To update the Foreign Intelligence Surveillance Act of 1978.

IN THE HOUSE OF REPRESENTATIVES

JULY 18, 2006

Mrs. Wilson of New Mexico (for herself, Mr. Sensenbrenner, Mr. Hoekstra, Mr. Renzi, Mrs. Johnson of Connecticut, Mr. Everett, Mr. Thornberry, Mr. Rogers of Michigan, Mr. GALLEGLY, and Mr. Issa) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Select Committee on Intelligence (Permanent Select), for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

A BILL

To update the Foreign Intelligence Surveillance Act of 1978.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Electronic Surveillance Modernization Act”.

SEC. 2. FISA DEFINITIONS.

(a) AGENT OF A FOREIGN POWER.—Subsection (b)(1) of section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801) is amended—
(1) in subparagraph (B), by striking ‘‘; or’’ and inserting ‘‘;’’; and

(2) by adding at the end the following new sub-
paragraph:

“(D) possesses or is reasonably expected to
transmit or receive foreign intelligence informa-
tion while in the United States; or’’.

(b) ELECTRONIC SURVEILLANCE.—Subsection (f) of
such section is amended to read as follows:

“(f) ‘Electronic surveillance’ means—

“(1) the installation or use of a surveillance de-
vice for the intentional collection of information re-
lating to a person who is reasonably believed to be
in the United States by intentionally targeting that
person, under circumstances in which the person has
a reasonable expectation of privacy and a warrant
would be required for law enforcement purposes; or

“(2) the intentional acquisition of the contents
of any communication, without the consent of a
party to the communication, under circumstances in
which a person has a reasonable expectation of pri-
vacy and a warrant would be required for law en-
forcement purposes, if both the sender and all in-
tended recipients are located within the United
States.”.
(c) MINIMIZATION PROCEDURES.—Subsection (h) of such section is amended—

(1) in paragraph (2), by striking “importance;” and inserting “importance; and”; 

(2) in paragraph (3), by striking “; and” and inserting “.”; and 

(3) by striking paragraph (4).

(d) WIRE COMMUNICATION AND SURVEILLANCE DEVICE.—Subsection (l) of such section is amended to read as follows:

“(l) ‘Surveillance device’ is a device that allows surveillance by the Federal Government, but excludes any device that extracts or analyzes information from data that has already been acquired by the Federal Government by lawful means.”.

(e) PHYSICAL SEARCH.—Section 301(5) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1821(5)) is amended by striking “Act, or (B)” and inserting “Act, (B) activities described in section 102(b) of this Act, or (C)”.

SEC. 3. AUTHORIZATION FOR ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE PURPOSES.

Section 102 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1802) is amended—

(1) in subsection (a)(1)—
(A) in subparagraph (A)—

(i) in clause (i), by striking “transmitted by means of” and all that follows and inserting “of a foreign power, as defined in paragraph (1), (2), or (3) of section 101(a), or an agent of a foreign power, as defined in section 101(b)(1); or”;

and

(ii) in clause (ii), by striking “or (3);” and inserting “or (3); and”;

(B) by striking subparagraph (B); and

(C) by redesignating subparagraph (C) as subparagraph (B);

(2) by striking subsection (a)(4);

(3) in subsection (b), to read as follows:

“(b)(1) The Attorney General may require, by written certification, any person with authorized access to electronic communications or equipment used to transmit or store electronic communications to provide information, facilities, or technical assistance—

“(A) necessary to accomplish electronic surveillance authorized under subsection (a); or

“(B) to an official designated by the President for a period of up to one year, provided the Attorney General certifies in writing, under oath, that the
provision of the information, facilities, or technical assistance does not constitute electronic surveillance.

“(2) The Attorney General may require a person providing information, facilities, or technical assistance under paragraph (1) to—

“(A) provide the information, facilities, or technical assistance in such a manner as will protect the secrecy of the provision of such information, facilities, or technical assistance and produce a minimum of interference with the services that such person is providing the customers of such person; and

“(B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning such electronic surveillance or the information, facilities, or technical assistance provided which such person wishes to retain.

“(3) The Government shall compensate, at the prevailing rate, a person for providing information, facilities, or technical assistance pursuant to paragraph (1).”; and

(4) by adding at the end the following new subsection:

“(e) Notwithstanding any other provision of law, the President may designate an official who may authorize electronic surveillance of international radio communica-
tions of a diplomat or diplomatic mission or post of the
government of a foreign country in the United States in
accordance with procedures approved by the Attorney
General.”.

SEC. 4. APPLICATIONS FOR COURT ORDERS.

