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109TH CONGRESS
2D SESSION

S. 2453

To establish procedures for the review of electronic surveillance programs.

IN THE SENATE OF THE UNITED STATES

MARCH 16 (legislative day, MARCH 15), 2006

Mr. SPECTER (for himself and Mr. HAGEL) introduced the following bill;
which was read twice and referred to the Committee on the Judiciary

SEPTEMBER 13, 2006

Reported by Mr. SPECTER, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To establish procedures for the review of electronic
surveillance programs.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “National Security Sur-
5 veillance Act of 2006”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

1 (1) After the terrorist attacks of September 11,
2 2001, President Bush authorized the National Secu-
3 rity Agency to intercept communications between
4 people inside the United States, including American
5 citizens, and terrorism suspects overseas.

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

11 (3) The Commander in Chief requires the abil-
12 ity and means to detect and track an enemy that
13 can master and exploit modern technology.

14 (4) Although it is essential that the President
15 have all necessary means to protect us against our
16 enemies, it is equally essential that, in doing so, the
17 President does not compromise the very civil lib-
18 erties that the President seeks to safeguard. As Jus-
19 tice Hugo Black observed, "The President's power, if
20 any, to issue [an] order must stem either from an
21 Act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.
22 579, 585 (1952) (opinion by Black, J.).

23 (5) In 2004, Justice Sandra Day O'Connor ex-
24 plained in her plurality opinion for the Supreme

1 Court in *Hamdi v. Rumsfeld*. "We have long since
2 made clear that a state of war is not a blank check
3 for the President when it comes to the rights of the
4 Nation's citizens. *Youngstown Sheet & Tube*, 343
5 U.S., at 587, 72 S.Ct. 863. Whatever power the
6 United States Constitution envisions for the Execu-
7 tive in its exchanges with other nations or with
8 enemy organizations in times of conflict, it most as-
9 suredly envisions a role for all three branches when
10 individual liberties are at stake." *Hamdi v. Rums-*
11 *feld*, 542 U.S. 507, 536 (2004) (citations omitted).

12 (6) Similarly, as Justice Jackson famously ob-
13 served in his *Youngstown* concurrence. "When the
14 President acts pursuant to an express or implied au-
15 thorization of Congress, his authority is at its max-
16 imum, for it includes all that he possesses in his own
17 right plus all that Congress can delegate. . . . When
18 the President acts in absence of either a congres-
19 sional grant or denial of authority, he can only rely
20 upon his own independent powers, but there is a
21 zone of twilight in which he and Congress may have
22 concurrent authority, or in which its distribution is
23 uncertain. Therefore, congressional inertia, indiffer-
24 ence or quiescence may sometimes, at least as a
25 practical matter, enable, if not invite, measures on

1 independent presidential responsibility . . . When the
2 President takes measures incompatible with the ex-
3 pressed or implied will of Congress, his power is at
4 its lowest ebb, for then he can rely only upon his
5 own constitutional powers minus any constitutional
6 powers of Congress over the matter. Courts can sus-
7 tain exclusive Presidential control in such a case
8 only by disabling the Congress from acting upon the
9 subject.“. *Youngstown Sheet & Tube Co. v. Sawyer*,
10 343 U.S. 579, 635–38 (1952) (Jackson, J., concur-
11 ring).

12 (7) The Constitution provides Congress with
13 broad powers of oversight over national security and
14 foreign policy, under article I, section 8 of the Con-
15 stitution of the United States, which confers on Con-
16 gress numerous powers, including the powers—

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

20 (B) “To raise and support Armies”;

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

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

1 (E) "To provide for calling forth the Militia
2 to execute the Laws of the Union, suppress
3 Insurrections and repel Invasions"; and

4 (F) "To provide for organizing, arming,
5 and disciplining the Militia, and for governing
6 such Part of them as may be employed in the
7 Service of the United States".

8 (8) It is in our Nation's best interest for Congress
9 to use its oversight power to establish a system
10 to ensure that electronic surveillance programs do
11 not infringe on the constitutional rights of Americans,
12 while at the same time making sure that the
13 President has all the powers and means necessary to
14 detect and track our enemies.

15 (9) While Attorney General Alberto Gonzales
16 explained that the executive branch reviews the elec-
17 tronic surveillance program of the National Security
18 Agency every 45 days to ensure that the program is
19 not overly broad, it is the belief of Congress that ap-
20 proval and supervision of electronic surveillance pro-
21 grams should be conducted outside of the executive
22 branch, by the Article III court established under
23 section 103 of the Foreign Intelligence Surveillance
24 Act of 1978 (50 U.S.C. 1803). It is also the belief
25 of Congress that it is appropriate for an Article III

1 court to pass upon the constitutionality of electronic
2 surveillance programs that may implicate the rights
3 of Americans.

4 (10) The Foreign Intelligence Surveillance
5 Court is the proper court to approve and supervise
6 classified electronic surveillance programs because it
7 is adept at maintaining the secrecy with which it
8 was charged and it possesses the requisite expertise
9 and discretion for adjudicating sensitive issues of
10 national security.

11 (11) In 1975, then Attorney General Edward
12 Levi, a strong defender of executive authority, testi-
13 fied that in times of conflict, the President needs the
14 power to conduct long-range electronic surveillance
15 and that a foreign intelligence surveillance court
16 should be empowered to issue special warrants in
17 these circumstances.

18 (12) This Act clarifies and definitively estab-
19 lishes that the Foreign Intelligence Surveillance
20 Court has the authority to review electronic surveil-
21 lance programs and pass upon their constitu-
22 tionality. Such authority is consistent with well-es-
23 tablished, longstanding practices.

24 (13) The Foreign Intelligence Surveillance
25 Court already has broad authority to approve sur-

1 surveillance of members of international conspiracies, in
2 addition to granting warrants for surveillance of a
3 particular individual under sections 104, 105, and
4 402 of the Foreign Intelligence Surveillance Act of
5 1978 (50 U.S.C. 1804, 1805, and 1842).

6 (14) Prosecutors have significant flexibility in
7 investigating domestic conspiracy cases. Courts have
8 held that flexible warrants comply with the fourth
9 amendment to the Constitution of the United States
10 when they relate to complex, far reaching, and
11 multi-faceted criminal enterprises like drug conspir-
12 acies and money laundering rings. The courts recog-
13 nize that applications for search warrants must be
14 judged in a common sense and realistic fashion, and
15 the courts permit broad warrant language where,
16 due to the nature and circumstances of the inves-
17 tigation and the criminal organization, more precise
18 descriptions are not feasible.

19 (15) Federal agents investigating international
20 terrorism by foreign enemies are entitled to tools at
21 least as broad as those used by Federal agents in-
22 vestigating domestic crimes by United States citi-
23 zens. The Supreme Court, in the “Keith Case”,
24 United States v. United States District Court for
25 the Eastern District of Michigan, 407 U.S. 297

1 (1972), recognized that the standards and proce-
2 dures used to fight ordinary crime may not be appli-
3 able to cases involving national security. The Court
4 recognized that national “security surveillance may
5 involve different policy and practical considerations
6 from the surveillance of ordinary crime” and that
7 courts should be more flexible in issuing warrants in
8 national security cases. *United States v. United*
9 *States District Court for the Eastern District of*
10 *Michigan*, 407 U.S. 297, 322 (1972).

