109TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 109–680
Part 2

ELECTRONIC SURVEILLANCE MODERNIZATION ACT

SEPTEMBER 25, 2006.—Ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING AND ADDITIONAL VIEWS

[To accompany H.R. 5825]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5825) to update the Foreign Intelligence Surveillance Act of 1978, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Electronic Surveillance Modernization Act".

SEC. 2. FINDING.

Congress finds that article I, section 8, clause 18 of the Constitution, known as the "necessary and proper clause", grants Congress clear authority to regulate the President's inherent power to gather foreign intelligence.

SEC. 3. 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:

"(D) is reasonably expected to possess, control, transmit, or receive foreign intelligence information while such person is in the United States, provided that the official making the certification required by section 104(a)(7) deems such foreign intelligence information to be significant; 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 an electronic, mechanical, or other surveillance device for acquiring information by intentionally directing surveillance at a par-

ticular known person who is reasonably believed to be in the United States under circumstances in which that 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 under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, if both the sender and all intended recipients are reasonably believed to be located within the United States.".

(c) CONTENTS.—Subsection (n) of such section is amended to read as follows:

"(n) 'Contents', when used with respect to a communication, includes any information concerning the substance, purport, or meaning of that communication.".

SEC. 4. AUTHORIZATION FOR ELECTRONIC SURVEILLANCE AND OTHER ACQUISITIONS FOR FOREIGN INTELLIGENCE PURPOSES.

(a) IN GENERAL.—The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is further amended by striking section 102 and inserting the following:

"AUTHORIZATION FOR ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE PURPOSES

"SEC. 102. (a) IN GENERAL.—Notwithstanding any other law, the President, acting through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that—

"(1) the electronic surveillance is directed at—

"(A) the acquisition of the contents of communications of foreign powers, as defined in paragraph (1), (2), or (3) of section 101(a), or an agent of a foreign power, as defined in subparagraph (A) or (B) of section 101(b)(1); or

"(B) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in paragraph (1), (2), or (3) of section 101(a); and

"(2) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 101(h);

if the Attorney General reports such minimization procedures and any changes thereto to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate at least 30 days prior to the effective date of such minimization procedures, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

"(b) MINIMIZATION PROCEDURES.—An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the minimization procedures. The Attorney General shall assess compliance with such procedures and shall report such assessments to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate under the provisions of section 108(a).

"(c) SUBMISSION OF CERTIFICATION.—The Attorney General shall immediately transmit under seal to the court established under section 103(a) a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless—

"(1) an application for a court order with respect to the surveillance is made under section 104; or

"(2) the certification is necessary to determine the legality of the surveillance under section 106(f).

"AUTHORIZATION FOR ACQUISITION OF FOREIGN INTELLIGENCE INFORMATION

"SEC. 102A. (a) IN GENERAL.—Notwithstanding any other law, the President, acting through the Attorney General may, for periods of up to one year, authorize the acquisition of foreign intelligence information concerning a person reasonably believed to be outside the United States if the Attorney General certifies in writing under oath that—

"(1) the acquisition does not constitute electronic surveillance;

"(2) the acquisition involves obtaining the foreign intelligence information from or with the assistance of a wire or electronic communications service provider, custodian, or other person (including any officer, employee, agent, or other specified person of such service provider, custodian, or other person) who has access to wire or electronic communications, either as they are transmitted

or while they are stored, or equipment that is being or may be used to transmit or store such communications;

"(3) a significant purpose of the acquisition is to obtain foreign intelligence information; and

"(4) the proposed minimization procedures with respect to such acquisition activity meet the definition of minimization procedures under section 101(h).

"(b) SPECIFIC PLACE NOT REQUIRED.—A certification under subsection (a) is not required to identify the specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed.

"(c) SUBMISSION OF CERTIFICATION.—The Attorney General shall immediately transmit under seal to the court established under section 103(a) a copy of a certification made under subsection (a). Such certification shall be maintained under security measures established by the Chief Justice of the United States and the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless the certification is necessary to determine the legality of the acquisition under section 102B.

"(d) MINIMIZATION PROCEDURES.—An acquisition under this section may be conducted only in accordance with the certification of the Attorney General and the minimization procedures adopted by the Attorney General. The Attorney General shall assess compliance with such procedures and shall report such assessments to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate under section 108(a).

"DIRECTIVES RELATING TO ELECTRONIC SURVEILLANCE AND OTHER ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION

"SEC. 102B. (a) DIRECTIVE.—With respect to an authorization of electronic surveillance under section 102 or an authorization of an acquisition under section 102A, the Attorney General may direct a person to—

"(1) immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition of foreign intelligence information in such a manner as will protect the secrecy of the electronic surveillance or acquisition and produce a minimum of interference with the services that such person is providing to the target; and

"(2) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the electronic surveillance or acquisition or the aid furnished that such person wishes to maintain.

"(b) COMPENSATION.—The Government shall compensate, at the prevailing rate, a person for providing information, facilities, or assistance pursuant to subsection (a).

"(c) FAILURE TO COMPLY.—In the case of a failure to comply with a directive issued pursuant to subsection (a), the Attorney General may petition the court established under section 103(a) to compel compliance with the directive. The court shall issue an order requiring the person or entity to comply with the directive if it finds that the directive was issued in accordance with section 102(a) or 102A(a) and is otherwise lawful. Failure to obey an order of the court may be punished by the court as contempt of court. Any process under this section may be served in any judicial district in which the person or entity may be found.

"(d) REVIEW OF PETITIONS.—(1) IN GENERAL.—(A) CHALLENGE.—A person receiving a directive issued pursuant to subsection (a) may challenge the legality of that directive by filing a petition with the pool established under section 103(e)(1).

"(B) ASSIGNMENT OF JUDGE.—The presiding judge designated pursuant to section 103(b) shall assign a petition filed under subparagraph (A) to one of the judges serving in the pool established by section 103(e)(1). Not later than 24 hours after the assignment of such petition, the assigned judge shall conduct an initial review of the directive. If the assigned judge determines that the petition is frivolous, the assigned judge shall deny the petition and affirm the directive or any part of the directive that is the subject of the petition. If the assigned judge determines the petition is not frivolous, the assigned judge shall, within 72 hours, consider the petition in accordance with the procedures established under section 103(e)(2) and provide a written statement for the record of the reasons for any determination under this subsection.

"(2) STANDARD OF REVIEW.—A judge considering a petition to modify or set aside a directive may grant such petition only if the judge finds that such directive does not meet the requirements of this section or is otherwise unlawful. If the judge does not modify or set aside the directive, the judge shall affirm such directive, and order the recipient to comply with such directive.

"(3) DIRECTIVES NOT MODIFIED.—Any directive not explicitly modified or set aside under this subsection shall remain in full effect.

"(e) APPEALS.—The Government or a person receiving a directive reviewed pursuant to subsection (d) may file a petition with the court of review established under section 103(b) for review of the decision issued pursuant to subsection (d) not later than 7 days after the issuance of such decision. Such court of review shall have jurisdiction to consider such petitions and shall provide for the record a written statement of the reasons for its decision. On petition by the Government or any person receiving such directive for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

"(f) PROCEEDINGS.—Judicial proceedings under this section shall be concluded as expeditiously as possible. The record of proceedings, including petitions filed, orders granted, and statements of reasons for decision, shall be maintained under security measures established by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.

"(g) SEALED PETITIONS.—All petitions under this section shall be filed under seal. In any proceedings under this section, the court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information.

"(h) LIABILITY.—No cause of action shall lie in any court against any person for providing any information, facilities, or assistance in accordance with a directive under this section.

"(i) USE OF INFORMATION.—Information acquired pursuant to a directive by the Attorney General under this section concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by section 102(a) or 102A(a). No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this section shall lose its privileged character. No information from an electronic surveillance under section 102 or an acquisition pursuant to section 102A may be used or disclosed by Federal officers or employees except for lawful purposes.

