau of Investigation suspected that con-  
10 fessed terrorist Zacarias Moussaoui was planning to  
11 hijack a commercial plane. The Federal Bureau of  
12 Investigation, however, could not meet the require-  
13 ments to obtain a traditional criminal warrant or an  
14 order under the Foreign Intelligence Surveillance  
15 Act of 1978 to search his laptop computer (Report  
16 of the 9/11 Commission 273–76).

17 (4) The President, as the constitutional officer  
18 most directly responsible for protecting the United  
19 States from attack, requires the ability and means  
20 to detect and track an enemy that can master and  
21 exploit modern technology.

22 (5) It is equally essential, however, that in pro-  
23 tecting the United Sates against our enemies, the  
24 President does not compromise the very civil lib-  
25 erties that he seeks to safeguard. As Justice Hugo

1 Black observed, “The President’s power, if any, to  
2 issue [an] order must stem either from an Act of  
3 Congress or from the Constitution itself.” *Youngs-*  
4 *town Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,  
5 585 (1952) (opinion by Black, J.). Similarly, in  
6 2004, Justice Sandra Day O’Connor explained in  
7 her plurality opinion for the Supreme Court in  
8 *Hamdi v. Rumsfeld*: “We have long since made clear  
9 that a state of war is not a blank check for the  
10 President when it comes to the rights of the Na-  
11 tion’s citizens.” *Hamdi v. Rumsfeld*, 542 U.S. 507,  
12 536 (2004) (citations omitted).

13 (6) When deciding issues of national security, it  
14 is in our Nation’s best interest that, to the extent  
15 feasible, all 3 branches of the Federal Government  
16 should be involved. This helps guarantee that elec-  
17 tronic surveillance programs do not infringe on the  
18 constitutional rights of Americans, while at the same  
19 time ensuring that the President has all the powers  
20 and means necessary to detect and track our en-  
21 emies and protect our Nation from attack.

22 (7) As Justice Sandra Day O’Connor explained  
23 in her plurality opinion for the Supreme Court in  
24 *Hamdi v. Rumsfeld*, “Whatever power the United  
25 States Constitution envisions for the Executive in its

1 exchanges with other nations or with enemy organi-  
2 zations in times of conflict, it most assuredly envi-  
3 sions a role for all 3 branches when individual lib-  
4 erties are at stake.” Hamdi v. Rumsfeld, 542 U.S.  
5 507, 536 (2004) (citations omitted).

6 (8) Similarly, Justice Jackson famously ex-  
7 plained in his Youngstown concurrence: “When the  
8 President acts pursuant to an express or implied au-  
9 thorization of Congress, his authority is at its max-  
10 imum, for it includes all that he possesses in his own  
11 right plus all that Congress can delegate... When the  
12 President acts in absence of either a congressional  
13 grant or denial of authority, he can only rely upon  
14 his own independent powers, but there is a zone of  
15 twilight in which he and Congress may have concur-  
16 rent authority, or in which its distribution is uncer-  
17 tain. Therefore, congressional inertia, indifference or  
18 quiescence may sometimes, at least as a practical  
19 matter, enable, if not invite, measures on inde-  
20 pendent presidential responsibility... When the Presi-  
21 dent takes measures incompatible with the expressed  
22 or implied will of Congress, his power is at its lowest  
23 ebb, for then he can rely only upon his own constitu-  
24 tional powers minus any constitutional powers of  
25 Congress over the matter. Courts can sustain exclu-

1       sive Presidential control in such a case only by dis-  
2       abling the Congress from acting upon the subject.”  
3       Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S.  
4       579, 635–38 (1952) (Jackson, J., concurring).

5               (9) Congress clearly has the authority to enact  
6       legislation with respect to electronic surveillance pro-  
7       grams. The Constitution provides Congress with  
8       broad powers of oversight over national security and  
9       foreign policy, under article I, section 8 of the Con-  
10      stitution of the United States, which confers on Con-  
11      gress numerous powers, including the powers—

12               (A) “To declare War, grant Letters of  
13      Marque and Reprisal, and make Rules con-  
14      cerning Captures on Land and Water”;

15               (B) “To raise and support Armies”;

16               (C) “To provide and maintain a Navy”;

17               (D) “To make Rules for the Government  
18      and Regulation of the land and naval Forces”;

19               (E) “To provide for calling forth the Mili-  
20      tia to execute the Laws of the Union, suppress  
21      Insurrections and repel Invasions”; and

22               (F) “To provide for organizing, arming,  
23      and disciplining the Militia, and for governing  
24      such Part of them as may be employed in the  
25      Service of the United States”.

1           (10) While Attorney General Alberto Gonzales  
2 explained that the executive branch reviews the elec-  
3 tronic surveillance program of the National Security  
4 Agency every 45 days to ensure that the program is  
5 not overly broad, it is the belief of Congress that ap-  
6 proval and supervision of electronic surveillance pro-  
7 grams should be conducted outside of the executive  
8 branch, by the article III court established under  
9 section 103 of the Foreign Intelligence Surveillance  
10 Act of 1978 (50 U.S.C. 1803). It is also the belief  
11 of Congress that it is appropriate for an article III  
12 court to pass upon the constitutionality of electronic  
13 surveillance programs that may implicate the rights  
14 of Americans.

15           (11) The Foreign Intelligence Surveillance  
16 Court is the proper court to approve and supervise  
17 classified electronic surveillance programs because it  
18 is adept at maintaining the secrecy with which it  
19 was charged and it possesses the requisite expertise  
20 and discretion for adjudicating sensitive issues of  
21 national security.