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

(1) in subsection (a)—

(A) by striking paragraphs (6), (9), and
(11);

(B) by redesignating paragraphs (7), (8),
and (10) as paragraphs (6), (7), and (8), re-
spectively;

(C) in paragraph (6), as redesignated by
subparagraph (B)—

(i) in the matter preceding subpara-
graph (A), by striking “or officials des-
ignated” and all that follows through “con-
sent of the Senate” and inserting “des-
ignated by the President to authorize elec-
tronic surveillance for foreign intelligence
purposes”;

(ii) in subparagraph (C), by striking
“techniques;” and inserting “techniques;
and”;

•HR 5825 IH
(iii) by striking subparagraphs (D) and (E) and inserting the following:

“(D) including a statement of the basis for the certification that the information sought is the type of foreign intelligence information designated;”;

(D) in paragraph (7), as redesignated by subparagraph (B)—

(i) by striking “a statement of the means by which the surveillance will be ef-fected and”; and

(ii) by adding “and” at the end; and

(E) in paragraph (8), as redesignated by subparagraph (B), by striking “; and” and in-serting a period;

(2) by striking subsection (b); and

(3) by redesignating subsections (c), (d), and (e) as subsections (b), (c), and (d), respectively.

SEC. 5. ISSUANCE OF AN ORDER.

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

(1) in subsection (a)—

(A) by striking paragraph (1); and
(B) by redesignating paragraphs (2), (3), (4), and (5) as paragraphs (1), (2), (3), and (4), respectively;

(2) in subsection (c)(1)—

(A) in subparagraph (B), by striking “known;” and inserting “known; and”;

(B) by striking subparagraphs (C), (D), and (F);

(C) by redesignating subparagraph (E) as subparagraph (C); and

(D) in subparagraph (C), as redesignated by subparagraph (C), by striking “approved; and” and inserting “approved.”;

(3) by striking subsection (d);

(4) by redesignating subsections (e), (f), (g), (h), and (i) as subsections (d), (e), (f), (g), and (h), respectively;

(5) in subsection (d), as redesignated by paragraph (4)—

(A) in paragraph (1), by striking “for the period necessary” and all that follows and insert “for a period not to exceed one year.”; and

(B) in paragraph (2), by striking “original order, except that” and all that follows and in-
serting “original order for a period not to exceed one year.”;

(6) in subsection (e), as redesignated by paragraph (4), to read as follows:

“(e) Notwithstanding any other provision of this title, the Attorney General may authorize the emergency employment of electronic surveillance if the Attorney General—

“(1) determines that an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained;

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

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

“(4) makes an application in accordance with this title to a judge having jurisdiction under section 103 as soon as practicable, but not more than 120 hours after the official authorizes such surveillance.
If the Attorney General authorizes such emergency employment of electronic surveillance, the Attorney General shall require that the minimization procedures required by this title for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 120 hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. A denial of the application
made under this subsection may be reviewed as provided in section 103.”; and

(7) in subsection (h), as redesignated by paragraph (4)—

(A) by striking “in accordance with a court order” and all that follows and inserting “—”; and

(B) by adding at the end the following new paragraphs:

“(1) in accordance with a court order or request for emergency assistance under this Act for electronic surveillance or physical search; or

“(2) in response to a certification by the Attorney General or a designee of the Attorney General seeking information, facilities, or technical assistance from such person that does not constitute electronic surveillance.”.

SEC. 6. USE OF INFORMATION.

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

(1) by striking “radio communication” and inserting “communication”; and

(2) by striking “contents indicates” and inserting “contents contain significant foreign intelligence information or indicate”.

•HR 5825 IH
SEC. 7. AUTHORIZATION AFTER AN ARMED ATTACK.

(a) ELECTRONIC SURVEILLANCE.—Section 111 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1811) is amended by striking “for a period not to exceed” and all that follows and inserting the following: “for a period not to exceed 60 days following an armed attack against the territory of the United States if the President submits to each member of the congressional intelligence committee notification of the authorization under this section.”.

(b) PHYSICAL SEARCH.—Section 309 of such Act (50 U.S.C. 1829) is amended by striking “for a period not to exceed” and all that follows and inserting the following: “for a period not to exceed 60 days following an armed attack against the territory of the United States if the President submits to each member of the congressional intelligence committee notification of the authorization under this section.”.

SEC. 8. AUTHORIZATION OF ELECTRONIC SURVEILLANCE AFTER A TERRORIST ATTACK.

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

(1) by adding at the end of title I the following new section:
“AUTHORIZATION FOLLOWING A TERRORIST ATTACK
UPON THE UNITED STATES

“Sec. 112. (a) In General.—Notwithstanding any other provision of law, but subject to subsection (d), the President, acting through the Attorney General, may authorize electronic surveillance without an order under this title to acquire foreign intelligence information for a period not to exceed 45 days following a terrorist attack against the United States if the President submits a notification to each member of the congressional intelligence committees and a judge having jurisdiction under section 103 that—

“(1) the United States has been the subject of a terrorist attack; and

“(2) identifies the terrorist organizations or affiliates of terrorist organizations believed to be responsible for the terrorist attack.