"(j) USE IN LAW ENFORCEMENT.—No information acquired pursuant to this section shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived from such information, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

"(k) DISCLOSURE IN TRIAL.—If the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance conducted under section 102 or an acquisition authorized pursuant to section 102A, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to disclose or use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to disclose or use such information.

"(l) DISCLOSURE IN STATE TRIALS.—If a State or political subdivision of a State intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision of a State, against an aggrieved person, any information obtained or derived from an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A, the State or political subdivision of such State shall notify the aggrieved person, the court, or other authority in which the information is to be disclosed or used and the Attorney General that the State or political subdivision intends to disclose or use such information.

"(m) MOTION TO EXCLUDE EVIDENCE.—(1) IN GENERAL.—Any person against whom evidence obtained or derived from an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A is to be, or has been, used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance or such acquisition on the grounds that—

"(A) the information was unlawfully acquired; or

"(B) the electronic surveillance or acquisition was not properly made in conformity with an authorization under section 102(a) or 102A(a).

"(2) TIMING.—A person moving to suppress evidence under paragraph (1) shall make the motion to suppress the evidence before the trial, hearing, or other pro-

ceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

"(n) REVIEW OF MOTIONS.—If a court or other authority is notified pursuant to subsection (k) or (l), a motion is made pursuant to subsection (m), or a motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State—

"(1) to discover or obtain an Attorney General directive or other materials relating to an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A, or

"(2) to discover, obtain, or suppress evidence or information obtained or derived from an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A,

the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to such electronic surveillance or such acquisition as may be necessary to determine whether such electronic surveillance or such acquisition authorized under this section was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the directive or other materials relating to the acquisition only where such disclosure is necessary to make an accurate determination of the legality of the acquisition.

"(o) DETERMINATIONS.—If, pursuant to subsection (n), a United States district court determines that the acquisition authorized under this section was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived or otherwise grant the motion of the aggrieved person. If the court determines that such acquisition was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

"(p) BINDING ORDERS.—Orders granting motions or requests under subsection (m), decisions under this section that an electronic surveillance or an acquisition was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of directives, orders, or other materials relating to such acquisition shall be final orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.

"(q) COORDINATION.—(1) IN GENERAL.—Federal officers who acquire foreign intelligence information may consult with Federal law enforcement officers or law enforcement personnel of a State or political subdivision of a State, including the chief executive officer of that State or political subdivision who has the authority to appoint or direct the chief law enforcement officer of that State or political subdivision, to coordinate efforts to investigate or protect against—

"(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(B) sabotage, international terrorism, or the development or proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

"(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

"(2) CERTIFICATION REQUIRED.—Coordination authorized under paragraph (1) shall not preclude the certification required by section 102(a) or 102A(a).

"(r) RETENTION OF DIRECTIVES AND ORDERS.—A directive made or an order granted under this section shall be retained for a period of not less than 10 years from the date on which such directive or such order is made.".

(b) TABLE OF CONTENTS.—The table of contents in the first section of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended by inserting after the item relating to section 102 the following:

"102A. Authorization for acquisition of foreign intelligence information.
"102B. Directives relating to electronic surveillance and other acquisitions of foreign intelligence information.".

SEC. 5. JURISDICTION OF FISA COURT.

Section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803) is amended by adding at the end the following new subsection:

"(g) Applications for a court order under this title are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to the court having jurisdiction under this section, and a judge to whom an

application is made may, notwithstanding any other law, grant an order, in conformity with section 105, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information.".

SEC. 6. 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) in paragraph (6), by striking "detailed description" and inserting "summary description";

(B) in paragraph (7)—

(i) in the matter preceding subparagraph (A), by striking "or officials designated" and all that follows through "consent of the Senate" and inserting "designated by the President to authorize electronic surveillance for foreign intelligence purposes";

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

(iii) by striking subparagraph (D); and

(iv) by redesignating subparagraph (E) as subparagraph (D);

(C) in paragraph (8), by striking "a statement of the means" and inserting "a summary statement of the means";

(D) in paragraph (9)—

(i) by striking "a statement" and inserting "a summary statement"; and

(ii) by striking "application;" and inserting "application; and";

(E) in paragraph (10), by striking "thereafter; and" and inserting "thereafter."; and

(F) by striking paragraph (11).

(2) by striking subsection (b);

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

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

SEC. 7. 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) through (5) as paragraphs (1) through (4), respectively;

(2) in subsection (c)(1)—

(A) in subparagraph (D), by striking "surveillance;" and inserting "surveillance; and";

(B) in subparagraph (E), by striking "approved; and" and inserting "approved."; and

(C) by striking subparagraph (F);

(3) by striking subsection (d);

(4) by redesignating subsections (e) through (i) as subsections (d) through (h), respectively;

(5) in subsection (d), as redesignated by paragraph (4), by amending paragraph (2) to read as follows:

"(2) Extensions of an order issued under this title may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order and may be 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, an official appointed by the President with the advice and consent of the Senate that is designated by the President to authorize electronic surveillance may authorize the emergency employment of electronic surveillance if—

"(1) such official 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) such official determines that the factual basis for issuance of an order under this title to approve such electronic surveillance exists;

"(3) such official informs the Attorney General of such electronic surveillance;

"(4) the Attorney General or a designee of the Attorney General informs a judge having jurisdiction under section 103 of such electronic surveillance as soon as practicable, but in no case more than 7 days after the date on which such electronic surveillance is authorized;

"(5) an application in accordance with this title is made to such judge or another judge having jurisdiction under section 103 as soon as practicable, but not more than 7 days after such electronic surveillance is authorized;

"(6) such official requires 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 7 days from the time of authorization by such official, whichever is earliest. In the event that the application for approval submitted pursuant to paragraph (5) 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 pursuant to paragraph (5) may be reviewed as provided in section 103.";

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

(A) by striking "a wire or" and inserting "an"; and

(B) by striking "physical search" and inserting "physical search or 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 under section 102B"; and

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

"(i) In any case in which the Government makes an application to a judge under this title to conduct electronic surveillance involving communications and the judge grants such application, the judge shall also authorize the installation and use of pen registers and trap and trace devices to acquire dialing, routing, addressing, and signaling information related to such communications and such dialing, routing, addressing, and signaling information shall not be subject to minimization procedures.".

SEC. 8. 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".

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 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. INTERNATIONAL MOVEMENT OF TARGETS.

(a) ELECTRONIC SURVEILLANCE.—Section 105(d) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(d)), as redesignated by section 7(4), is amended by adding at the end the following new paragraph:

"(4) An order issued under this section shall remain in force during the authorized period of surveillance notwithstanding the absence of the target from the United States, unless the Government files a motion to extinguish the order and the court grants the motion.".

(b) PHYSICAL SEARCH.—Section 304(d) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1824(d)) is amended by adding at the end the following new paragraph:

"(4) An order issued under this section shall remain in force during the authorized period of surveillance notwithstanding the absence of the target from the United States, unless the Government files a motion to extinguish the order and the court grants the motion.".

SEC. 11. COMPLIANCE WITH COURT ORDERS AND ANTITERRORISM PROGRAMS.

(a) IN GENERAL.—Notwithstanding any other provision of law, and in addition to the immunities, privileges, and defenses provided by any other provision of law, no action shall lie or be maintained in any court, and no penalty, sanction, or other form of remedy or relief shall be imposed by any court or any other body, against any person for an activity arising from or relating to any alleged intelligence program involving electronic surveillance that the Attorney General or a designee of the Attorney General certifies, in a manner consistent with the protection of State secrets, is, was, or would be intended to protect the United States from a terrorist attack. This section shall apply to all actions or proceedings pending on or after the effective date of this Act.

(b) JURISDICTION.—Any action or claim described in subsection (a) that is brought in a State court shall be deemed to arise under the Constitution and laws of the United States and shall be removable pursuant to section 1441 of title 28, United States Code.

(c) DEFINITIONS.—In this section:

(1) The term "electronic surveillance" has the meaning given the term in section 101(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(f)) on the day before the date of the enactment of this Act.