22           (12) In 1975, [then] Attorney General Edward  
23 Levi, a strong defender of executive authority, testi-  
24 fied that in times of conflict, the President needs the  
25 power to conduct long-range electronic surveillance

1           and that a foreign intelligence surveillance court  
2           should be empowered to issue special approval orders  
3           in these circumstances.

4           (13) The Foreign Intelligence Surveillance Act  
5           of 1978 clarifies and definitively establishes that the  
6           Foreign Intelligence Surveillance Court has the au-  
7           thority to review electronic surveillance programs  
8           and pass upon their constitutionality. Such authority  
9           is consistent with well-established, longstanding  
10          practices.

11          (14) The Foreign Intelligence Surveillance  
12          Court already has broad authority to approve sur-  
13          veillance of members of international conspiracies, in  
14          addition to granting warrants for surveillance of a  
15          particular individual under sections 104, 105, and  
16          402 of the Foreign Intelligence Surveillance Act of  
17          1978 (50 U.S.C. 1804, 1805, and 1842).

18          (15) Prosecutors have significant flexibility in  
19          investigating domestic conspiracy cases. Courts have  
20          held that flexible warrants comply with the 4th  
21          amendment to the Constitution of the United States  
22          when they relate to complex, far-reaching, and  
23          multifaceted criminal enterprises like drug conspir-  
24          acies and money laundering rings. The courts recog-  
25          nize that applications for search warrants must be

1       judged in a common sense and realistic fashion, and  
2       the courts permit broad warrant language where,  
3       due to the nature and circumstances of the inves-  
4       tigation and the criminal organization, more precise  
5       descriptions are not feasible.

6           (16) Federal agents investigating international  
7       terrorism by foreign enemies are entitled to tools at  
8       least as broad as those used by law enforcement offi-  
9       cers investigating domestic crimes by United States  
10      citizens. The Supreme Court, in the “Keith Case”,  
11      United States v. United States District Court for  
12      the Eastern District of Michigan, 407 U.S. 297  
13      (1972), recognized that the standards and proce-  
14      dures used to fight ordinary crime may not be appli-  
15      cable to cases involving national security. The Court  
16      recognized that national “security surveillance may  
17      involve different policy and practical considerations  
18      from the surveillance of ordinary crime” and that  
19      courts should be more flexible in issuing warrants in  
20      national security cases. United States v. United  
21      States District Court for the Eastern District of  
22      Michigan, 407 U.S. 297, 322 (1972).

23           (17) By authorizing the Foreign Intelligence  
24      Surveillance Court to review electronic surveillance  
25      programs, Congress preserves the ability of the



1 President to use the necessary means to guard our  
2 national security, while also protecting the civil lib-  
3 erties and constitutional rights that we cherish.

4 **SEC. 3. DEFINITIONS.**

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

7 (1) by redesignating title VII as title IX;

8 (2) by redesignating section 701 as section 901;

9 and

10 (3) by inserting after title VI the following:

11 **“TITLE VII—ELECTRONIC**  
12 **SURVEILLANCE**

13 **“SEC. 701. DEFINITION.**

14 “As used in this title—

15 “(1) the terms ‘agent of a foreign power’, ‘At-  
16 torney General’, ‘foreign power’, ‘international ter-  
17 rorism’, ‘minimization procedures’, ‘person’, ‘United  
18 States’, and ‘United States person’ have the same  
19 meaning as in section 101;

20 “(2) the term ‘congressional intelligence com-  
21 mittees’ means the Select Committee on Intelligence  
22 of the Senate and the Permanent Select Committee  
23 on Intelligence of the House of Representatives;

24 “(3) the term ‘electronic communication’ means  
25 any transfer of signs, signals, writing, images,

1 sounds, data, or intelligence of any nature trans-  
2 mitted, in whole or in part, by a wire, radio, electro  
3 magnetic, photo electronic or photo optical system,  
4 cable, or other like connection furnished or operated  
5 by any person engaged as a common carrier in pro-  
6 viding or operating such facilities for the trans-  
7 mission of communications;

8 “(4) the term ‘electronic tracking’ means the  
9 acquisition by an electronic, mechanical, or other  
10 surveillance device of the substance of any electronic  
11 communication sent by, received by, or intended to  
12 be received by a person who is reasonably believed  
13 to be in the United States, through the intentional  
14 targeting of that person’s communications, where a  
15 person in the United States participating in the  
16 communication has a reasonable expectation of pri-  
17 vacy;

18 “(5) the term ‘electronic surveillance program’  
19 means a program to engage in electronic tracking—

20 “(A) that has as a significant purpose the  
21 gathering of foreign intelligence information or  
22 protecting against international terrorism;

23 “(B) where it is not technically feasible to  
24 name every person or address every location to  
25 be subjected to electronic tracking;

1           “(C) where effective gathering of foreign  
2 intelligence information requires the flexibility  
3 to begin electronic surveillance immediately  
4 after learning of suspect activity; and

5           “(D) where effective gathering of foreign  
6 intelligence information requires an extended  
7 period of electronic surveillance;

8           “(6) the term ‘foreign intelligence information’  
9 has the same meaning as in section 101 and in-  
10 cludes information necessary to protect against  
11 international terrorism;

12           “(7) the term ‘Foreign Intelligence Surveillance  
13 Court’ means the court established under section  
14 103(a);

15           “(8) the term ‘Foreign Intelligence Surveillance  
16 Court of Review’ means the court established under  
17 section 103(b);

18           “(9) the term ‘intercept’ means the acquisition  
19 of the substance of any electronic communication by  
20 a person through the use of any electronic, mechan-  
21 ical, or other device; and

22           “(10) the term ‘substance’ means any informa-  
23 tion concerning the symbols, sounds, words, purport,  
24 or meaning of a communication, and does not in-  
25 clude dialing, routing, addressing, or signaling.”.