11 (16) By authorizing the Foreign Intelligence
12 Surveillance Court to review electronic surveillance
13 programs, Congress preserves the ability of the
14 Commander in Chief to use the necessary means to
15 guard our national security, while also protecting the
16 civil liberties and constitutional rights that we cher-
17 ish.

18 **SEC. 3. DEFINITIONS.**

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

21 (1) by redesignating title VII as title VIII;
22 (2) by redesignating section 701 as section 801;
23 and
24 (3) by inserting after title VI the following:

1 **“TITLE VII—ELECTRONIC**
2 **SURVEILLANCE**

3 **“SEC. 701. DEFINITIONS.**

4 “As used in this title—

5 “(1) the terms ‘agent of a foreign power’, ‘At-
6 torney General’, ‘foreign intelligence information’,
7 ‘foreign power’, ‘international terrorism’, ‘minimiza-
8 tion procedures’, ‘person’, ‘United States’, and
9 ‘United States person’ have the same meaning as in
10 section 101;

11 “(2) the term ‘congressional intelligence com-
12 mittees’ means the Select Committee on Intelligence
13 of the Senate and the Permanent Select Committee
14 on Intelligence of the House of Representatives;

15 “(3) the term ‘electronic communication’ means
16 any transfer of signs, signals, writing, images,
17 sounds, data, or intelligence of any nature trans-
18 mitted in whole or in part by a wire, radio, electro-
19 magnetic, photoelectronic or photooptical system,
20 cable, or other like connection furnished or operated
21 by any person engaged as a common carrier in pro-
22 viding or operating such facilities for the trans-
23 mission of communications;

24 “(4) the term ‘electronic surveillance’ means the
25 acquisition by an electronic, mechanical, or other

1 surveillance device of the substance of any electronic
2 communication sent by, received by, or intended to
3 be received by a person who is in the United States,
4 where there is a reasonable possibility that the sur-
5 veillance will intercept communication in which a
6 person in the United States participating in the
7 communication has a reasonable expectation of pri-
8 vacy;

9 “(5) the term ‘electronic surveillance program’
10 means a program to engage in electronic surveil-
11 lance—

12 ““(A) to gather foreign intelligence informa-
13 tion or to protect against international ter-
14 rrorism or clandestine intelligence activities by
15 obtaining the substance of or information re-
16 garding electronic communications sent by, re-
17 ceived by, or intended to be received by a for-
18 eign power, an agent or agents of a foreign
19 power, or a person or persons who have had
20 communication with a foreign power seeking to
21 commit an act of international terrorism or
22 clandestine intelligence activities against the
23 United States;

1 “(B) where it is not feasible to name every
2 person or address every location to be subjected
3 to electronic surveillance; and

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

7 “(6) the term ‘Foreign Intelligence Surveillance
8 Court’ means the court, sitting en banc, established
9 under section 103(a);

10 “(7) the term ‘Foreign Intelligence Surveillance
11 Court of review’ means the court established under
12 section 103(b);

13 “(8) the term ‘intercept’ means the acquisition
14 of the substance of any electronic communication by
15 a person through the use of any electronic, mechan-
16 ical, or other device; and

17 “(9) the term ‘substance’ means any informa-
18 tion concerning the words, purport, or meaning of a
19 communication, and does not include information
20 identifying the sender, origin, or recipient of the
21 communication or the date or time of its trans-
22 mission.”.

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

4 Title VII of the Foreign Intelligence Surveillance Act
5 of 1978, as amended by section 3, is amended by adding
6 at the end the following:

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

10 “(a) IN GENERAL.—The Foreign Intelligence Sur-
11 veillance Court shall have jurisdiction to issue an order
12 under this title, lasting not longer than 45 days, that au-
13 thorizes an electronic surveillance program to obtain for-
14 eign intelligence information or to protect against inter-
15 national terrorism or clandestine intelligence activities.

16 “(b) REAUTHORIZATION.—In order to continue an
17 electronic surveillance program after the time period de-
18 scribed in subsection (a), the Attorney General shall sub-
19 mit a new application under section 703. There shall be
20 no limit on the number of times the Attorney General may
21 seek approval of an electronic surveillance program.

22 “(c) MODIFICATIONS AND APPEAL IN EAPPLI-
23 CATION IS DENIED.—

24 “(1) IN GENERAL.—In the event that the For-
25 eign Intelligence Surveillance Court refuses to ap-

1 prove an application under subsection (a), the court
2 shall state its reasons in a written opinion.

3 “(2) OPINION.—The court shall submit a writ-
4 ten opinion described in paragraph (1) to the Attor-
5 ney General and to each member of the congres-
6 sional intelligence committees (or any subcommittee
7 thereof designated for oversight of electronic surveil-
8 lance programs under this title).

9 “(3) RESUBMISSION OR APPEAL.—The Attor-
10 ney General shall be permitted to submit a new ap-
11 plication under section 703 for the electronic surveil-
12 lance program, reflecting modifications to address
13 the concerns set forth in the written opinion of the
14 Foreign Intelligence Surveillance Court. There shall
15 be no limit on the number of times the Attorney
16 General may seek approval of an electronic surveil-
17 lance program. Alternatively, the Attorney General
18 shall be permitted to appeal the decision of the For-
19 eign Intelligence Surveillance Court to the Foreign
20 Intelligence Surveillance Court of Review.

21 “(d) COMMUNICATIONS SUBJECT TO THIS TITLE.—

22 “(1) IN GENERAL.—The provisions of this title
23 requiring authorization by the Foreign Intelligence
24 Surveillance Court apply only to interception of the
25 substance of electronic communications sent by, re-

1 eeived by, or intended to be received by a person
2 who is in the United States, where there is a reason-
3 able possibility that a participant in the communica-
4 tion has a reasonable expectation of privacy.

5 “(2) EXCLUSION.—The provisions of this title
6 requiring authorization by the Foreign Intelligence
7 Surveillance Court do not apply to information iden-
8 tifying the sender, origin, or recipient of the elec-
9 tronic communication or the date or time of its
10 transmission that is obtained without review of the
11 substance of the electronic communication.

12 “(e) EXISTING PROGRAMS SUBJECT TO THIS
13 TITLE.—

14 “(1) IN GENERAL.—The Attorney General shall
15 submit an application to the Foreign Intelligence
16 Surveillance Court for any electronic surveillance
17 program to obtain foreign intelligence information or
18 to protect against international terrorism or clandestine
19 intelligence activities.

20 “(2) EXISTING PROGRAMS.—Not later than 45
21 days after the date of enactment of this title, the At-
22 torney General shall submit an application under
23 this title for approval of the electronic surveillance
24 program sometimes referred to as the ‘Terrorist
25 Surveillance Program’ and discussed by the Attorney

1 General before the Committee on the Judiciary of
2 the United States Senate on February 6, 2006. Not
3 later than 120 days after the date of enactment of
4 this title, the Attorney General shall submit applica-
5 tions under this title for approval of any other elec-
6 tronic surveillance program in existence on the date
7 of enactment of this title that has not been sub-
8 mitted to the Foreign Intelligence Surveillance
9 Court.”.