(2) The term "person" has the meaning given the term in section 2510(6) of title 18, United States Code.

SEC. 12. REPORT ON MINIMIZATION PROCEDURES.

(a) REPORT.—Not later than two years after the date of the enactment of this Act, and annually thereafter until December 31, 2009, the Director of the National Security Agency, in consultation with the Director of National Intelligence and the Attorney General, shall submit to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate a report on the effectiveness and use of minimization procedures applied to information concerning United States persons acquired by means that were considered electronic surveillance as that term was defined by section 101(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(f)) on the day before the date of the enactment of this Act but no longer constitutes electronic surveillance as of the effective date of this Act.

(b) REQUIREMENTS.—A report submitted under subsection (a) shall include—

(1) a description of the implementation, during the course of communications intelligence activities conducted by the National Security Agency, of procedures established to minimize the acquisition, retention, and dissemination of nonpublicly available information concerning United States persons;

(2) the number of significant violations, if any, of such minimization procedures during the 18 months following the effective date of this Act; and

(3) summary descriptions of such violations.

(c) RETENTION OF INFORMATION.—Information concerning United States persons shall not be retained solely for the purpose of complying with the reporting requirements of this section.

(d) MINIMIZATION PROCEDURES DEFINED.—In this section, the term "minimization procedures" has the meaning given the term in section 101(h) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(h)).

SEC. 13. TECHNICAL AND CONFORMING AMENDMENTS.

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

(1) in section 101(h)(4), by striking "approved pursuant to section 102(a)," and inserting "authorized pursuant to section 102 or any acquisition authorized pursuant to section 102A";

(2) in section 105(a)(4), as redesignated by section 7(1)(B)—

(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)".

PURPOSE AND SUMMARY

Representative Heather Wilson, Judiciary Committee Chairman Sensenbrenner, and Select Committee on Intelligence Chairman Hoekstra introduced H.R. 5825, the "Electronic Surveillance Modernization Act," on July 18, 2006. This bill would strengthen oversight of the executive branch and enhance accountability, clarify the scope and applicability of FISA (Foreign Intelligence Surveillance Act) warrants; and update the 1978 Foreign Intelligence Surveillance Act to reflect modern changes in technology and communication.

BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 5825 pertains to the manner in which the Federal government collects oral, wire and electronic communications for foreign intelligence purposes. Congress enacted the first Federal wiretap statute during World War I.[1] The authority and limits of government surveillance have been the focus of extensive judicial consideration. By the time the United States Supreme Court ruled on the issue in *Olmstead* v. *United States*,[2] over 40 States had banned wiretapping. In the *Olmstead* case, the Court found that a wiretap of a Seattle bootlegger did not violate the Fourth Amendment because there was not "an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house or curtilage for the purposes of making a seizure."[3] Subsequent decisions eroded the *Olmstead* holding, however.

Today, United States courts tend to use a two-prong expectation of privacy analysis to determine whether the Fourth Amendment has been violated.[4] Justice Harlan's concurrence in *Silverman* v. *United States*,[5] highlights the analysis stating ". . . there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."

In order to safeguard Fourth Amendment protections, Congress has created procedures to allow limited law enforcement access to private communications and communication records. Specifically,

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[1] Charles Doyle, and Gina Stevens, Congressional Research Service, Library of Congress, Privacy: An Overview of Federal Statutes Governing Wiretapping and Electronic Eavesdropping, at 2 (2001).

[2] 277 U.S. 438 (1928).

[3] Id. at 466.

[4] Charles Doyle, and Gina Stevens, Congressional Research Service, Library of Congress, Privacy: An Overview of Federal Statutes Governing Wiretapping and Electronic Eavesdropping, at 5 n.15 (2001).

[5] 389 U.S. 347, 361 (1967).

Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[6] that outlines what is and is not permissible with regard to wiretapping and electronic eavesdropping.[7] Title III of the Crime Control Act, authorizes the use of electronic surveillance for crimes specified in 18 U.S.C. 2516.

While Congress did not cover national security cases in the Crime Control Act, it did include a disclaimer that the wiretap laws did not affect the President's constitutional duty to protect National Security. In 1972, the U.S. Supreme Court rejected the claim that this disclaimer applied to domestic security case.[8] The Court specifically invited Congress to establish similar standards for domestic intelligence that were established for criminal investigations.[9]

Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA),[10] to prescribe procedures for foreign intelligence collected domestically. FISA authorized the Federal government to collect intelligence within the United States on foreign powers and agents of foreign powers. It established a special court to review and authorize or deny wiretapping and other forms of electronic eavesdropping for purposes of foreign intelligence gathering in domestic surveillance cases. FISA was enacted by Congress to secure the integrity of the Fourth Amendment while protecting the national security interest of the United States by providing a mechanism for the domestic collection of foreign intelligence information.

Changes in technology have caused an unintentional shift in the focus and reach of FISA. When FISA was enacted, domestic communications were ordinarily transmitted differently than international communications. Domestic communications were trans-

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[6] 87 Stat. 197, 18 U.S.C. 2510–2520 (1970 ed.) (Title III of the Crime Control Act).

[7] Charles Doyle, and Gina Stevens, Congressional Research Service, Library of Congress, Privacy: An Overview of Federal Statutes Governing Wiretapping and Electronic Eavesdropping, at 6 (2001).

[8] *United States* v. *United States District Court*, 407 U.S. 297 (1972).

[9] "Moreover, we do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime'. The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

Given these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment [407 U.S. 297, 323] if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection. As the Court said in *Camara* v. *Municipal Court*, 387 U.S. 523, 534–535 (1967):

"In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . . In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement."

It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of 2518 but should allege other circumstances more appropriate to domestic security cases; that the request for prior court authorization could, in sensitive cases, be made to any member of a specially designated court (e.g., the District Court for the District of Columbia or the Court of Appeals for the District of Columbia Circuit); and that the time and reporting requirements need not be so strict as those in 2518. Id. at 322.

[10] 92 Stat. 1783, 50 U.S.C. 1801 et seq.

mitted via "wire" while international communications were transmitted via "radio." Over time, however, wire became the preferred method of transmitting international communications, blurring the technology-centered distinction between international and domestic communications.

As General Hayden testified before the Senate on July 26, 2006, the:

> . . . NSA intercepts communications and it does so for only one purpose: to protect the lives, the liberties and the well being of the citizens of the United States from those who would do us harm. By the late 1990s, that job was becoming very difficult. The explosion of modern communications in terms of its volume, variety and velocity threatened to overwhelm the Agency. The September 11th attacks exposed an even more critical fault line. The laws of the United States do (and should) distinguish between the information space that is America and the rest of the planet.
>
> But modern telecommunications do not so cleanly respect that geographic distinction. We exist on a unitary, integrated, global telecommunications grid in which geography is an increasingly irrelevant factor. What does "place" mean when one is traversing the World Wide Web? There are no area codes on the Internet.
>
> And if modern telecommunications muted the distinctions of geography, our enemy seemed to want to end the distinction altogether. After all, he killed 3000 of our countrymen from within the homeland.
>
> In terms of both technology and the character of our enemy, "in" America and "of" America no longer were synonymous.
>
> I testified about this challenge in open session to the House Intelligence Committee in April of the year 2000. At the time I created some looks of disbelief when I said that if Usama bin Ladin crossed the bridge from Niagara Falls, Ontario to Niagara Falls, New York, there were provisions of U.S. law that would kick in, offer him some protections and affect how NSA could now cover him. At the time I was just using this as a stark hypothetical. Seventeen months later this was about life and death.
>
> The legal regime under which NSA was operating—the Foreign Intelligence Surveillance Act—had been crafted to protect American liberty and American security.
>
> But the revolution in telecommunications technology has extended the actual impact of the FISA regime far beyond what Congress could ever have anticipated in 1978. And I don't think that anyone could make the claim that the FISA statute was optimized to deal with a 9/11 or to deal with a lethal enemy who likely already had combatants inside the United States.
>
> Because of the wording of the statute, the government looks to four factors in assessing whether or not a court order was required before NSA can lawfully intercept a communication: who was the target, where was the target, how did we intercept the communication, and where did we intercept the communication.