1 **SEC. 4. FOREIGN INTELLIGENCE SURVEILLANCE COURT**  
2 **JURISDICTION TO REVIEW ELECTRONIC SUR-**  
3 **VEILLANCE PROGRAMS.**

4 (a) IN GENERAL.—Title VII of the Foreign Intel-  
5 ligence Surveillance Act of 1978, as amended by section  
6 3, is amended by adding at the end the following:

7 **“SEC. 702. FOREIGN INTELLIGENCE SURVEILLANCE COURT**  
8 **JURISDICTION TO REVIEW ELECTRONIC SUR-**  
9 **VEILLANCE PROGRAMS.**

10 “(a) AUTHORIZATION OF REVIEW.—

11 “(1) INITIAL AUTHORIZATION.—The Foreign  
12 Intelligence Surveillance Court shall have jurisdic-  
13 tion to issue an order under this title, lasting not  
14 longer than 90 days, that authorizes an electronic  
15 surveillance program to obtain foreign intelligence  
16 information or to protect against international ter-  
17 rorism.

18 “(2) REAUTHORIZATION.—The Foreign Intel-  
19 ligence Surveillance Court shall have jurisdiction to  
20 reauthorize an electronic surveillance program for a  
21 period of time not longer than such court determines  
22 to be reasonable.

23 “(3) RESUBMISSION OR APPEAL.—In the event  
24 that the Foreign Intelligence Surveillance Court re-  
25 fuses to approve an application under this sub-  
26 section, the Attorney General may submit a new ap-

1 plication. There shall be no limit on the number of  
2 times the Attorney General may seek approval of an  
3 electronic surveillance program. Alternatively, the  
4 Attorney General may appeal the decision of the  
5 Foreign Intelligence Surveillance Court to the For-  
6 eign Intelligence Surveillance Court of Review.

7 “(b) MANDATORY TRANSFER FOR REVIEW.—

8 “(1) IN GENERAL.—In any case before any  
9 court challenging the legality of classified commu-  
10 nications intelligence activity relating to a foreign  
11 threat, including an electronic surveillance program,  
12 or in which the legality of any such activity or pro-  
13 gram is in issue, if the Attorney General files an af-  
14 fidavit under oath that further proceedings in such  
15 court would harm the national security of the United  
16 States, the court shall transfer the case to the For-  
17 eign Intelligence Surveillance Court of Review for  
18 further proceedings under this subsection.

19 “(2) PROCEDURES FOR REVIEW.—The Foreign  
20 Intelligence Surveillance Court of Review shall have  
21 jurisdiction as appropriate to determine standing  
22 and the legality of the communications intelligence  
23 activity or program to the extent necessary for reso-  
24 lution of the underlying case. All proceedings under  
25 this paragraph shall be conducted subject to the pro-

1 cedures of section 106(f), except that the Foreign  
2 Intelligence Surveillance Court of Review shall not  
3 require the disclosure of national security informa-  
4 tion to any person without the approval of the Direc-  
5 tor of National Intelligence or the Attorney General,  
6 unless in the context of a criminal proceeding disclo-  
7 sure would be constitutionally required.

8 “(3) RETRANSFER TO ORIGINATING COURT.—  
9 Upon completion of review pursuant to this sub-  
10 section, the Foreign Intelligence Surveillance Court  
11 of Review shall remand the case to the originating  
12 court for further proceedings consistent with its  
13 opinion.

14 “(4) PRESERVATION OF LITIGATION.—In any  
15 case that is transferred and received under this sub-  
16 section, all litigation privileges shall be preserved.

17 “(5) CERTIORARI AND EFFECTS OF DECI-  
18 SIONS.—The decision the Foreign Intelligence Sur-  
19 veillance Court of Review made under paragraph  
20 (2), including a decision that the disclosure of na-  
21 tional security information is constitutionally re-  
22 quired, shall be subject to certiorari review in the  
23 United States Supreme Court, and shall otherwise  
24 be binding in all other courts.

1           “(6) DISMISSAL.—The Foreign Intelligence  
2           Surveillance Court of Review or a court that is an  
3           originating court under paragraph (1) may dismiss  
4           a challenge to the legality of an electronic surveil-  
5           lance program for any reason provided for under  
6           law.

7           “(c) MODIFICATIONS AND APPEAL IN EVENT APPLI-  
8           CATION IS DENIED.—In the event that the Foreign Intel-  
9           ligence Surveillance Court declines to approve an applica-  
10          tion under subsection (a)—

11           “(1) the court shall state its reasons in a writ-  
12          ten opinion, which it shall submit to the Attorney  
13          General; and

14           “(2) the Attorney General may submit a new  
15          application under section 703 for the electronic sur-  
16          veillance program.”.