10 **SEC. 5. APPLICATIONS FOR APPROVAL OF ELECTRONIC**
11 **SURVEILLANCE PROGRAMS.**

12 Title VII of the Foreign Intelligence Surveillance Act
13 of 1978, as amended by section 4, is amended by adding
14 at the end the following:

15 **“SEC. 703. APPLICATIONS FOR APPROVAL OF ELECTRONIC**
16 **SURVEILLANCE PROGRAMS.**

17 “(a) IN GENERAL.—Each application for approval of
18 an electronic surveillance program under this title shall—

19 “(1) be made by the Attorney General;

20 “(2) include a statement of the authority con-
21 ferred on the Attorney General by the President of
22 the United States;

23 “(3) include a statement setting forth the legal
24 basis for the conclusion by the Attorney General
25 that the electronic surveillance program is consistent

1 with the requirements of the Constitution of the
2 United States;

3 “(4) certify that the information sought cannot
4 reasonably be obtained by conventional investigative
5 techniques or through an application under section
6 104;

7 “(5) include the name, if known, identity, or de-
8 scription of the foreign power or agent of a foreign
9 power seeking to commit an act of international ter-
10 rorism or clandestine intelligence activities against
11 the United States that the electronic surveillance
12 program seeks to monitor or detect;

13 “(6) include a statement of the means and
14 operational procedures by which the surveillance will
15 be executed and effected;

16 “(7) include a statement of the facts and cir-
17 cumstances relied upon by the Attorney General to
18 justify the belief that at least 1 of the participants
19 in the communications to be intercepted by the elec-
20 tronic surveillance program will be the foreign power
21 or agent of a foreign power that is specified under
22 paragraph (5), or a person who has had communica-
23 tion with the foreign power or agent of a foreign
24 power that is specified under paragraph (5), and is
25 seeking to commit an act of international terrorism

1 or clandestine intelligence activities against the
2 United States;

3 “(8) include a statement of the proposed mini-
4 mization procedures;

5 “(9) include a detailed description of the nature
6 of the information sought and the type of commu-
7 nication to be intercepted by the electronic surveil-
8 lance program;

9 “(10) include an estimate of the number of
10 communications to be intercepted by the electronic
11 surveillance program during the requested authoriza-
12 tion period;

13 “(11) specify the date that the electronic sur-
14 veillance program that is the subject of the applica-
15 tion was initiated, if it was initiated before submis-
16 sion of the application;

17 “(12) certify that any electronic surveillance of
18 a person in the United States under this title shall
19 cease 45 days after the date of the authorization,
20 unless the Government has obtained judicial author-
21 ization for continued surveillance of the person in
22 the United States under section 104 or another Fed-
23 eral statute;

24 “(13) include a statement of the facts con-
25 cerning all previous applications that have been

1 made to the Foreign Intelligence Surveillance Court
2 under this title involving the electronic surveillance
3 program in the application, including the minimiza-
4 tion procedures and the means and operational pro-
5 ceedures proposed, and the Foreign Intelligence Sur-
6 veillance Court's decision on each previous applica-
7 tion; and

8 “(14) include a statement of the facts con-
9 cerning the implementation of the electronic surveil-
10 lance program described in the application, includ-
11 ing, for any period of operation of the program au-
12 thorized at least 45 days prior to the date of submis-
13 sion of the application—

14 “(A) the minimization procedures imple-
15 mented;

16 “(B) the means and operational procedures
17 by which the surveillance was executed and ef-
18 feeted;

19 “(C) the number of communications sub-
20 jected to the electronic surveillance program;

21 “(D) the identity, if known, or a descrip-
22 tion of any United States person whose commu-
23 nications sent or received in the United States
24 were intercepted by the electronic surveillance
25 program; and

1 “(E) a description of the foreign intel-
2 ligence information obtained through the elec-
3 tronic surveillance program.

4 “(b) ADDITIONAL INFORMATION.—The Foreign In-
5 telligence Surveillance Court may require the Attorney
6 General to furnish such other information as may be nee-
7 ssary to make a determination under section 704.”.

8 **SEC. 6. APPROVAL OF ELECTRONIC SURVEILLANCE PRO-**
9 **GRAMS.**

10 Title VII of the Foreign Intelligence Surveillance Act
11 of 1978, as amended by section 5, is amended by adding
12 at the end the following:

13 **“SEC. 704. APPROVAL OF ELECTRONIC SURVEILLANCE**
14 **PROGRAMS.**

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

20 “(1) the President has authorized the Attorney
21 General to make the application for electronic sur-
22 veillance for foreign intelligence information;

23 “(2) approval of the electronic surveillance pro-
24 gram in the application is consistent with the duty

1 of the Foreign Intelligence Surveillance Court to up-
2 hold the Constitution of the United States;

3 “(3) there is probable cause to believe that the
4 electronic surveillance program will intercept com-
5 munications of the foreign power or agent of a for-
6 eign power specified in the application, or a person
7 who has had communication with the foreign power
8 or agent of a foreign power that is specified in the
9 application and is seeking to commit an act of inter-
10 national terrorism or clandestine intelligence activi-
11 ties against the United States;

12 “(4) the proposed minimization procedures
13 meet the definition of minimization procedures
14 under section 101(h);

15 “(5) the application contains all statements and
16 certifications required by section 703; and

17 “(6) an evaluation of the implementation of the
18 electronic surveillance program, as described in sub-
19 section (b), supports approval of the application.

20 **“(b) EVALUATION OF THE IMPLEMENTATION OF THE**
21 **ELECTRONIC SURVEILLANCE PROGRAM.**—In determining
22 whether the implementation of the electronic surveillance
23 program supports approval of the application for purposes
24 of subsection (a)(6), the Foreign Intelligence Surveillance
25 Court shall consider the performance of the electronic sur-

1 surveillance program for at least 3 previously authorized peri-
2 ods, to the extent such information is available, and
3 shall—

4 “(1) evaluate whether the electronic surveillance
5 program has been implemented in accordance with
6 the proposal by the Federal Government by com-
7 paring—

8 “(A) the minimization procedures proposed
9 with the minimization procedures implemented;
10 “(B) the nature of the information sought
11 with the nature of the information obtained;
12 and

13 “(C) the means and operational procedures
14 proposed with the means and operational proce-
15 dures implemented;

16 “(2) consider the number of communications
17 intercepted by the electronic surveillance program
18 and the length of time the electronic surveillance
19 program has been in existence; and

20 “(3) consider the effectiveness of the electronic
21 surveillance program, as reflected by the foreign in-
22 telligence information obtained.”.

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

2 Title VII of the Foreign Intelligence Surveillance Act
3 of 1978, as amended by section 6, is amended by adding
4 at the end the following:

5 **“SEC. 705. CONGRESSIONAL OVERSIGHT.**

6 “(a) **IN GENERAL.**—The President shall submit to
7 each member of the congressional intelligence committees
8 (or any subcommittee thereof designated for oversight of
9 electronic surveillance programs under this title) a report
10 on the management and operational details of the elec-
11 tronic surveillance program generally and on any specific,
12 surveillance conducted under the electronic surveillance
13 program whenever requested by either of the committees,
14 or any such subcommittee, as applicable.

15 “(b) **SEMI-ANNUAL REPORTS.**—

16 “(1) **IN GENERAL.**—In addition to any reports
17 required under subsection (a), the President shall,
18 not later than 6 months after the date of enactment
19 of this Act and every 6 months thereafter, fully in-
20 form each member of the congressional intelligence
21 committees (or any subcommittee thereof designated
22 for oversight of electronic surveillance programs
23 under this title) on all electronic surveillance con-
24 ducted under the electronic surveillance program.