The [Specter] bill before the committee today effectively re-examines the relevance of each of these factors and the criteria we want to use with each.

Who is the target?

The FISA regime from 1978 onward focused on specific court orders, against individual targets, individually justified and individually documented. This was well suited to stable, foreign entities on which we wanted to focus for extended period of time for foreign intelligence purposes. It is less well suited to provide the agility to detect and prevent attacks against the homeland.

In short, its careful, individualized processes exacted little cost when the goal was long term and exhaustive intelligence coverage against a known and recognizable agent of a foreign power. The costs were different when the objective was to detect and prevent attacks, when we are in hot pursuit of communications entering or leaving the United States involving someone associated with al Qa'ida.

* * * * *

Where is the target?

As I said earlier, geography is becoming less relevant. In the age of the Internet and a global communications grid that routes communications by the cheapest available bandwidth available each nanosecond, should our statutes presume that all communications that touch America should be equally protected?

* * * * *

How did we intercept the communication?

For reasons that seemed sound at the time, current statute makes a distinction between collection "on a wire" and collection out of the air. When the law was passed, almost all local calls were on a wire and almost all long haul communications were in the air. In an age of cell phones and fiber optic cables, that has been reversed . . . with powerful and unintended consequences for how NSA can lawfully acquire a signal. Legislators in 1978 should not have been expected to predict the future of global telecommunications. Neither should you. The statute should be technology neutral.

Where we intercept the communication?

A single communication can transit the world even if the communicants are only a few miles apart. And in that transit NSA may have multiple opportunities to intercept it as it moves and changes medium. As long as a communication is otherwise lawfully targeted, we should be indifferent to where the intercept is achieved. Signals intelligence is a difficult art and science, especially in today's telecommunication universe. Intercept of a particular communication—one that would help protect the homeland, for example—is always probabilistic, not deterministic. No coverage is guaranteed. We need to be able to use all the technological tools we have.

In that light, there are no communications more important to the safety of the Homeland than those affiliated

> with al Qa'ida with one end in the United States. And so why should our laws make it more difficult to target the al Qa'ida communications that are most important to us—those entering or leaving the United States![11]

As we learned from the 9/11 attacks, the enemy will exploit any vulnerability in our antiterrorism efforts with catastrophic consequences. Congress must ensure that the law enforcement and the intelligence communities are given the necessary tools and resources to detect and deter credible threats to our national security before they materialize. Congress has enhanced the tools law enforcement and intelligence officers need to fight and win the war against terrorism by passing the USA PATRIOT Act, the Homeland Security Act and the Intelligence Reform Act. However, the threat has not receded, nor has the need to update current law to ensure that FISA continues to serve the goals for which it was established.

Congressional hearings demonstrate that FISA must be streamlined and technology-neutral. Furthermore, testimony highlighted the need for Congress to return FISA's focus to protecting Fourth Amendment rights. The General Counsel for the National Security Agency pointed out that "the legislative history of the 1978 statute states: '[t]he history and law relating to electronic surveillance for 'national security' purposes have revolved around the competing demands of the President's constitutional powers to gather intelligence deemed necessary for the security of the nation and the requirements of the Fourth Amendment.'[12] With that balance in mind, H.R. 5825, the "Electronic Surveillance Modernization Act," works to accomplish these goals.

HEARINGS

The Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held two hearings on H.R. 5825 on the 6th and 12th of September 2006.

COMMITTEE CONSIDERATION

On September 20, 2006, the Committee met in open session and ordered favorably reported the bill, H.R. 5825, with an amendment, by rollcall vote with 20 ayes and 16 nays, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the Committee's consideration of H.R. 5825:

ROLLCALL NO. 5—DATE: 9–20–06

SUBJECT: Nadler motion to adjourn, which was not agreed to by a rollcall vote of 14 ayes to 17 nays.

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE		X	

[11] FISA for the 21st Century: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006).

[12] H. Rpt. 95–1283 at p. 15, 95th Congress, 2d Session, June 8, 1978.

	Ayes	Nays	Present
MR. SMITH		X	
MR. GALLEGLY.			
MR. GOODLATTE.			
MR. CHABOT		X	
MR. LUNGREN		X	
MR. JENKINS		X	
MR. CANNON		X	
MR. BACHUS		X	
MR. INGLIS		X	
MR. HOSTETTLER.			
MR. GREEN		X	
MR. KELLER.			
MR. ISSA.			
MR. FLAKE		X	
MR. PENCE		X	
MR. FORBES		X	
MR. KING		X	
MR. FEENEY		X	
MR. FRANKS		X	
MR. GOHMERT		X	
MR. CONYERS	X		
MR. BERMAN	X		
MR. BOUCHER.			
MR. NADLER	X		
MR. SCOTT	X		
MR. WATT	X		
MS. LOFGREN	X		
MS. JACKSON LEE.			
MS. WATERS	X		
MR. MEEHAN	X		
MR. DELAHUNT.			
MR. WEXLER	X		
MR. WEINER	X		
MR. SCHIFF	X		
MS. SANCHEZ	X		
MR. VAN HOLLEN	X		
MRS. WASSERMAN SCHULTZ	X		
MR. SENSENBRENNER, CHAIRMAN		X	
TOTAL	14	17	

ROLLCALL NO. 6—DATE: 9–20–06

SUBJECT: Roll to record presence of Members to consider amendments to H.R. 5825—there were 16 Members present.

MR. HYDE.			
MR. COBLE			X
MR. SMITH			X
MR. GALLEGLY.			
MR. GOODLATTE.			
MR. CHABOT			X
MR. LUNGREN			X
MR. JENKINS			X
MR. CANNON			X
MR. BACHUS			X
MR. INGLIS			X
MR. HOSTETTLER.			
MR. GREEN			X
MR. KELLER.			
MR. ISSA.			
MR. FLAKE			X
MR. PENCE			X
MR. FORBES			X

MR. KING			X
MR. FEENEY			X
MR. FRANKS			X
MR. GOHMERT.			
MR. CONYERS.			
MR. BERMAN.			
MR. BOUCHER.			
MR. NADLER.			
MR. SCOTT.			
MR. WATT.			
MS. LOFGREN.			
MS. JACKSON LEE.			
MS. WATERS.			
MR. MEEHAN.			
MR. DELAHUNT.			
MR. WEXLER.			
MR. WEINER.			
MR. SCHIFF.			
MS. SANCHEZ.			
MR. VAN HOLLEN.			
MRS. WASSERMAN SCHULTZ.			
MR. SENSENBRENNER, CHAIRMAN		X	
TOTAL			16

ROLLCALL NO. 7—DATE 9–20–06

SUBJECT: Mr. Lungren amendment to H.R. 5825, which was agreed to by a rollcall vote of 17 ayes to 2 nays. The amendment modifies section 2 to narrow the new definition in H.R. 5825 of an "Agent of a Foreign Power" that covers non-U.S. persons who possess or receive foreign intelligence information to covering only situations in which the relevant foreign intelligence information is deemed significant. This amendment would also amend the bill's modified definition of "electronic surveillance." The amendment also amends section 3 of the bill that modified section 102(a) certification process of FISA to ensure that it remains focused on foreign power or agents of those foreign powers. Furthermore, the amendment modifies section 5 and 6 that streamline the FISA process to ensure that the court receives the information necessary. The amendment expands section 5, FISA's emergency authorization provision, to allow an emergency surveillance from 5 days prior to court approval up to 7 days.