17   **SEC. 5. APPLICATIONS FOR APPROVAL OF ELECTRONIC**  
18                           **SURVEILLANCE PROGRAMS.**

19          Title VII of the Foreign Intelligence Surveillance Act  
20          of 1978, as amended by section 4, is amended by adding  
21          at the end the following:

1 **“SEC. 703. APPLICATIONS FOR APPROVAL OF ELECTRONIC**  
2 **SURVEILLANCE PROGRAMS.**

3 “(a) IN GENERAL.—Each application for approval of  
4 an electronic surveillance program under this title (includ-  
5 ing for reauthorization) shall—

6 “(1) be made by the Attorney General or his  
7 designee;

8 “(2) include a statement of the authority con-  
9 ferred on the Attorney General by the President of  
10 the United States;

11 “(3) include a statement setting forth the legal  
12 basis for the conclusion by the Attorney General  
13 that the electronic surveillance program is consistent  
14 with the Constitution of the United States;

15 “(4) certify that a significant purpose of the  
16 electronic surveillance program is to gather foreign  
17 intelligence information or to protect against inter-  
18 national terrorism;

19 “(5) certify that the information sought cannot  
20 reasonably be obtained by normal investigative tech-  
21 niques or through an application under section 104;

22 “(6) include a statement of the means and  
23 operational procedures by which the electronic track-  
24 ing will be executed and effected;

25 “(7) include an explanation of how the elec-  
26 tronic surveillance program is reasonably designed to



1 ensure that the communications that are intercepted  
2 are communications of or with—

3 “(A) a foreign power that is engaged in  
4 international terrorism activities or in prepara-  
5 tion therefor;

6 “(B) an agent of a foreign power that is  
7 engaged in international terrorism activities or  
8 in preparation therefor; or

9 “(C) a person reasonably believed to have  
10 communication with or be associated with a for-  
11 eign power that is engaged in international ter-  
12 rorism activities or in preparation therefor or  
13 an agent of a foreign power that is engaged in  
14 international terrorism activities or in prepara-  
15 tion therefor;

16 “(8) include a statement of the proposed mini-  
17 mization procedures;

18 “(9) if the electronic surveillance program that  
19 is the subject of the application was initiated prior  
20 to the date the application was submitted, specify  
21 the date that the program was initiated;

22 “(10) include a description of all previous appli-  
23 cations that have been made under this title involv-  
24 ing the electronic surveillance program in the appli-  
25 cation (including the minimization procedures and

1 the means and operational procedures proposed) and  
2 the decision on each previous application; and

3 “(11) include a statement of facts concerning  
4 the implementation of the electronic surveillance pro-  
5 gram described in the application, including, for any  
6 period of operation of the program authorized not  
7 less than 90 days prior to the date of submission of  
8 the application—

9 “(A) the minimization procedures imple-  
10 mented; and

11 “(B) the means and operational procedures  
12 by which the electronic tracking was executed  
13 and effected.

14 “(b) ADDITIONAL INFORMATION.—The Foreign In-  
15 telligence Surveillance Court may require the Attorney  
16 General to furnish such other information as may be nec-  
17 essary to make a determination under section 704.”.

18 **SEC. 6. APPROVAL OF ELECTRONIC SURVEILLANCE PRO-**  
19 **GRAMS.**

20 Title VII of the Foreign Intelligence Surveillance Act  
21 18 of 1978, as amended by section 5, is amended by add-  
22 ing at the end the following:

1 **“SEC. 704. APPROVAL OF ELECTRONIC SURVEILLANCE**  
2 **PROGRAMS.**

3 “(a) NECESSARY FINDINGS.—Upon receipt of an ap-  
4 plication under section 703, the Foreign Intelligence Sur-  
5 veillance Court shall enter an ex parte order as requested,  
6 or as modified, approving the electronic surveillance pro-  
7 gram if it finds that—

8 “(1) the President has authorized the Attorney  
9 General to make the application for electronic sur-  
10 veillance for foreign intelligence information or to  
11 protect against international terrorism;

12 “(2) approval of the electronic surveillance pro-  
13 gram in the application is consistent with the Con-  
14 stitution of the United States;

15 “(3) the electronic surveillance program is rea-  
16 sonably designed to ensure that the communications  
17 that are intercepted are communications of or  
18 with—

19 “(A) a foreign power that is engaged in  
20 international terrorism activities or in prepara-  
21 tion therefor;

22 “(B) an agent of a foreign power that is  
23 engaged in international terrorism activities or  
24 in preparation therefor; or

25 “(C) a person reasonably believed to have  
26 communication with or be associated with a for-

1           eign power that is engaged in international ter-  
2           rorism activities or in preparation therefor or  
3           an agent of a foreign power that is engaged in  
4           international terrorism activities or in prepara-  
5           tion therefor;

6           “(4) the proposed minimization procedures  
7           meet the definition of minimization procedures  
8           under section 101(h); and

9           “(5) the application contains all statements and  
10          certifications required by section 703.

11          “(b) CONSIDERATIONS.—In considering the constitu-  
12          tionality of the electronic surveillance program under sub-  
13          section (a), the Foreign Intelligence Surveillance Court  
14          may consider—

15                 “(1) whether the electronic surveillance pro-  
16                 gram has been implemented in accordance with the  
17                 proposal by the Attorney General by comparing—

18                         “(A) the minimization procedures proposed  
19                         with the minimization procedures actually im-  
20                         plemented;

21                         “(B) the nature of the information sought  
22                         with the nature of the information actually ob-  
23                         tained; and

1                   “(C) the means and operational procedures  
2                   proposed with the means and operational proce-  
3                   dures actually implemented; and

4                   “(2) whether foreign intelligence information  
5                   has been obtained through the electronic surveillance  
6                   program.

7                   “(c) CONTENTS OF ORDER.—An order approving an  
8                   electronic surveillance program under this section shall di-  
9                   rect—

10                   “(1) that the minimization procedures be fol-  
11                   lowed;

12                   “(2) that, upon the request of the applicant,  
13                   specified communication or other common carriers,  
14                   landlords, custodians, or other specified person, fur-  
15                   nish the applicant forthwith with all information, fa-  
16                   cilities, or technical assistance necessary to under-  
17                   take the electronic surveillance program in such a  
18                   manner as will protect its secrecy and produce a  
19                   minimum of interference with the services that such  
20                   carriers, landlords, custodians, or other persons are  
21                   providing potential targets of the electronic surveil-  
22                   lance program;

23                   “(3) that any record concerning the electronic  
24                   surveillance program or the aid furnished or retained  
25                   by such carriers, landlords, custodians, or other per-

1       sons are maintained under security procedures ap-  
2       proved by the Attorney General and the Director of  
3       National Intelligence; and

4               “(4) that the applicant compensate, at the pre-  
5       vailing rate, such carriers, landlords, custodians, or  
6       other persons for furnishing such aid.”.