25 “(2) **CONTENTS.**—Each report under para-
26 graph (1) shall include the following:

1 “(A) A complete discussion of the management,
2 operational details, effectiveness, and necessity of the electronic surveillance program
3 generally, and of the management, operational details, effectiveness, and necessity of all electronic
4 surveillance conducted under the program, during the 6-month period ending on the
5 date of such report.

6 “(B) The total number of targets of electronic surveillance commenced or continued
7 under the electronic surveillance program.

8 “(C) The total number of United States persons targeted for electronic surveillance under the electronic surveillance program.

9 “(D) The total number of targets of electronic surveillance under the electronic surveillance program for which an application was submitted under section 104 for an order under section 105 approving electronic surveillance; and, of such applications, the total number either granted, modified, or denied.

10 “(E) Any other information specified, in writing, to be included in such report by the congressional intelligence committees or any

1 subcommittees thereof designated for oversight
2 of the electronic surveillance program.

3 “(F) A description of the nature of the in-
4 formation sought under the electronic surveil-
5 lance program, the types of communications
6 subjected to such program, and whether the in-
7 formation sought under such program could be
8 reasonably obtained by less intrusive investiga-
9 tive techniques in a timely and effective man-
10 ner.

11 “(e) FORM OF REPORTS.—Any report or information
12 submitted under this section shall be submitted in classi-
13 fied form.”.

14 **SEC. 8. EMERGENCY AUTHORIZATION.**

15 Title VII of the Foreign Intelligence Surveillance Act
16 of 1978, as amended by section 6, is amended by adding
17 at the end the following:

18 **SEC. 706. EMERGENCY AUTHORIZATION.**

19 “Notwithstanding any other provision of law, the
20 President, through the Attorney General, may authorize
21 electronic surveillance without a court order under this
22 title to acquire foreign intelligence information for a pe-
23 riod not to exceed 45 days following a declaration of war
24 by Congress.”.

1 **SEC. 9. CONFORMING AMENDMENT.**

2 The table of contents for the Foreign Intelligence
 3 Surveillance Act of 1978 is amended by striking the items
 4 related to title VII and section 701 and inserting the fol-
 5 lowing:

“TITLE VII—ELECTRONIC SURVEILLANCE

“See. 701. Definitions

“See. 702. Foreign Intelligence Surveillance Court jurisdiction to review elec-
tronic surveillance programs

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

“See. 704. Approval of electronic surveillance programs

“See. 705. Congressional oversight

“See. 706. Emergency Authorization

“TITLE VIII—EFFECTIVE DATE

“See. 801. Effective date”.

6 **SECTION 1. SHORT TITLE.**

7 *This Act may be cited as the “National Security Sur-
8 veillance Act of 2006”.*

9 **SEC. 2. FINDINGS.**

10 *Congress finds the following:*

11 *(1) After the terrorist attacks of September 11,
12 2001, President Bush authorized the National Secu-
13 rity Agency to intercept communications between peo-
14 ple inside the United States, including American citi-
15 zens, and terrorism suspects overseas.*

16 *(2) One of the lessons learned from September
17 11, 2001, is that the enemies who seek to greatly harm
18 and terrorize our Nation utilize technologies and tech-
19 niques that defy conventional law enforcement prac-
20 tices.*

1 (3) *For days before September 11, 2001, the Federal*
2 *Bureau of Investigation suspected that confessed*
3 *terrorist Zacarias Moussaoui was planning to hijack*
4 *a commercial plane. The Federal Bureau of Investigation,*
5 *however, could not meet the requirements to ob-*
6 *tain a traditional criminal warrant or an order*
7 *under the Foreign Intelligence Surveillance Act of*
8 *1978 to search his laptop computer (Report of the 9/*
9 *11 Commission 273–76).*

10 (4) *The President, as the constitutional officer*
11 *most directly responsible for protecting the United*
12 *States from attack, requires the ability and means to*
13 *detect and track an enemy that can master and ex-*
14 *ploit modern technology.*

15 (5) *It is equally essential, however, that in pro-*
16 *tecting the United States against our enemies, the*
17 *President does not compromise the very civil liberties*
18 *that he seeks to safeguard. As Justice Hugo Black ob-*
19 *served, “The President’s power, if any, to issue [an]*
20 *order must stem either from an Act of Congress or*
21 *from the Constitution itself.” Youngstown Sheet &*
22 *Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (opin-*
23 *ion by Black, J.). Similarly, in 2004, Justice Sandra*
24 *Day O’Connor explained in her plurality opinion for*
25 *the Supreme Court in Hamdi v. Rumsfeld: “We have*

1 *long since made clear that a state of war is not a
2 blank check for the President when it comes to the
3 rights of the Nation's citizens.” Hamdi v. Rumsfeld,
4 542 U.S. 507, 536 (2004) (citations omitted).*

5 *(6) When deciding issues of national security, it
6 is in our Nation’s best interest that, to the extent fea-
7 sible, all 3 branches of the Federal Government should
8 be involved. This helps guarantee that electronic sur-
9 veillance programs do not infringe on the constitu-
10 tional rights of Americans, while at the same time en-
11 suring that the President has all the powers and
12 means necessary to detect and track our enemies and
13 protect our Nation from attack.*

14 *(7) As Justice Sandra Day O’Connor explained
15 in her plurality opinion for the Supreme Court in
16 Hamdi v. Rumsfeld, “Whatever power the United
17 States Constitution envisions for the Executive in its
18 exchanges with other nations or with enemy organiza-
19 tions in times of conflict, it most assuredly envisions
20 a role for all 3 branches when individual liberties are
21 at stake.” Hamdi v. Rumsfeld, 542 U.S. 507, 536
22 (2004) (citations omitted).*

23 *(8) Similarly, Justice Jackson famously ex-
24 plained in his Youngstown concurrence: “When the
25 President acts pursuant to an express or implied au-*

1 *thorization of Congress, his authority is at its max-*
2 *imum, for it includes all that he possesses in his own*
3 *right plus all that Congress can delegate... When the*
4 *President acts in absence of either a congressional*
5 *grant or denial of authority, he can only rely upon*
6 *his own independent powers, but there is a zone of*
7 *twilight in which he and Congress may have concur-*
8 *rent authority, or in which its distribution is uncer-*
9 *tain. Therefore, congressional inertia, indifference or*
10 *quiescence may sometimes, at least as a practical*
11 *matter, enable, if not invite, measures on independent*
12 *presidential responsibility... When the President takes*
13 *measures incompatible with the expressed or implied*
14 *will of Congress, his power is at its lowest ebb, for*
15 *then he can rely only upon his own constitutional*
16 *powers minus any constitutional powers of Congress*
17 *over the matter. Courts can sustain exclusive Presi-*
18 *dential control in such a case only by disabling the*
19 *Congress from acting upon the subject.” Youngstown*
20 *Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38*
21 *(1952) (Jackson, J., concurring).*

22 (9) *Congress clearly has the authority to enact*
23 *legislation with respect to electronic surveillance pro-*
24 *grams. The Constitution provides Congress with broad*
25 *powers of oversight over national security and foreign*

1 *policy, under article I, section 8 of the Constitution*
2 *of the United States, which confers on Congress nu-*
3 *merous powers, including the powers—*

- 4 (A) “*To declare War, grant Letters of*
5 *Marque and Reprisal, and make Rules con-*
6 *cerning Captures on Land and Water*”;
7 (B) “*To raise and support Armies*”;
8 (C) “*To provide and maintain a Navy*”;
9 (D) “*To make Rules for the Government*
10 *and Regulation of the land and naval Forces*”;
11 (E) “*To provide for calling forth the Militia*
12 *to execute the Laws of the Union, suppress In-*
13 *surrections and repel Invasions*”; and
14 (F) “*To provide for organizing, arming,*
15 *and disciplining the Militia, and for governing*
16 *such Part of them as may be employed in the*
17 *Service of the United States*”.