	Ayes	Nays	Present
MR. HYDE	X		
MR. COBLE	X		
MR. SMITH	X		
MR. GALLEGLY	X		
MR. GOODLATTE	X		
MR. CHABOT	X		
MR. LUNGREN	X		
MR. JENKINS	X		
MR. CANNON	X		
MR. BACHUS	X		
MR. INGLIS		X	
MR. HOSTETTLER	X		
MR. GREEN	X		
MR. KELLER	X		
MR. ISSA	X		
MR. FLAKE		X	

	Ayes	Nays	Present
MR. PENCE	X		
MR. FORBES	X		
MR. KING	X		
MR. FEENEY	X		
MR. FRANKS	X		
MR. GOHMERT	X		
MR. CONYERS.			
MR. BERMAN.			
MR. BOUCHER.			
MR. NADLER.			
MR. SCOTT.			
MR. WATT.			
MR. LOFGREN.			
MS. JACKSON LEE.			
MR. WATERS.			
MR. MEEHAN.			
MR. DELAHUNT.			
MR. WEXLER.			
MR. WEINER.			
MR. SCHIFF.			
MR. SANCHEZ.			
MR. VAN HOLLEN.			
MRS. WASSERMAN SCHULTZ.			
MR. SENSENBRENNER, CHAIRMAN	X		
TOTAL	17	2	

ROLLCALL NO. 8—DATE: 9–20–06

SUBJECT: Mr. Schiff and Mr. Flake offered an amendment in the nature of a substitute to H.R. 5825, which was not agreed to by a rollcall vote of 18 ayes to 20 nays. This amendment would have deemed the Foreign Intelligence Surveillance Act the sole authorization for electronic surveillance to gather foreign intelligence information; prohibited future congressional action to amend this restriction; required the President to report to the Judiciary and Intelligence Committees on the Terrorist Surveillance Program; expanded the judges who the Chief Justice could designate as having jurisdiction to hear Foreign Intelligence Surveillance cases; has language to streamline FISA; expanded the period for applications for orders for emergency electronic surveillance; and changed the Wartime exception that currently allows warrantless surveillance to times when Congress declares war or provides an authorization that contains a specific authorization for electronic surveillance, among other things.

	Ayes	Nays	Present
MR. HYDE		X	
MR. COBLE		X	
MR. SMITH		X	
MR. GALLEGLY		X	
MR. GOODLATTE		X	
MR. CHABOT		X	
MR. LUNGREN		X	
MR. JENKINS		X	
MR. CANNON		X	
MR. BACHUS		X	
MR. INGLIS	X		
MR. HOSTETTLER		X	
MR. GREEN		X	
MR. KELLER.			

	Ayes	Nays	Present
MR. ISSA		X	
MR. FLAKE	X		
MR. PENCE		X	
MR. FORBES		X	
MR. KING		X	
MR. FEENEY		X	
MR. FRANKS		X	
MR. GOHMERT		X	
MR. CONYERS	X		
MR. BERMAN	X		
MR. BOUCHER	X		
MR. NADLER	X		
MR. SCOTT	X		
MR. WATT	X		
MS. LOFGREN	X		
MS. JACKSON LEE.			
MS. WATERS	X		
MR. MEEHAN	X		
MR. DELAHUNT	X		
MR. WEXLER	X		
MR. WEINER	X		
MR. SCHIFF	X		
MS. SANCHEZ	X		
MR. VAN HOLLEN	X		
MRS. WASSERMAN SCHULTZ.			
MR. SENSENBRENNER, CHAIRMAN		X	
TOTAL	18	20	

ROLLCALL NO. 13—DATE: 9–20–06

SUBJECT: Mr. Cannon offered an amendment to H.R. 5825, which was agreed to by a rollcall vote of 22 ayes to 16 nays. This amendment would limit the civil and criminal liability of telecommunications carriers for any activity arising from, or relating to, any alleged intelligence program involving electronic surveillance that the government has certified is, was, or would be intended to protect the United States from a terrorist attack. The amendment applies to all pending and future cases, and allows all such cases to be removed to Federal court. The amendment also applies the old definition of "electronic surveillance" contained in FISA prior to enactment of the Act.

	Ayes	Nays	Present
MR. HYDE	X		
MR. COBLE	X		
MR. SMITH	X		
MR. GALLEGLY	X		
MR. GOODLATTE	X		
MR. CHABOT	X		
MR. LUNGREN	X		
MR. JENKINS	X		
MR. CANNON	X		
MR. BACHUS	X		
MR. INGLIS	X		
MR. HOSTETTLER	X		
MR. GREEN	X		
MR. KELLER.			
MR. ISSA	X		
MR. FLAKE	X		
MR. PENCE	X		
MR. FORBES	X		

	Ayes	Nays	Present
MR. KING	X		
MR. FEENEY	X		
MR. FRANKS	X		
MR. GOHMERT	X		
MR. CONYERS		X	
MR. BERMAN		X	
MR. BOUCHER.			
MR. NADLER		X	
MR. SCOTT		X	
MR. WATT		X	
MS. LOFGREN		X	
MS. JACKSON LEE		X	
MS. WATERS		X	
MR. MEEHAN		X	
MR. DELAHUNT		X	
MR. WEXLER		X	
MR. WEINBER		X	
MR. SCHIFF		X	
MS. SANCHEZ		X	
MR. VAN HOLLEN		X	
MRS. WASSERMAN SCHULTZ		X	
MR. SENSENBRENNER, CHAIRMAN	X		
TOTAL	22	16	

ROLLCALL NO. 14

SUBJECT: Mr. Nadler offered an amendment to H.R. 5825, which was not agreed to by a rollcall vote of 14 ayes to 22 nays. This amendment would have allowed any person to seek injunctive relief to stop an intelligence program involving electronic surveillance.

	Ayes	Nays	Present
MR. HYDE		X	
MR. COBLE		X	
MR. SMITH		X	
MR. GALLEGLY		X	
MR. GOODLATTE		X	
MR. CHABOT		X	
MR. LUNGREN		X	
MR. JENKINS		X	
MR. CANNON		X	
MR. BACHUS		X	
MR. INGLIS		X	
MR. HOSTETTLER		X	
MR. GREEN		X	
MR. KELLER.			
MR. ISSA		X	
MR. FLAKE		X	
MR. PENCE		X	
MR. FORBES		X	
MR. KING		X	
MR. FEENEY		X	
MR. FRANKS		X	
MR. GOHMERT		X	
MR. CONYERS	X		
MR. BERMAN	X		
MR. BOUCHER.			
MR. NADLER	X		
MR. SCOTT	X		
MR. WATT	X		
MS. LOFGREN	X		

	Ayes	Nays	Present
MS. JACKSON LEE	X		
MS. WATERS	X		
MR. MEEHAN..			
MR. DELAHUNT..			
MR. WEXLER	X		
MR. WEINER	X		
MR. SCHIFF	X		
MS. SANCHEZ	X		
MR. VAN HOLLEN	X		
MRS. WASSERMAN SCHULTZ	X		
MR. SENSENBRENNER, CHAIRMAN		X	
TOTAL	14	22	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 5825, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

H.R. 5825—Electronic Surveillance Modernization Act

Summary: H.R. 5825 would modify the rules and procedures the government must follow to use electronic surveillance programs in the investigation of international terrorism. The bill would amend the definition of electronic surveillance under the Foreign Intelligence Surveillance Act (FISA) to remove the current distinction between treatment of wire and radio communications, and to focus FISA protections on domestic communications. The bill also would expand the ability of the government to conduct electronic surveillance without a warrant in certain cases where the target of the surveillance is an agent of a foreign power.

H.R. 5825 would authorize the President, under certain conditions, to acquire foreign intelligence information concerning a person believed to be outside of the United States. To this end, the bill would authorize the Attorney General to direct any person or organization with access to such information to provide the United States government with all assistance necessary to acquire such intelligence. The bill directs that such persons shall be compensated at the prevailing rate for such assistance.

In addition, H.R. 5825 also bakes a number of changes that could reduce the volume of material required for a FISA application, including minimizing the detailed descriptions of both the nature of the foreign intelligence information sought and the intended method of collection.

CBO has no basis for predicting how the volume or type of surveillance would be changed if H.R 5825 were enacted. Furthermore, information regarding surveillance techniques and their associated costs are classified. For these reasons, CBO cannot estimate the impact on the federal budget of implementing H.R. 5825.