7       **SEC. 7. CONGRESSIONAL OVERSIGHT.**

8       Title VII of the Foreign Intelligence Surveillance Act  
9       of 1978, as amended by section 6, is amended by adding  
10      at the end the following:

11     **“SEC. 705. CONGRESSIONAL OVERSIGHT.**

12       “(a) IN GENERAL.—Not less often than every 180  
13      days, the Attorney General shall submit to the congres-  
14      sional intelligence committees a report in classified form  
15      on the activities during the previous 180-day period under  
16      any electronic surveillance program authorized under this  
17      title.

18       “(b) CONTENTS.—Each report submitted under sub-  
19      section (a) shall provide, with respect to the previous 180-  
20      day period, a description of—

21               “(1) the minimization procedures implemented;

22               “(2) the means and operational procedures by  
23      which the surveillance was executed and effected;  
24      and

1           “(3) significant decisions of the Foreign Intel-  
2           ligence Surveillance Court on applications made  
3           under section 703.

4           “(c) RULE OF CONSTRUCTION.—Nothing in this title  
5           shall be construed to limit the authority or responsibility  
6           of any committee of either House of Congress to obtain  
7           such information as such committee may need to carry  
8           out its respective functions and duties.”.

9           **SEC. 8. CLARIFICATION OF THE FOREIGN INTELLIGENCE**  
10                                   **SURVEILLANCE ACT OF 1978.**

11           (a) IN GENERAL.—The Foreign Intelligence Surveil-  
12           lance Act of 1978 (50 U.S.C. 1801 et seq.) is amended  
13           by inserting after title VII, as amended by this Act, the  
14           following:

15                                   **“TITLE VIII—EXECUTIVE**  
16                                   **AUTHORITY**

17           **“SEC. 801. EXECUTIVE AUTHORITY.**

18           “Nothing in this Act shall be construed to limit the  
19           constitutional authority of the President to collect intel-  
20           ligence with respect to foreign powers and agents of for-  
21           eign powers.”.

22           (b) REPEAL.—Sections 111, 309, and 404 of the  
23           Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.  
24           1811, 1829, and 1844) are repealed.

25           (c) CONFORMING AMENDMENTS.—

1           (1) TITLE 18.—Section 2511(2) of title 18,  
2           United States Code, is amended—

3                   (A) in paragraph (e), by striking “, as de-  
4                   fined in section 101” and all that follows  
5                   through the end of the paragraph and inserting  
6                   the following: “under the Constitution or the  
7                   Foreign Intelligence Surveillance Act of 1978.”;  
8                   and

9                   (B) in paragraph (f), by striking “from  
10                   international or foreign communications,” and  
11                   all that follows through the end of the para-  
12                   graph and inserting “that is authorized under  
13                   a Federal statute or the Constitution of the  
14                   United States.”

15           (2) FISA.—Section 109 of the Foreign Intel-  
16           ligence Surveillance Act of 1978 (50 U.S.C. 1809)  
17           is amended—

18                   (A) in subsection (a)—

19                           (i) in paragraph (1)—

20                                   (I) by inserting “or under the  
21                                   Constitution” after “authorized by  
22                                   statute”; and

23                                   (II) by striking “or” at the end;

24                           (ii) in paragraph (2)—



1 (I) by inserting “or under the  
2 Constitution” after “authorized by  
3 statute”; and

4 (II) by striking the period and  
5 inserting “; or”; and

6 (iii) by adding at the end the fol-  
7 lowing:

8 “(3) knowingly discloses or uses information ob-  
9 tained under color of law by electronic surveillance  
10 in a manner or for a purpose not authorized by  
11 law.”; and

12 (B) in subsection (c)—

13 (i) by striking “\$10,000” and insert-  
14 ing “\$100,000”; and

15 (ii) by striking “five years” and in-  
16 serting “15 years”.

17 **SEC. 9. OTHER CONFORMING AMENDMENTS TO FISA.**

18 (a) REFERENCE.—In this section, a reference to  
19 “FISA” shall mean the Foreign Intelligence Surveillance  
20 Act of 1978 (50 U.S.C. 1801 et seq.)

21 (b) DEFINITIONS.—Section 101 of FISA (50 U.S.C.  
22 1801) is amended—

23 (1) in subsection (b)(1)—

24 (A) in subparagraph (B), by striking “or”  
25 after the semicolon; and

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

2 “(D) otherwise possesses or is expected to  
3 transmit or receive foreign intelligence informa-  
4 tion within the United States; or”;

5 (2) by striking subsection (f) and inserting the  
6 following:

7 “(f) ‘Electronic surveillance’ means—

8 “(1) the installation or use of an electronic, me-  
9 chanical, or other surveillance device for the inten-  
10 tional collection of information concerning a par-  
11 ticular known person who is reasonably believed to  
12 be in the United States by intentionally targeting  
13 that person under circumstances in which that per-  
14 son has a reasonable expectation of privacy and a  
15 warrant would be required for law enforcement pur-  
16 poses; or

17 “(2) the intentional acquisition of the contents  
18 of any communication under circumstances in which  
19 a person has a reasonable expectation of privacy and  
20 a warrant would be required for law enforcement  
21 purposes, and if both the sender and all intended re-  
22 cipients are located within the United States.”;

23 (3) in subsection (g), by inserting before the pe-  
24 riod the following: “or a person or persons des-

1           ignated by the Attorney General or Acting Attorney  
2           General”;

3                   (4) in subsection (h)—

4                           (A) in paragraph (2), by inserting “and”  
5                   after the semicolon;

6                           (B) in paragraph (3), by striking “; and”  
7                   and inserting a period; and

8                           (C) by striking paragraph (4); and

9                   (5) by striking subsection (n) and inserting the  
10           following:

11           “(n) ‘contents’ has the meaning set forth in section  
12   2510(8) of title 18, United States Code.”.