18 (10) *While Attorney General Alberto Gonzales ex-*
19 *plained that the executive branch reviews the elec-*
20 *tronic surveillance program of the National Security*
21 *Agency every 45 days to ensure that the program is*
22 *not overly broad, it is the belief of Congress that ap-*
23 *proval and supervision of electronic surveillance pro-*
24 *grams should be conducted outside of the executive*
25 *branch, by the article III court established under sec-*

1 *tion 103 of the Foreign Intelligence Surveillance Act*
2 *of 1978 (50 U.S.C. 1803). It is also the belief of Con-*
3 *gress that it is appropriate for an article III court to*
4 *pass upon the constitutionality of electronic surveil-*
5 *lance programs that may implicate the rights of*
6 *Americans.*

7 *(11) The Foreign Intelligence Surveillance Court*
8 *is the proper court to approve and supervise classified*
9 *electronic surveillance programs because it is adept at*
10 *maintaining the secrecy with which it was charged*
11 *and it possesses the requisite expertise and discretion*
12 *for adjudicating sensitive issues of national security.*

13 *(12) In 1975, [then] Attorney General Edward*
14 *Levi, a strong defender of executive authority, testified*
15 *that in times of conflict, the President needs the*
16 *power to conduct long-range electronic surveillance*
17 *and that a foreign intelligence surveillance court*
18 *should be empowered to issue special approval orders*
19 *in these circumstances.*

20 *(13) The Foreign Intelligence Surveillance Act of*
21 *1978 clarifies and definitively establishes that the*
22 *Foreign Intelligence Surveillance Court has the au-*
23 *thority to review electronic surveillance programs and*
24 *pass upon their constitutionality. Such authority is*

1 *consistent with well-established, longstanding practices.*

3 *(14) The Foreign Intelligence Surveillance Court
4 already has broad authority to approve surveillance
5 of members of international conspiracies, in addition
6 to granting warrants for surveillance of a particular
7 individual under sections 104, 105, and 402 of the
8 Foreign Intelligence Surveillance Act of 1978 (50
9 U.S.C. 1804, 1805, and 1842).*

10 *(15) Prosecutors have significant flexibility in
11 investigating domestic conspiracy cases. Courts have
12 held that flexible warrants comply with the 4th
13 amendment to the Constitution of the United States
14 when they relate to complex, far-reaching, and multi-
15 faceted criminal enterprises like drug conspiracies
16 and money laundering rings. The courts recognize
17 that applications for search warrants must be judged
18 in a common sense and realistic fashion, and the
19 courts permit broad warrant language where, due to
20 the nature and circumstances of the investigation and
21 the criminal organization, more precise descriptions
22 are not feasible.*

23 *(16) Federal agents investigating international
24 terrorism by foreign enemies are entitled to tools at
25 least as broad as those used by law enforcement offi-*

1 *cers investigating domestic crimes by United States*
2 *citizens. The Supreme Court, in the “Keith Case”,*
3 *United States v. United States District Court for the*
4 *Eastern District of Michigan, 407 U.S. 297 (1972),*
5 *recognized that the standards and procedures used to*
6 *fight ordinary crime may not be applicable to cases*
7 *involving national security. The Court recognized that*
8 *national “security surveillance may involve different*
9 *policy and practical considerations from the surveil-*
10 *lance of ordinary crime” and that courts should be*
11 *more flexible in issuing warrants in national security*
12 *cases. United States v. United States District Court*
13 *for the Eastern District of Michigan, 407 U.S. 297,*
14 *322 (1972).*

15 *(17) By authorizing the Foreign Intelligence*
16 *Surveillance Court to review electronic surveillance*
17 *programs, Congress preserves the ability of the Presi-*
18 *dent to use the necessary means to guard our national*
19 *security, while also protecting the civil liberties and*
20 *constitutional rights that we cherish.*

21 **SEC. 3. DEFINITIONS.**

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

24 *(1) by redesignating title VII as title IX;*

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

2 and

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

4 **“TITLE VII—ELECTRONIC
5 SURVEILLANCE”**

6 **“SEC. 701. DEFINITION.**

7 “As used in this title—

8 “(1) the terms ‘agent of a foreign power’, ‘Attor-
9 ney General’, ‘foreign power’, ‘international ter-
10 rorism’, ‘minimization procedures’, ‘person’, ‘United
11 States’, and ‘United States person’ have the same
12 meaning as in section 101;

13 “(2) the term ‘congressional intelligence commit-
14 tees’ means the Select Committee on Intelligence of the
15 Senate and the Permanent Select Committee on Intel-
16 ligence of the House of Representatives;

17 “(3) the term ‘electronic communication’ means
18 any transfer of signs, signals, writing, images,
19 sounds, data, or intelligence of any nature trans-
20 mitted, in whole or in part, by a wire, radio, electro-
21 magnetic, photo electronic or photo optical system,
22 cable, or other like connection furnished or operated
23 by any person engaged as a common carrier in pro-
24 viding or operating such facilities for the trans-
25 mission of communications;

1 “(4) the term ‘electronic tracking’ means the ac-
2 quisition by an electronic, mechanical, or other sur-
3 veillance device of the substance of any electronic com-
4 munication sent by, received by, or intended to be re-
5 ceived by a person who is reasonably believed to be
6 in the United States, through the intentional tar-
7 geting of that person’s communications, where a per-
8 son in the United States participating in the commu-
9 nication has a reasonable expectation of privacy;

10 “(5) the term ‘electronic surveillance program’
11 means a program to engage in electronic tracking—
12 “(A) that has as a significant purpose the
13 gathering of foreign intelligence information or
14 protecting against international terrorism;

15 “(B) where it is not technically feasible to
16 name every person or address every location to
17 be subjected to electronic tracking;

18 “(C) where effective gathering of foreign in-
19 telligence information requires the flexibility to
20 begin electronic surveillance immediately after
21 learning of suspect activity; and

22 “(D) where effective gathering of foreign in-
23 telligence information requires an extended pe-
24 riod of electronic surveillance;

1 “(6) the term ‘foreign intelligence information’
2 has the same meaning as in section 101 and includes
3 information necessary to protect against inter-
4 national terrorism;

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

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

11 “(9) the term ‘intercept’ means the acquisition of
12 the substance of any electronic communication by a
13 person through the use of any electronic, mechanical,
14 or other device; and

15 “(10) the term ‘substance’ means any informa-
16 tion concerning the symbols, sounds, words, purport,
17 or meaning of a communication, and does not include
18 dialing, routing, addressing, or signaling.”.