H.R. 5825 contains intergovernmental mandates, as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that costs to state and local governments would fall well below the annual threshold established in UMRA ($64 million in 2006, adjusted annually for inflation).

The bill also contains private-sector mandates as defined in UMRA, but CBO has no basis for estimating the costs of those mandates or whether the costs would exceed the annual threshold established in UMRA ($128 million in 2006, adjusted annually for inflation).

Estimated cost to the Federal Government: CBO cannot estimate the budgetary impact of implementing H.R. 5825 because we cannot predict how the volume or type of surveillance would change under this legislation. Moreover, information regarding surveillance technologies and their associated costs are classified.

Any changes in federal spending under the bill would be subject to the appropriation of the necessary funds. Enacting H.R. 5825 would not affect direct spending or revenues.

Estimated impact on state, local, and tribal governments: H.R. 5825 contains an intergovernmental mandate as defined in UMRA because it would exempt from liability individuals that comply with certain federal requests for information. That exemption would preempt some state and local liability laws. CBO estimates that such preemption would impose only minimal costs on those governments.

The bill also contains a mandate because it would allow federal law enforcement officers to direct public institutions such as libraries to provide information. Because data about the number of public entities currently complying with similar requests and the costs of that compliance is classified, CBO cannot estimate the total costs state and local governments would incur to comply with this mandate. Based on information from a recent survey of public libraries, however, CBO estimates that the number of requests likely would be small and that the total costs to those entities would be well below the annual threshold established in UMRA ($64 million in 2006, adjusted annually for inflation).

Estimated impact on the private sector: H.R. 5825 contains private-sector mandates as defined in UMRA by requiring certain entities to assist the government with electronic surveillance and providing liability protections for those entities. CBO has no basis for estimating the costs of the mandates or whether the costs would exceed the annual threshold established in UMRA for private-sector mandates ($128 million in 2006, adjusted annually for inflation).

The bill would authorize the Attorney General, after obtaining the certification required under the bill, to direct a person to immediately provide the government with all information, facilities, and assistance necessary to conduct electronic surveillance and to acquire foreign intelligence. Under current law, the Attorney General may direct a "common carrier" to provide such assistance with electronic surveillance. This bill would expand the scope of entities that must comply with the government orders in such cases. Because CBO has no information about how often such entities would be directed to provide assistance or the costs associated with providing assistance, CBO has no basis for estimating the costs of this mandate. The bill also would authorize the government to compensate, at the prevailing rate, a person for providing such information, facilities or assistance.

H.R. 5825 also would provide protection from a cause of action for any person providing information, facilities, or assistance as well as conducting physical searches in accordance with a directive from the Attorney General under the bill. Because the bill would eliminate existing rights to seek compensation for injury caused by certain acts, it would impose a private-sector mandate. The cost of the mandate would be the forgone net value of awards and settlements that could be received under current law. Because of the lack of information about both the value of awards in such cases and the number of claims that would be filed in the absence of this legislation, CBO cannot estimate the cost of this mandate.

Estimate prepared by: Federal Costs: Jason Wheelock. Impact on State, Local, and Tribal Governments: Melissa Merrell. Impact on the Private Sector: Victoria Liu.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5825 continues the effort by Congress to provide the Administration with reasonable tools and authorities to prevent terrorist attacks on our nation, while protecting Fourth Amendment rights. The bill makes FISA technology neutral and simplifies the process for obtaining a FISA court order.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article 1, section 8, and the Fourth Amendment of the Constitution.

EARMARKS

Pursuant to H. Res. 1000, adopted by the House on September 14, 2006, the Committee states that this legislation contains no earmarks.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes the bill as reported by the Committee.

Section 1. Short title

This section sets forth the title of the bill as the "Electronic Surveillance Modernization Act."

Section 2. Finding

This section contains a finding about the balance between congressional and presidential authority.

Section 3. FISA definitions

This section updates definitions in the Foreign Intelligence Surveillance Act in an effort to update the law and make it technology neutral. Section 3(a) amends the definition of "Agent of a Foreign Power," and also the definition "Electronic Surveillance." Section 50 U.S.C. 1801(b) (the Foreign Intelligence Surveillance Act of 1978) provides the definitions used to determine the target of surveillance under FISA. This section of the bill amends the definition of "Agent of a Foreign Power" under section 50 U.S.C. 1801(b)(1) by adding new subparagraph D. Section 1801(b)(1) covers any person other than a United States person, who—

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(C) engages in international terrorism or activities in preparation therefore.

Section 3(a) of the bill would add new subparagraph D to the definition, which states "Agent of a foreign power" for any person other than a United States person, includes a person who "is reasonably expected to possess, control, transmit or receive foreign intelligence information while in the United States, provided that the official making the certification required by section 104(a)(7) deems such foreign intelligence information to be significant;". This new definition applies only to situations in which the relevant foreign intelligence information is deemed significant.

Section 3(b) of the bill would update the term "Electronic Surveillance" to account for significant changes in technology since the 1978 passage of FISA. The Committee believes these changes will return FISA to its original purpose of protecting Fourth Amendment concerns by focusing on the fundamental question of whose communications are being targeted and not on the type of technology used or where communications are intercepted. The definition turns on targeting a particular known person (a) believed to be in the United States, (b) in circumstances in which that person

has (i) a reasonable expectation of privacy and (ii) a warrant would be required for law enforcement purposes. The Committee strongly believes that the focus must be on the target to determine what applies and does not apply and whether fourth amendment privacy rights are implicated. A non-U.S. person, who is a terrorist in Afghanistan does not have the same privacy rights of a U.S. person and our surveillance laws should reflect this. Furthermore, the government should not be required to use different surveillance procedures based on whether a terrorist uses radio communications or wire communications to plot another attack on U.S. soil.

Section 3(c) would make the definition of "content" for consistent with the definition used in the Federal criminal code.

Section 4. Authorization for electronic surveillance and other acquisitions for foreign intelligence purposes

Section 4 of the bill would amend the current section 102(a) certification process to expand the circumstances under which the government may conduct electronic surveillance without court order of foreign powers or agents of foreign powers. The drafters of FISA were trying to carve out Foreign to Foreign communications, the testimony before the Subcommittee on Crime, Terrorism, and Homeland Security explained that technology changes have made it impossible to use this provision. This section updates the section to cover agents of a foreign power and make the language technology neutral.

This section would also provide a new and streamlined Attorney General certification process permitting the Attorney General to direct electronic communications service providers to provide certain information, facilities, or technical assistance for a period of up to 1 year, provided that the provision of these resources does not constitute "electronic surveillance." The new process the manner in which the information is to be obtained and creates a mechanism for the FISA Court to review and enforce the directives as well as allowing for challenges to the process.

This section of the bill would modernize the law by providing the AG with the ability to "require" rather than "direct" common carriers to provide access to communications or equipment. Since the leaks of classified information to the press, some companies are concerned about assisting law enforcement in the war on terrorism without a legal document directing them to do so.

Section 5. Jurisdiction of the FISA court

This section provides that applications for a court order under this title are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to the court having jurisdiction under this section, and a judge to whom an application is made may, notwithstanding any other law, grant an order, in conformity with section 105, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information.

Section 6. Applications for court orders

This section of the bill amends section 104 of FISA (50 U.S.C. 1804). Section 104 of FISA covers the process and circumstances by which an application for a court order authorizing electronic sur-

veillance for foreign intelligence purposes may be sought. An application for such a court order must still be made by a Federal officer in writing on oath or affirmation to a FISC judge. The application must still be approved by the Attorney General based upon his finding that the criteria and requirements set forth in 50 U.S.C. § 1801 et seq. have been met. This section would reduce the volume of material required for a FISA application.

Section 7. Issuance of an order

This section of the bill would amend section 105 of FISA (50 U.S.C. § 1805) that covers the issuance of an order based on the application in section 104 of FISA (50 U.S.C. § 1804). This section modifies the issuance of order section to be consistent with the changes in the application process. Current protections and minimization procedures will remain in place to protect unintended targets. This section also amends 50 U.S.C. § 1805(f) that covers emergency orders to extend the period before a judge must be notified of an emergency employment of electronic surveillance from not more than 72 hours to not more than 158 hours (7 days).