13           (c) **ELECTRONIC SURVEILLANCE AUTHORIZATION.**—

14   Section 102 of FISA (50 U.S.C. 1802) is amended to read  
15   as follows:

16   “**ELECTRONIC SURVEILLANCE AUTHORIZATION WITHOUT**

17   **COURT ORDER; CERTIFICATION BY ATTORNEY GEN-**

18   **ERAL; REPORTS TO CONGRESSIONAL COMMITTEES;**

19   **TRANSMITTAL UNDER SEAL; DUTIES AND COM-**

20   **PENSATION OF COMMUNICATION COMMON CARRIER;**

21   **APPLICATIONS; JURISDICTION OF COURT**

22   “**SEC. 102. (a)(1)** Notwithstanding any other law, the

23   President through the Attorney General, may authorize

24   electronic surveillance without a court order under this

25   title to acquire foreign intelligence information for periods

1 of up to 1 year if the Attorney General certifies in writing  
2 under oath that—

3 “(A)(i) the acquisition of the contents of com-  
4 munications of foreign powers, as defined in section  
5 101(a), an agent of a foreign power as defined in  
6 section 101(b)(1); or

7 “(ii) the acquisition of technical intelligence,  
8 other than the spoken communications of individ-  
9 uals, from property or premises under the open and  
10 exclusive control of a foreign power, as defined in  
11 paragraph (1), (2), or (3) of section 101(a); and

12 “(B) the proposed minimization procedures  
13 with respect to such surveillance meet the definition  
14 of minimization procedures under section 101(h);

15 if the Attorney General reports such minimization proce-  
16 dures and any changes thereto to the Senate Select Com-  
17 mittee on Intelligence and the House Permanent Select  
18 Committee on Intelligence at least 30 days prior to their  
19 effective date, unless the Attorney General determines im-  
20 mediate action is required and notifies the committees im-  
21 mediately of such minimization procedures and the reason  
22 for their becoming effective immediately.

23 “(2) An electronic surveillance authorized by this  
24 subsection may be conducted only in accordance with the  
25 Attorney General’s certification and the minimization pro-

1 cedures. The Attorney General shall assess compliance  
2 with such procedures and shall report such assessments  
3 to the Senate Select Committee on Intelligence and the  
4 House Permanent Select Committee on Intelligence under  
5 the provisions of section 108(a).

6 “(3) The Attorney General shall immediately trans-  
7 mit under seal to the court established under section  
8 103(a) a copy of his certification. Such certification shall  
9 be maintained under security measures established by the  
10 Chief Justice with the concurrence of the Attorney Gen-  
11 eral, in consultation with the Director of National Intel-  
12 ligence, and shall remain sealed unless—

13 “(A) an application for a court order with re-  
14 spect to the surveillance is made under section 104;  
15 or

16 “(B) the certification is necessary to determine  
17 the legality of the surveillance under section 106(f).

18 “(b) The Attorney General is also authorized to de-  
19 liver to a provider of any electronic communication service,  
20 landlord, custodian, or other person (including any officer,  
21 employee, agent, or other specified person thereof) who  
22 has access to electronic communications, either as they are  
23 transmitted or while they are stored, or equipment that  
24 is being or may be used to transmit or store such commu-  
25 nications, a certificate requiring that such person or per-

1 sons furnish any information, facilities, or technical assist-  
2 ance to an official authorized by the President to engage  
3 in electronic surveillance for foreign intelligence purposes,  
4 for periods of up to 1 year if the Attorney General certifies  
5 in writing to the carrier under oath that such provision  
6 of information, facilities, or technical assistance does not  
7 constitute electronic surveillance as defined in section  
8 101(f).

9       “(c) With respect to electronic surveillance or the fur-  
10 nishing of any information, facilities, or technical assist-  
11 ance authorized by this section, the Attorney General may  
12 direct a provider of any electronic communication service,  
13 landlord, custodian or other person (including any officer,  
14 employee, agent, or other specified person thereof) who  
15 has access to electronic communications, either as they are  
16 transmitted or while they are stored or equipment that  
17 is being or may be used to transmit or store such commu-  
18 nications to—

19               “(1) furnish all information, facilities, or tech-  
20 nical assistance necessary to accomplish the elec-  
21 tronic surveillance in such a manner as will protect  
22 its secrecy and produce a minimum of interference  
23 with the services that such provider of any electronic  
24 communication service, landlord, custodian, or other  
25 person is providing its customers; and

1           “(2) maintain under security procedures ap-  
2           proved by the Attorney General and the Director of  
3           National Intelligence any records concerning the sur-  
4           veillance or the aid furnished which such provider of  
5           any electronic communication service, landlord, cus-  
6           todian, or other person wishes to retain.

7           The Government shall compensate, at the prevailing rate,  
8           such provider of any electronic communication service,  
9           landlord, custodian, or other person for furnishing such  
10          aid.