19 SEC. 4. FOREIGN INTELLIGENCE SURVEILLANCE COURT JU-
20 *RISDICTION TO REVIEW ELECTRONIC SUR-*
21 *VEILLANCE PROGRAMS.*

22 (a) *IN GENERAL.*—Title VII of the Foreign Intelligence
23 Surveillance Act of 1978, as amended by section 3, is
24 amended by adding at the end the following:

1 **“SEC. 702. FOREIGN INTELLIGENCE SURVEILLANCE COURT**2 **JURISDICTION TO REVIEW ELECTRONIC SUR-**
3 **VEILLANCE PROGRAMS.**4 “(a) *AUTHORIZATION OF REVIEW.*—5 “(1) *INITIAL AUTHORIZATION.*—*The Foreign In-*
6 *telligence Surveillance Court shall have jurisdiction to*
7 *issue an order under this title, lasting not longer than*
8 *90 days, that authorizes an electronic surveillance*
9 *program to obtain foreign intelligence information or*
10 *to protect against international terrorism.*11 “(2) *REAUTHORIZATION.*—*The Foreign Intel-*
12 *ligence Surveillance Court shall have jurisdiction to*
13 *reauthorize an electronic surveillance program for a*
14 *period of time not longer than such court determines*
15 *to be reasonable.*16 “(3) *RESUBMISSION OR APPEAL.*—*In the event*
17 *that the Foreign Intelligence Surveillance Court re-*
18 *fuses to approve an application under this subsection,*
19 *the Attorney General may submit a new application.*
20 *There shall be no limit on the number of times the At-*
21 *torney General may seek approval of an electronic*
22 *surveillance program. Alternatively, the Attorney*
23 *General may appeal the decision of the Foreign Intel-*
24 *ligence Surveillance Court to the Foreign Intelligence*
25 *Surveillance Court of Review.*26 “(b) *MANDATORY TRANSFER FOR REVIEW.*—

1 “(1) *IN GENERAL.*—*In any case before any court*
2 *challenging the legality of classified communications*
3 *intelligence activity relating to a foreign threat, includ-*
4 *ing an electronic surveillance program, or in*
5 *which the legality of any such activity or program is*
6 *in issue, if the Attorney General files an affidavit*
7 *under oath that the case should be transferred to the*
8 *Foreign Intelligence Court of Review because further*
9 *proceedings in the originating court would harm the*
10 *national security of the United States, the originating*
11 *court shall transfer the case to the Foreign Intel-*
12 *ligence Surveillance Court of Review for further pro-*
13 *ceedings under this subsection.*

14 “(2) *RETRANSFER TO ORIGINATING COURT.*—
15 *Upon completion of review pursuant to this sub-*
16 *section, the Foreign Intelligence Surveillance Court of*
17 *Review shall remand the case to the originating court*
18 *for further proceedings consistent with its opinion.*

19 “(3) *PRESERVATION OF LITIGATION.*—*In any*
20 *case that is transferred and received under this sub-*
21 *section, all litigation privileges shall be preserved.*

22 “(4) *CERTIORARI AND EFFECTS OF DECISIONS.*—
23 *The decision the Foreign Intelligence Surveillance*
24 *Court of Review made under paragraph (1), includ-*
25 *ing a decision that the disclosure of national security*

1 *information is constitutionally required, shall be sub-*
2 *ject to certiorari review in the United States Supreme*
3 *Court, and shall otherwise be binding in all other*
4 *courts.*

5 “(5) *DISMISSAL*.—The Foreign Intelligence Sur-
6 veillance Court of Review or a court that is an origi-
7 nating court under paragraph (1) may dismiss a
8 challenge to the legality of an electronic surveillance
9 program for any reason provided for under law.

“(c) MODIFICATIONS AND APPEAL IN EVENT APPLICA-
TION IS DENIED.—In the event that the Foreign Intelligence
Surveillance Court declines to approve an application
under subsection (a)—

14 “(1) the court shall state its reasons in a written
15 opinion, which it shall submit to the Attorney Gen-
16 eral; and

17 “(2) the Attorney General may submit a new ap-
18 plication under section 703 for the electronic surveil-
19 lance program.”.

20 SEC. 5. APPLICATIONS FOR APPROVAL OF ELECTRONIC
21 SURVEILLANCE PROGRAMS.

22 *Title VII of the Foreign Intelligence Surveillance Act*
23 *of 1978, as amended by section 4, is amended by adding*
24 *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 des-
7 ignee;

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

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

15 “(4) certify that a significant purpose of the elec-
16 tronic surveillance program is to gather foreign intel-
17 ligence 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 oper-
23 ational procedures by which the electronic tracking
24 will be executed and effected;

25 “(7) include an explanation of how the electronic
26 surveillance program is reasonably designed to ensure

1 *that the communications that are intercepted are*
2 *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 en-*
7 *gaged in international terrorism activities or in*
8 *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 an*
13 *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 is*
19 *the subject of the application was initiated prior to*
20 *the date the application was submitted, specify the*
21 *date that the program was initiated;*

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

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

3 “(11) include a statement of facts concerning the
4 implementation of the electronic surveillance program
5 described in the application, including, for any pe-
6 riod of operation of the program authorized not less
7 than 90 days prior to the date of submission of the
8 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 Intel-*
15 *ligence Surveillance Court may require the Attorney Gen-*
16 *eral to furnish such other information as may be necessary*
17 *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 adding*
22 *at the end the following:*

1 **“SEC. 704. APPROVAL OF ELECTRONIC SURVEILLANCE PRO-**2 **GRAMS.**

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 surveil-
10 lance for foreign intelligence information or to protect
11 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 with—

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

21 “(B) an agent of a foreign power that is en-
22 gaged in international terrorism activities or in
23 preparation therefor; or

24 “(C) a person reasonably believed to have
25 communication with or be associated with a for-
26 eign power that is engaged in international ter-

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

5 “(4) *the proposed minimization procedures meet
6 the definition of minimization procedures under sec-
7 tion 101(h); and*

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

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

14 “(1) *whether the electronic surveillance program
15 has been implemented in accordance with the pro-
16 posal by the Attorney General by comparing—*

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

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

23 “(C) *the means and operational procedures
24 proposed with the means and operational proce-
25 dures actually implemented; and*

1 “(2) whether foreign intelligence information has
2 been obtained through the electronic surveillance pro-
3 gram.

4 “(c) CONTENTS OF ORDER.—An order approving an
5 electronic surveillance program under this section shall di-
6 rect—

7 “(1) that the minimization procedures be fol-
8 lowed;

9 “(2) that, upon the request of the applicant,
10 specified communication or other common carriers,
11 landlords, custodians, or other specified person, fur-
12 nish the applicant forthwith with all information, fa-
13 cilities, or technical assistance necessary to undertake
14 the electronic surveillance program in such a manner
15 as will protect its secrecy and produce a minimum of
16 interference with the services that such carriers, land-
17 lords, custodians, or other persons are providing po-
18 tential targets of the electronic surveillance program;

19 “(3) that any record concerning the electronic
20 surveillance program or the aid furnished or retained
21 by such carriers, landlords, custodians, or other per-
22 sons are maintained under security procedures ap-
23 proved by the Attorney General and the Director of
24 National Intelligence; and

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

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

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

8 **“SEC. 705. CONGRESSIONAL OVERSIGHT.**

9 “(a) *IN GENERAL.*—Not less often than every 180 days,
10 the Attorney General shall submit to the congressional intel-
11 ligence committees a report in classified form on the activi-
12 ties during the previous 180-day period under any elec-
13 tronic surveillance program authorized under this title.