Section 8. Use of information

This section strike the term "radio" in effort to make the statute technology neutral. Additionally section 106(I) of FISA directs the destruction of unintentionally acquired information, unless the contents indicate a threat of death or serious bodily harm to any person. The bill would add to the exception contents that contain significant foreign intelligence information.

Section 9. Congressional oversight

Section 9 would strengthen and expand congressional oversight by amending current law that requires the Administration to inform the Intelligence Committees to instead require the Administration to inform each Member of the House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence of electronic surveillance activities conducted under this Act.

Section 10. International movement of targets

This section provides that an order issued under this section shall remain in force during the authorized period of surveillance notwithstanding the absence of the target from the United States, unless the Government files a motion to extinguish the order and the court grants the motion.

Section 11. Compliance with court orders and antiterrorism programs

This section would limit the civil and criminal liability of telecommunications carriers for any activity arising from, or relating to, any alleged intelligence program involving electronic surveillance that the government has certified is, was, or would be intended to protect the United States from a terrorist attack. The amendment applies to all pending and future cases, and allows all such cases to be removed to Federal court. The amendment also applies the old definition of "electronic surveillance" contained in FISA prior to enactment of the Act.

Section 12. Report on minimization procedures

This section would require reporting to Congress that would permit Congress to conduct efficient and appropriate oversight of the implementation of FISA modernization at NSA. H.R. 5825 would update the definition of "electronic surveillance" in FISA to help restore the statute to its intended focus on the surveillance of the domestic communications of persons in the United States and more generally on situations in which the constitutional interests are greatest. The bill would limit the circumstances under which it is necessary to obtain an order from the FISA Court, thereby help to focus FISA resources on the circumstances in which those resources are most important. This Amendment would provide for reporting to Congress—allowing better congressional oversight—on the treatment of U.S. person information for several years and would help Congress see whether the changes have had the desired effects. Specifically, this section requires the NSA to provide a report to the intelligence committees on the effectiveness of the procedures applied to safeguard U.S. person information acquired by means that constituted "electronic surveillance" under the current FISA, but do not constitute "electronic surveillance" under the modernized FISA. The reports would require:

- A description of the "minimization" procedures implemented by the NSA to protect this information pertaining to U.S. Persons;
- The number of significant violations of those procedures; and,
- Summary descriptions of those violations.

Section 13. Technical and conforming amendments

This section makes technical corrections to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.)

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

* * * * * * *

FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

AN ACT To authorize electronic surveillance to obtain foreign intelligence information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Intelligence Surveillance Act of 1978".

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TITLE I—ELECTRONIC SURVEILLANCE WITHIN THE UNITED STATES FOR FOREIGN INTELLIGENCE PURPOSES

DEFINITIONS

SEC. 101. As used in this title:
(a) * * *
(b) "Agent of a foreign power" means—
(1) any person other than a United States person, who—
(A) * * *
(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; [or]

* * * * * * *

(D) is reasonably expected to possess, control, transmit, or receive foreign intelligence information while such person is in the United States, provided that the official making the certification required by section 104(a)(7) deems such foreign intelligence information to be significant; or

* * * * * * *

[(f) "Electronic surveillance" means—
[(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communications sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
[(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of title 18, United States Code;
[(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

[(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.]

(f) "Electronic surveillance" means—

(1) the installation or use of an electronic, mechanical, or other surveillance device for acquiring information by intentionally directing surveillance at a particular known person who is reasonably believed to be in the United States under circumstances in which that 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 under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, if both the sender and all intended recipients are reasonably believed to be located within the United States.

* * * * * * *

(h) "Minimization procedures", with respect to electronic surveillance, means—

(1) * * *

* * * * * * *

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance [approved pursuant to section 102(a),] *authorized pursuant to section 102 or any acquisition authorized pursuant to section 102A* procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 105 is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

* * * * * * *

[(n) "Contents", when used with respect to a communication, includes any information concerning the identity of the parties to such communications or the existence, substance, purport, or meaning of that communication.]

(n) "Contents", when used with respect to a communication, includes any information concerning the substance, purport, or meaning of that communication.

* * * * * * *

[AUTHORIZATION FOR ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE PURPOSES

[SEC. 102. (a)(1) Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that—

[(A) the electronic surveillance is solely directed at—

[(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 101(a) (1), (2), or (3); or

[(ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 101(a) (1), (2), or (3);

[(B) there is no substantial likelihood that the surveillance will acquire the contents of any communications to which a United States person is a party; and

[(C) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 101(h); and

if the Attorney General reports such minimization procedures and any changes thereto to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence at least thirty days prior to their effective date, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

[(2) An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the minimization procedures adopted by him. The Attorney General shall assess compliance with such procedures and shall report such assessments to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence under the provisions of section 108(a).

[(3) The Attorney General shall immediately transmit under seal to the court established under section 103(a) a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless—

[(A) an application for a court order with respect to the surveillance is made under sections 101(h)(4) and 104; or

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

[(4) With respect to electronic surveillance authorized by this subsection, the Attorney General may direct a specified communication common carrier to—

[(A) furnish all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier is providing its customers; and

[(B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished which such carrier wishes to retain.

The Government shall compensate, at the prevailing rate, such carrier for furnishing such aid.

[(b) Applications for a court order under this title are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to the court having jurisdic-

tion under section 103, and a judge to whom an application is made may, notwithstanding any other law, grant an order, in conformity with section 105, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information, except that the court shall not have jurisdiction to grant any order approving electronic surveillance directed solely as described in paragraph (1)(A) of subsection (a) unless such surveillance may involve the acquisition of communications of any United States person.]

AUTHORIZATION FOR ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE PURPOSES

SEC. 102. (a) IN GENERAL.—Notwithstanding any other law, the President, acting through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that—

(1) the electronic surveillance is directed at—

(A) the acquisition of the contents of communications of foreign powers, as defined in paragraph (1), (2), or (3) of section 101(a), or an agent of a foreign power, as defined in subparagraph (A) or (B) of section 101(b)(1); or

(B) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in paragraph (1), (2), or (3) of section 101(a); and

(2) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 101(h);

if the Attorney General reports such minimization procedures and any changes thereto to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate at least 30 days prior to the effective date of such minimization procedures, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

(b) MINIMIZATION PROCEDURES.—An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the minimization procedures. The Attorney General shall assess compliance with such procedures and shall report such assessments to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate under the provisions of section 108(a).

(c) SUBMISSION OF CERTIFICATION.—The Attorney General shall immediately transmit under seal to the court established under section 103(a) a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless—

(1) an application for a court order with respect to the surveillance is made under section 104; or

(2) the certification is necessary to determine the legality of the surveillance under section 106(f).

AUTHORIZATION FOR ACQUISITION OF FOREIGN INTELLIGENCE INFORMATION

SEC. 102A. (a) IN GENERAL.—Notwithstanding any other law, the President, acting through the Attorney General may, for periods of up to one year, authorize the acquisition of foreign intelligence information concerning a person reasonably believed to be outside the United States if the Attorney General certifies in writing under oath that—

(1) the acquisition does not constitute electronic surveillance;

(2) the acquisition involves obtaining the foreign intelligence information from or with the assistance of a wire or electronic communications service provider, custodian, or other person (including any officer, employee, agent, or other specified person of such service provider, custodian, or other person) who has access to wire or electronic communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications;

(3) a significant purpose of the acquisition is to obtain foreign intelligence information; and

(4) the proposed minimization procedures with respect to such acquisition activity meet the definition of minimization procedures under section 101(h).

(b) SPECIFIC PLACE NOT REQUIRED.—A certification under subsection (a) is not required to identify the specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed.