11          “(d) Electronic surveillance directed solely at the col-  
12          lection of international radio communications of diplomati-  
13          cally immune persons in the United States may be author-  
14          ized by an official authorized by the President to engage  
15          in electronic surveillance for foreign intelligence purposes  
16          in accordance with procedures approved by the Attorney  
17          General.”.

18          (d) DESIGNATION OF JUDGES.—Section 103 of FISA  
19          (50 U.S.C. 1803) is amended in subsection (a), by insert-  
20          ing, “at least” before “seven of the United States Judici-  
21          ary”.

22          (e) APPLICATIONS FOR COURT ORDERS.—Section  
23          104 of FISA (50 U.S.C. 1804) is amended:

24                  (1) in subsection (a), by striking paragraphs  
25                  (6) through (11) and inserting the following:

1           “(6) a certification or certifications by the As-  
2           sistant to the President for National Security Af-  
3           fairs or an executive branch official authorized by  
4           the President to conduct electronic surveillance for  
5           foreign intelligence purposes—

6                   “(A) that the certifying official deems the  
7           information sought to be foreign intelligence in-  
8           formation;

9                   “(B) that a significant purpose of the sur-  
10          veillance is to obtain foreign intelligence infor-  
11          mation;

12                   “(C) that such information cannot reason-  
13          ably be obtained by normal investigative tech-  
14          niques; and

15                   “(D) including a statement of the basis for  
16          the certification that—

17                           “(i) the information sought is the type  
18          of foreign intelligence information des-  
19          ignated; and

20                           “(ii) such information cannot reason-  
21          ably be obtained by normal investigative  
22          techniques; and

23           “(7) a statement of the period of time for which  
24          the electronic surveillance is required to be main-  
25          tained, and if the nature of the intelligence gath-



1       ering is such that the approval of the use of elec-  
2       tronic surveillance under this title should not auto-  
3       matically terminate when the described type of infor-  
4       mation has first been obtained, a description of facts  
5       supporting the belief that additional information of  
6       the same type will be obtained thereafter.”;

7               (2) by striking subsection (b); and

8               (3) by redesignating subsections (e) through (e)  
9       as subsections (b) through (d), respectively.

10       (f) ISSUANCE OF ORDER.—Section 105 of FISA (50  
11 U.S.C. 1805) is amended—

12               (1) in subsection (a), by—

13                       (A) striking paragraph (1); and

14                       (B) redesignating paragraphs (2) through  
15       (5) as paragraphs (1) through (4), respectively;

16               (2) by striking paragraph (1) of subsection (c)  
17       and inserting the following:

18       “(1) An order approving an electronic surveillance  
19       under this section shall specify—

20               “(A) the identity, if known, or a description of  
21       the specific target of the electronic surveillance iden-  
22       tified or described in the application pursuant to sec-  
23       tion 104(a)(3);

1           “(B) the nature and location of each of the fa-  
2           cilities or places at which the electronic surveillance  
3           will be directed, if known; and

4           “(C) the period of time during which the elec-  
5           tronic surveillance is approved.”;

6           (3) by striking subsection (d) and inserting the  
7           following:

8           “(d) Each order under this section shall specify the  
9           type of electronic surveillance involved, including whether  
10          physical entry is required.”;

11          (4) by striking paragraphs (1) and (2) of sub-  
12          section (e) and inserting the following:

13          “(1) An order issued under this section may approve  
14          an electronic surveillance may be for a period not to exceed  
15          1 year. If such emergency employment of electronic sur-  
16          veillance is authorized, the official authorizing the emer-  
17          gency employment of electronic surveillance shall require  
18          that the minimization procedures required by this title for  
19          the issuance of a judicial order be followed.

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

1           (5) by striking subsection (f) and inserting the  
2 following:

3           “(f)(1) Notwithstanding any other provision of this  
4 title, when an official authorized by the President to con-  
5 duct electronic surveillance reasonably determines that—

6           “(A) an emergency situation exists with respect  
7 to the employment of electronic surveillance to ob-  
8 tain foreign intelligence information before an order  
9 authorizing such surveillance can with due diligence  
10 be obtained; and

11           “(B) the factual basis for issuance of an order  
12 under this title to approve such surveillance exists;  
13 that official may authorize the emergency employment of  
14 electronic surveillance in accordance with paragraph (2).

15           “(2) Under paragraph (1), the following require-  
16 ments shall be satisfied:

17           “(A) The Attorney General shall be informed of  
18 the emergency electronic surveillance.

19           “(B) A judge having jurisdiction under section  
20 103 shall be informed by the Attorney General or  
21 his designee as soon as practicable following such  
22 authorization that the decision has been made to  
23 employ emergency electronic surveillance.

24           “(C) An application in accordance with this  
25 title shall be made to that judge or another judge

1       having jurisdiction under section 103 as soon as  
2       practicable, but not more than 7 days after such  
3       surveillance is authorized. In the absence of a judi-  
4       cial order approving such electronic surveillance, the  
5       surveillance shall terminate when the information  
6       sought is obtained, when the application for the  
7       order is denied, or after the expiration of 7 days  
8       from the time of emergency authorization, whichever  
9       is earliest. In the event that such application for ap-  
10      proval is denied, or in any other case where the elec-  
11      tronic surveillance is terminated and no order is  
12      issued approving the surveillance, no information ob-  
13      tained or evidence derived from such surveillance  
14      shall be received in evidence or otherwise disclosed  
15      in any trial, hearing, or other proceeding in or be-  
16      fore any court, grand jury, department, office, agen-  
17      cy, regulatory body, legislative committee, or other  
18      authority of the United States, a State, or political  
19      subdivision thereof, and no information concerning  
20      any United States person acquired from such sur-  
21      veillance shall subsequently be used or disclosed in  
22      any other manner by Federal officers or employees  
23      without the consent of such person, except with the  
24      approval of the Attorney General if the information  
25      indicates a threat of death or serious bodily harm to

1 any person. A denial of the application made under  
2 this subsection may be reviewed as provided in sec-  
3 tion 103.”; and

4 (6) in subsection (i) by—

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

7 (B) striking “chapter” and inserting  
8 “title”; and

9 (C) by adding at the end “, or in response  
10 to certification by the Attorney General or his  
11 designee seeking information, facilities, or tech-  
12 nical assistance from such person that does not  
13 constitute electronic surveillance as defined in  
14 section 101(f)”.