“(b) Subsequent Certifications.—Subject to subsection (d), at the end of the 45-day period described in subsection (a), and every 45 days thereafter, the President may submit a subsequent certification to each member of the congressional intelligence committees and a judge having jurisdiction under section 103 that the circumstances of the terrorist attack for which the President submitted a certification under subsection (a) require the
President to continue the authorization of electronic surveillance under this section for an additional 45 days. The President shall be authorized to conduct electronic surveillance under this section for an additional 45 days after each such subsequent certification.

“(c) Electronic Surveillance of Individuals.—The President, or an official designated by the President to authorize electronic surveillance, may only conduct electronic surveillance of a person under this subsection when the President or such official determines that—

“(1) there is a reasonable belief that such person is communicating with a terrorist organization or an affiliate of a terrorist organization that is reasonably believed to be responsible for the terrorist attack; and

“(2) the information obtained from the electronic surveillance may be foreign intelligence information.

“(d) Minimization Procedures.—The President may not authorize electronic surveillance under this section until the Attorney General approves minimization procedures for electronic surveillance conducted under this section.
“(e) UNITED STATES PERSONS.—Notwithstanding subsection (b), the President may not authorize electronic surveillance of a United States person under this section without an order under this title for a period of more than 90 days unless the President, acting through the Attorney General, submits a certification to each member of the congressional intelligence committees that—

“(1) the continued electronic surveillance of the United States person is vital to the national security of the United States;

“(2) describes the circumstances that have prevented the Attorney General from obtaining an order under this title for continued surveillance;

“(3) describes the reasons for believing the United States person is affiliated with or in communication with a terrorist organization or affiliate of a terrorist organization that is reasonably believed to be responsible for the terrorist attack; and

“(4) describes the foreign intelligence information derived from the electronic surveillance conducted under this section.

“(f) USE OF INFORMATION.—Information obtained pursuant to electronic surveillance under this subsection may be used to obtain an order authorizing subsequent electronic surveillance under this title.
“(g) Reports.—Not later than 14 days after the
date on which the President submits a certification under
subsection (a), and every 30 days thereafter until the
President ceases to authorize electronic surveillance under
subsection (a) or (b), the President shall submit to each
member of the congressional intelligence committees a re-
port on the electronic surveillance conducted under this
section, including—

“(1) a description of each target of electronic
surveillance under this section; and

“(2) the basis for believing that each target is
in communication with a terrorist organization or an
affiliate of a terrorist organization.

“(h) Congressional Intelligence Committees
Defined.—In this section, the term ‘congressional intel-
ligence committees’ means the Permanent Select Com-
mittee on Intelligence of the House of Representatives and
the Select Committee on Intelligence of the Senate.”; and

(2) in the table of contents in the first section,
by inserting after the item relating to section 111
the following new item:

“Sec. 112. Authorization following a terrorist attack upon the United States.”.

SEC. 9. CONGRESSIONAL OVERSIGHT.

(a) Electronic Surveillance Under FISA.—

Section 108 of the Foreign Intelligence Surveillance Act
of 1978 (50 U.S.C. 1808) is amended—
(1) in subsection (a)(1), by inserting “each member of” before “the House Permanent Select Committee on Intelligence”; and

(2) in subsection (a)(2)—

(A) in subparagraph (B), by striking “and” at the end;

(B) in subparagraph (C), by striking the final period and inserting “; and”; and

(C) by adding at the end the following new subparagraph:

“(D) the authority under which the electronic surveillance is conducted.”; and

(3) in subsection (a), by adding at the end the following new paragraph:

“(3) Each report submitted under this subsection shall include reports on electronic surveillance conducted without a court order.”.

(b) INTELLIGENCE ACTIVITIES.—Section 501 of the National Security Act of 1947 (50 U.S.C. 413) is amended—

(1) in subsection (a)(1), by inserting “each member of” before “the congressional intelligence committees”; and
(2) in subsection (b), by inserting “each member of” before “the congressional intelligence committees”.

SEC. 10. TECHNICAL AND CONFORMING AMENDMENTS.

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

(1) in section 102(a)(3)(A), by striking “101(h)(4) and”;

(2) in section 105(a)(5)—

(A) by striking “104(a)(7)(E)” and inserting “104(a)(6)(D)”;

and

(B) by striking “104(d)” and inserting “104(c)”;

(3) in section 106—

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

and

(B) in subsection (k)(2), by striking “104(a)(7)(B)” and inserting “104(a)(6)(B)”;

and

(4) in section 108(a)(2)(C), by striking “105(f)” and inserting “105(e)”.

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