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

17 “(1) the minimization procedures implemented;
18 “(2) the means and operational procedures by
19 which the surveillance was executed and effected;

20 “(3) significant decisions of the Foreign Intel-
21 ligence Surveillance Court on applications made
22 under section 703;

23 “(4) the total number of applications made for
24 orders approving electronic surveillance pursuant to
25 this title; and

1 “(5) the total number of orders applied for that
2 are granted, modified, or denied.

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

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

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

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

16 "SEC. 801. EXECUTIVE AUTHORITY.

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

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

24 (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 paragraph*
12 *and inserting “that is authorized under a Fed-*
13 *eral statute or the Constitution of the United*
14 *States.”*

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

(iii) by adding at the end the following:

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

12 (B) in subsection (c)—

(ii) by striking “five years” and inserting “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)—

(A) in subparagraph (B), by striking “or” 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 be
12 in the United States by intentionally targeting that
13 person under circumstances in which that person has
14 a reasonable expectation of privacy and a warrant
15 would be required for law enforcement purposes; or

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

22 (3) in subsection (g), by inserting before the pe-
23 riod the following: “or a person or persons designated
24 by the Attorney General or Acting Attorney General”;

25 (4) in subsection (h)—

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

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

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

6 (5) by striking subsection (n) and inserting the
7 following:

8 “(n) ‘contents’ has the meaning set forth in section
9 2510(8) of title 18, United States Code.”.

10 (c) ELECTRONIC SURVEILLANCE AUTHORIZATION.—
11 Section 102 of FISA (50 U.S.C. 1802) is amended to read
12 as follows:

13 “ELECTRONIC SURVEILLANCE AUTHORIZATION WITHOUT
14 COURT ORDER; CERTIFICATION BY ATTORNEY GEN-
15 ERAL; REPORTS TO CONGRESSIONAL COMMITTEES;
16 TRANSMITTAL UNDER SEAL; DUTIES AND COMPENSA-
17 TION OF COMMUNICATION COMMON CARRIER; APPLICA-
18 TIONS; JURISDICTION OF COURT

19 “SEC. 102. (a)(1) Notwithstanding any other law, the
20 President through the Attorney General, may authorize elec-
21 tronic surveillance without a court order under this title
22 to acquire foreign intelligence information for periods of up
23 to 1 year if the Attorney General certifies in writing under
24 oath that—

25 “(A)(i) the acquisition of the contents of commu-
26 nications of foreign powers, as defined in section

1 *101(a), an agent of a foreign power as defined in sec-*
2 *tion 101(b)(1); or*

3 *"(ii) the acquisition of technical intelligence,*
4 *other than the spoken communications of individuals,*
5 *from property or premises under the open and exclu-*
6 *sive control of a foreign power, as defined in para-*
7 *graph (1), (2), or (3) of section 101(a); and*

8 *"(B) the proposed minimization procedures with*
9 *respect to such surveillance meet the definition of*
10 *minimization procedures under section 101(h);*

11 *if the Attorney General reports such minimization pro-*
12 *cedures and any changes thereto to the Senate Select Com-*
13 *mittee on Intelligence and the House Permanent Select*
14 *Committee on Intelligence at least 30 days prior to their*
15 *effective date, unless the Attorney General determines imme-*
16 *diate action is required and notifies the committees imme-*
17 *diately of such minimization procedures and the reason for*
18 *their becoming effective immediately.*

19 *"(2) An electronic surveillance authorized by this sub-*
20 *section may be conducted only in accordance with the Attor-*
21 *ney General's certification and the minimization pro-*
22 *cedures. The Attorney General shall assess compliance with*
23 *such procedures and shall report such assessments to the*
24 *Senate Select Committee on Intelligence and the House Per-*

1 manent Select Committee on Intelligence under the provi-
2 sions of section 108(a).

3 “(3) The Attorney General shall immediately transmit
4 under seal to the court established under section 103(a) a
5 copy of his certification. Such certification shall be main-
6 tained under security measures established by the Chief Jus-
7 tice with the concurrence of the Attorney General, in con-
8 sultation with the Director of National Intelligence, and
9 shall remain sealed unless—

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

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

15 “(b) The Attorney General is also authorized to deliver
16 to a provider of any electronic communication service, land-
17 lord, custodian, or other person (including any officer, em-
18 ployee, agent, or other specified person thereof) who has ac-
19 cess to electronic communications, either as they are trans-
20 mitted or while they are stored, or equipment that is being
21 or may be used to transmit or store such communications,
22 a certificate requiring that such person or persons furnish
23 any information, facilities, or technical assistance to an of-
24 ficial authorized by the President to engage in electronic
25 surveillance for foreign intelligence purposes, for periods of

1 up to 1 year if the Attorney General certifies in writing
2 to the carrier under oath that such provision of informa-
3 tion, facilities, or technical assistance does not constitute
4 electronic surveillance as defined in section 101(f).

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

15 “(1) furnish all information, facilities, or tech-
16 nical assistance necessary to accomplish the electronic
17 surveillance in such a manner as will protect its se-
18 crecy and produce a minimum of interference with
19 the services that such provider of any electronic com-
20 munication service, landlord, custodian, or other per-
21 son is providing its customers; and

22 “(2) maintain under security procedures ap-
23 proved by the Attorney General and the Director of
24 National Intelligence any records concerning the sur-
25 veillance or the aid furnished which such provider of

1 *any electronic communication service, landlord, custo-*
2 *dian, or other person wishes to retain.*

3 *The Government shall compensate, at the prevailing rate,*
4 *such provider of any electronic communication service,*
5 *landlord, custodian, or other person for furnishing such aid.*

6 “(d) *Electronic surveillance directed solely at the col-*
7 *lection of international radio communications of diplomatic-*
8 *cally immune persons in the United States may be author-*
9 *ized by an official authorized by the President to engage*
10 *in electronic surveillance for foreign intelligence purposes*
11 *in accordance with procedures approved by the Attorney*
12 *General.”.*

13 (d) *DESIGNATION OF JUDGES.*—Section 103 of FISA
14 (50 U.S.C. 1803) is amended in subsection (a), by inserting,
15 “at least” before “seven of the United States Judiciary”.