15 (g) USE OF INFORMATION.—Section 106 of FISA  
16 (50U.S.C. 1806) is amended—

17 (1) in subsection (i), by—

18 (A) deleting “radio”; and

19 (B) inserting “Attorney General deter-  
20 mines that the content” after “contain signifi-  
21 cant foreign intelligence or”; and

22 (2) in subsection (k), by deleting “104(a)(7)”  
23 and inserting “104(a)(6)”.

1 (h) CONGRESSIONAL OVERSIGHT.—Section 108 of  
2 FISA (50 U.S.C. 1808) is amended by adding at the end  
3 the following:

4 “(c) DOCUMENT MANAGEMENT SYSTEM FOR APPLI-  
5 CATIONS FOR ORDERS APPROVING ELECTRONIC SURVEIL-  
6 LANCE.—

7 “(1) SYSTEM PROPOSED.—The Attorney Gen-  
8 eral and Director of National Intelligence shall, in  
9 consultation with the Director of the Federal Bu-  
10 reau of Investigation, the Director of the National  
11 Security Agency, and the Foreign Intelligence Sur-  
12 veillance Court, conduct a feasibility study to de-  
13 velop and implement a secure, classified document  
14 management system that permits the prompt prepa-  
15 ration, modification, and review by appropriate per-  
16 sonnel of the Department of Justice, the Federal  
17 Bureau of Investigation, the National Security  
18 Agency, and other applicable elements of the United  
19 States Government of applications under section 104  
20 before their submittal to the Foreign Intelligence  
21 Surveillance Court.

22 “(2) SCOPE OF SYSTEM.—The document man-  
23 agement system proposed in paragraph (1) shall—

24 “(A) permit and facilitate the prompt sub-  
25 mittal of applications to the Foreign Intel-

1           ligence Surveillance Court under section 104 or  
2           105(g)(5); and

3                   “(B) permit and facilitate the prompt  
4           transmittal of rulings of the Foreign Intel-  
5           ligence Surveillance Court to personnel submit-  
6           ting applications described in paragraph (1).”.

7           (i) **CRIMINAL SANCTIONS.**—Section 109 of FISA (50  
8           U.S.C. 1809) is amended by striking subsection (a) and  
9           inserting the following:

10           “(a) **PROHIBITED ACTIVITIES.**—A person is guilty of  
11           an offense if he intentionally—

12                   “(1) engages in electronic surveillance, as de-  
13           fined in section 101(f), under color of law except as  
14           authorized by law; or

15                   “(2) discloses or uses information obtained  
16           under color of law by electronic surveillance, know-  
17           ing or having reason to know that the information  
18           was obtained through electronic surveillance not au-  
19           thorized by law.”.

20           (j) **AUTHORIZATION DURING TIME OF WAR.**—Title  
21           I of FISA is amended by striking section 111.

22           (k) **PHYSICAL SEARCHES.**—Title III of Foreign Intel-  
23           ligence Surveillance Act of 1978 (50 U.S.C. 1821 et seq.)  
24           is amended—

1           (1) in section 301 (50 U.S.C. 1821), by striking  
2 paragraph (5) and inserting the following:

3           “(5) ‘Physical search’ means any physical intru-  
4 sion within the United States into premises or prop-  
5 erty (including examination of the interior of prop-  
6 erty by technical means) that is intended to result  
7 in a seizure, reproduction, inspection, or alteration  
8 of information, material, or property, under cir-  
9 cumstances in which a person has a reasonable ex-  
10 pectation of privacy and a warrant would be re-  
11 quired for law enforcement purposes, but does not  
12 include activities conducted in accordance with sec-  
13 tions 102 or 105.”;

14           (2) in section 307, by striking subsection (a)  
15 and inserting the following:

16           “(a) A person is guilty of an offense if he inten-  
17 tionally—

18           “(1) under color of law for the purpose of ob-  
19 taining foreign intelligence information, executes a  
20 physical search within the United States except as  
21 authorized by statute or under the Constitution; or

22           “(2) discloses or uses information obtained  
23 under color of law by physical search within the  
24 United States, knowing or having reason to know  
25 that the information was obtained through physical



1 search not authorized by statute or the Constitu-  
2 tion.”; and

3 (3) by striking section 309.

4 **SEC. 10. CONFORMING AMENDMENT TO TABLE OF CON-**  
5 **TENTS.**

6 The table of contents for the Foreign Intelligence  
7 Surveillance Act of 1978 is amended by striking the items  
8 related to title VII and section 701 and inserting the fol-  
9 lowing:

“TITLE VII—ELECTRONIC SURVEILLANCE

“Sec. 701. Definition.

“Sec. 702. Foreign intelligence surveillance court jurisdiction to review elec-  
tronic surveillance programs.

“Sec. 703. Applications for approval of electronic surveillance programs.

“Sec. 704. Approval of electronic surveillance programs.

“Sec. 705. Congressional oversight.

“TITLE VIII—EXECUTIVE AUTHORITY

“Sec. 801. Executive authority.”.