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

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

20 “(6) a certification or certifications by the As-
21 sistant to the President for National Security Affairs
22 or an executive branch official authorized by the
23 President to conduct electronic surveillance for foreign
24 intelligence purposes—

1 “(A) that the certifying official deems the
2 information sought to be foreign intelligence in-
3 formation;

4 “(B) that a significant purpose of the sur-
5 veillance is to obtain foreign intelligence infor-
6 mation;

7 “(C) that such information cannot reason-
8 ably be obtained by normal investigative tech-
9 niques; and

10 “(D) including a statement of the basis for
11 the certification that—

12 “(i) the information sought is the type
13 of foreign intelligence information des-
14 ignated; and

15 “(ii) such information cannot reason-
16 ably be obtained by normal investigative
17 techniques; and

18 “(7) a statement of the period of time for which
19 the electronic surveillance is required to be main-
20 tained, and if the nature of the intelligence gathering
21 is such that the approval of the use of electronic sur-
22 veillance under this title should not automatically ter-
23 minate when the described type of information has
24 first been obtained, a description of facts supporting

1 *the belief that additional information of the same*
2 *type will be obtained thereafter.”;*

3 (2) by striking subsection (b); and
4 (3) by redesignating subsections (c) through (e)
5 *as subsections (b) through (d), respectively.*

6 (f) *ISSUANCE OF ORDER.—Section 105 of FISA (50*

7 *U.S.C. 1805) is amended—*

8 (1) *in subsection (a), by—*

9 (A) *striking paragraph (1); and*
10 (B) *redesignating paragraphs (2) through*
11 *(5) as paragraphs (1) through (4), respectively;*
12 (2) *by striking paragraph (1) of subsection (c)*
13 *and inserting the following:*

14 “(1) *An order approving an electronic surveillance*
15 *under this section shall specify—*

16 “(A) *the identity, if known, or a description of*
17 *the specific target of the electronic surveillance identi-*
18 *fied or described in the application pursuant to sec-*
19 *tion 104(a)(3);*

20 “(B) *the nature and location of each of the facili-*
21 *ties or places at which the electronic surveillance will*
22 *be directed, if known; and*

23 “(C) *the period of time during which the elec-*
24 *tronic surveillance is approved.”;*

1 (3) by striking subsection (d) and inserting the
2 following:

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

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

8 “(1) An order issued under this section may approve
9 an electronic surveillance may be for a period not to exceed
10 1 year. If such emergency employment of electronic surveil-
11 lance is authorized, the official authorizing the emergency
12 employment of electronic surveillance shall require that the
13 minimization procedures required by this title for the
14 issuance of a judicial order be followed.

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

20 (5) by striking subsection (f) and inserting the
21 following:

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

1 “(A) an emergency situation exists with respect
2 to the employment of electronic surveillance to obtain
3 foreign intelligence information before an order au-
4 thorizing such surveillance can with due diligence be
5 obtained; and

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

10 “(2) Under paragraph (1), the following requirements
11 shall be satisfied:

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

14 “(B) A judge having jurisdiction under section
15 103 shall be informed by the Attorney General or his
16 designee as soon as practicable following such author-
17 ization that the decision has been made to employ
18 emergency electronic surveillance.

19 “(C) An application in accordance with this title
20 shall be made to that judge or another judge having
21 jurisdiction under section 103 as soon as practicable,
22 but not more than 7 days after such surveillance is
23 authorized. In the absence of a judicial order approv-
24 ing such electronic surveillance, the surveillance shall
25 terminate when the information sought is obtained,

1 when the application for the order is denied, or after
2 the expiration of 7 days from the time of emergency
3 authorization, whichever is earliest. In the event that
4 such application for approval is denied, or in any
5 other case where the electronic surveillance is termi-
6 nated and no order is issued approving the surveil-
7 lance, no information obtained or evidence derived
8 from such surveillance shall be received in evidence or
9 otherwise disclosed in any trial, hearing, or other pro-
10 ceeding in or before any court, grand jury, depart-
11 ment, office, agency, regulatory body, legislative com-
12 mittee, or other authority of the United States, a
13 State, or political subdivision thereof, and no infor-
14 mation concerning any United States person acquired
15 from such surveillance shall subsequently be used or
16 disclosed in any other manner by Federal officers or
17 employees without the consent of such person, except
18 with the approval of the Attorney General if the in-
19 formation indicates a threat of death or serious bodily
20 harm to any person. A denial of the application made
21 under this subsection may be reviewed as provided in
22 section 103.”; and

23 (6) in subsection (i) by—

24 (A) striking “a wire or” and inserting
25 “any”;

1 (B) striking “chapter” and inserting
2 “title”; and

3 (C) by adding at the end “, or in response
4 to certification by the Attorney General or his
5 designee seeking information, facilities, or tech-
6 nical assistance from such person that does not
7 constitute electronic surveillance as defined in
8 section 101(f)”.

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

11 (1) in subsection (i), by—

12 (A) deleting “radio”; and
13 (B) inserting “Attorney General determines
14 that the content” after “contain significant for-
15 eign intelligence or”; and

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

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

21 “(c) DOCUMENT MANAGEMENT SYSTEM FOR APPLICA-
22 TIONS FOR ORDERS APPROVING ELECTRONIC SURVEIL-
23 LANCE.—

24 “(1) SYSTEM PROPOSED.—The Attorney General
25 and Director of National Intelligence shall, in con-

1 sultation with the Director of the Federal Bureau of
2 Investigation, the Director of the National Security
3 Agency, the Director of the Central Intelligence Agen-
4 cy, and the Foreign Intelligence Surveillance Court,
5 conduct a feasibility study to develop and implement
6 a secure, classified document management system that
7 permits the prompt preparation, modification, and
8 review by appropriate personnel of the Department of
9 Justice, the Federal Bureau of Investigation, the Na-
10 tional Security Agency, and other applicable elements
11 of the United States Government of applications
12 under section 104 before their submittal to the For-
13 eign Intelligence Surveillance Court.

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

16 “(A) permit and facilitate the prompt sub-
17 mittal of applications and all other matters, in-
18 cluding electronic filings, to the Foreign Intel-
19 ligence Surveillance Court under section 104 or
20 105(g)(5); and

21 “(B) permit and facilitate the prompt
22 transmittal of rulings of the Foreign Intelligence
23 Surveillance Court to personnel submitting ap-
24 plications described in paragraph (1).”.

1 (i) *CRIMINAL SANCTIONS.*—Section 109 of FISA (50
2 U.S.C. 1809) is amended by striking subsection (a) and in-
3 serting the following:

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

6 “(1) engages in electronic surveillance, as defined
7 in section 101(f), under color of law except as author-
8 ized by law; or

9 “(2) discloses or uses information obtained under
10 color of law by electronic surveillance, knowing or
11 having reason to know that the information was ob-
12 tained through electronic surveillance not authorized
13 by law.”.

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

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

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

21 “(5) ‘Physical search’ means any physical intru-
22 sion within the United States into premises or prop-
23 erty (including examination of the interior of prop-
24 erty by technical means) that is intended to result in
25 a seizure, reproduction, inspection, or alteration of

1 *information, material, or property, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, but does not include activities conducted in accordance with sections 102 or 105.”;*

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

9 *“(a) A person is guilty of an offense if he intentionally—*

11 *“(1) under color of law for the purpose of obtaining foreign intelligence information, executes a physical search within the United States except as authorized by statute or under the Constitution; or*

15 *“(2) discloses or uses information obtained under color of law by physical search within the United States, knowing or having reason to know that the information was obtained through physical search not authorized by statute or the Constitution.”; and*

20 *(3) by striking section 309.*

21 **SEC. 10. CONFORMING AMENDMENT TO TABLE OF CONTENTS.**

23 *The table of contents for the Foreign Intelligence Surveillance Act of 1978 is amended by striking the items re-*

1 lated to title VII and section 701 and inserting the fol-
2 lowing:

“TITLE VII—ELECTRONIC SURVEILLANCE

- “Sec. 701. Definition.
- “Sec. 702. Foreign intelligence surveillance court jurisdiction to review electronic 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.”.

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A BILL

To establish procedures for the review of electronic
surveillance programs.

SEPTEMBER 13, 2006

Reported with an amendment