(c) SUBMISSION OF CERTIFICATION.—The Attorney General shall immediately transmit under seal to the court established under section 103(a) a copy of a certification made under subsection (a). Such certification shall be maintained under security measures established by the Chief Justice of the United States and the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless the certification is necessary to determine the legality of the acquisition under section 102B.

(d) MINIMIZATION PROCEDURES.—An acquisition under this section may be conducted only in accordance with the certification of the Attorney General and the minimization procedures adopted by the Attorney General. The Attorney General shall assess compliance with such procedures and shall report such assessments to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate under section 108(a).

DIRECTIVES RELATING TO ELECTRONIC SURVEILLANCE AND OTHER ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION

SEC. 102B. (a) DIRECTIVE.—With respect to an authorization of electronic surveillance under section 102 or an authorization of an acquisition under section 102A, the Attorney General may direct a person to—

(1) immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition of foreign intelligence information in such a manner as

will protect the secrecy of the electronic surveillance or acquisition and produce a minimum of interference with the services that such person is providing to the target; and

(2) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the electronic surveillance or acquisition or the aid furnished that such person wishes to maintain.

(b) COMPENSATION.—The Government shall compensate, at the prevailing rate, a person for providing information, facilities, or assistance pursuant to subsection (a).

(c) FAILURE TO COMPLY.—In the case of a failure to comply with a directive issued pursuant to subsection (a), the Attorney General may petition the court established under section 103(a) to compel compliance with the directive. The court shall issue an order requiring the person or entity to comply with the directive if it finds that the directive was issued in accordance with section 102(a) or 102A(a) and is otherwise lawful. Failure to obey an order of the court may be punished by the court as contempt of court. Any process under this section may be served in any judicial district in which the person or entity may be found.

(d) REVIEW OF PETITIONS.—(1) IN GENERAL.—(A) CHALLENGE.—A person receiving a directive issued pursuant to subsection (a) may challenge the legality of that directive by filing a petition with the pool established under section 103(e)(1).

(B) ASSIGNMENT OF JUDGE.—The presiding judge designated pursuant to section 103(b) shall assign a petition filed under subparagraph (A) to one of the judges serving in the pool established by section 103(e)(1). Not later than 24 hours after the assignment of such petition, the assigned judge shall conduct an initial review of the directive. If the assigned judge determines that the petition is frivolous, the assigned judge shall deny the petition and affirm the directive or any part of the directive that is the subject of the petition. If the assigned judge determines the petition is not frivolous, the assigned judge shall, within 72 hours, consider the petition in accordance with the procedures established under section 103(e)(2) and provide a written statement for the record of the reasons for any determination under this subsection.

(2) STANDARD OF REVIEW.—A judge considering a petition to modify or set aside a directive may grant such petition only if the judge finds that such directive does not meet the requirements of this section or is otherwise unlawful. If the judge does not modify or set aside the directive, the judge shall affirm such directive, and order the recipient to comply with such directive.

(3) DIRECTIVES NOT MODIFIED.—Any directive not explicitly modified or set aside under this subsection shall remain in full effect.

(e) APPEALS.—The Government or a person receiving a directive reviewed pursuant to subsection (d) may file a petition with the court of review established under section 103(b) for review of the decision issued pursuant to subsection (d) not later than 7 days after the issuance of such decision. Such court of review shall have jurisdiction to consider such petitions and shall provide for the record a written statement of the reasons for its decision. On petition by the Government or any person receiving such directive for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(f) PROCEEDINGS.—Judicial proceedings under this section shall be concluded as expeditiously as possible. The record of proceedings, including petitions filed, orders granted, and statements of reasons for decision, shall be maintained under security measures established by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.

(g) SEALED PETITIONS.—All petitions under this section shall be filed under seal. In any proceedings under this section, the court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information.

(h) LIABILITY.—No cause of action shall lie in any court against any person for providing any information, facilities, or assistance in accordance with a directive under this section.

(i) USE OF INFORMATION.—Information acquired pursuant to a directive by the Attorney General under this section concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by section 102(a) or 102A(a). No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this section shall lose its privileged character. No information from an electronic surveillance under section 102 or an acquisition pursuant to section 102A may be used or disclosed by Federal officers or employees except for lawful purposes.

(j) USE IN LAW ENFORCEMENT.—No information acquired pursuant to this section shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived from such information, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

(k) DISCLOSURE IN TRIAL.—If the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance conducted under section 102 or an acquisition authorized pursuant to section 102A, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to disclose or use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to disclose or use such information.

(l) DISCLOSURE IN STATE TRIALS.—If a State or political subdivision of a State intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision of a State, against an aggrieved person, any information obtained or derived from an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A, the State or political subdivision of such State shall notify the aggrieved person, the court, or other authority in which the information is to be disclosed or used and the Attorney General that the State or political subdivision intends to disclose or use such information.

(m) MOTION TO EXCLUDE EVIDENCE.—(1) IN GENERAL.—Any person against whom evidence obtained or derived from an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A is to be, or has been, used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance or such acquisition on the grounds that—

(A) the information was unlawfully acquired; or

(B) the electronic surveillance or acquisition was not properly made in conformity with an authorization under section 102(a) or 102A(a).

(2) TIMING.—A person moving to suppress evidence under paragraph (1) shall make the motion to suppress the evidence before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(n) REVIEW OF MOTIONS.—If a court or other authority is notified pursuant to subsection (k) or (l), a motion is made pursuant to subsection (m), or a motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State—

(1) to discover or obtain an Attorney General directive or other materials relating to an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A, or

(2) to discover, obtain, or suppress evidence or information obtained or derived from an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A,

the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to such electronic surveillance or such acquisition as may be necessary to determine whether such electronic surveillance or such acquisition authorized under this section was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the directive or other materials relating to the acquisition only where such disclosure is necessary to make an accurate determination of the legality of the acquisition.

(o) DETERMINATIONS.—If, pursuant to subsection (n), a United States district court determines that the acquisition authorized under this section was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived or otherwise grant the motion of the aggrieved person. If the court determines that such acquisition was lawfully authorized and conducted, it shall deny

the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

(p) BINDING ORDERS.—Orders granting motions or requests under subsection (m), decisions under this section that an electronic surveillance or an acquisition was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of directives, orders, or other materials relating to such acquisition shall be final orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.

(q) COORDINATION.—(1) IN GENERAL.—Federal officers who acquire foreign intelligence information may consult with Federal law enforcement officers or law enforcement personnel of a State or political subdivision of a State, including the chief executive officer of that State or political subdivision who has the authority to appoint or direct the chief law enforcement officer of that State or political subdivision, to coordinate efforts to investigate or protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the development or proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

(2) CERTIFICATION REQUIRED.—Coordination authorized under paragraph (1) shall not preclude the certification required by section 102(a) or 102A(a).

(r) RETENTION OF DIRECTIVES AND ORDERS.—A directive made or an order granted under this section shall be retained for a period of not less than 10 years from the date on which such directive or such order is made.

DESIGNATION OF JUDGES

SEC. 103. (a) * * *

* * * * * * *

(g) Applications for a court order under this title are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to the court having jurisdiction under this section, and a judge to whom an application is made may, notwithstanding any other law, grant an order, in conformity with section 105, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information.

APPLICATION FOR AN ORDER

SEC. 104. (a) Each application for an order approving electronic surveillance under this title shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 103. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this title. It shall include—

(1) * * *

* * * * * * *

(6) a [detailed description] *summary description* of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official [or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate] *designated by the President to authorize electronic surveillance for foreign intelligence purposes*—

(A) * * *

* * * * * * *

(C) that such information cannot reasonably be obtained by normal investigative techniques; *and*

[(D) that designates the type of foreign intelligence information being sought according to the categories described in section 101(e); and]

[(E)] *(D)* including a statement of the basis for the certification that—

(i) * * *

* * * * * * *

(8) [a statement of the means] *a summary statement of the means* by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(9) [a statement] *a summary statement* of the facts concerning all previous applications that have been made to any judge under this title involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application; *and*

(10) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this title should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter[; and].

[(11) whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices involved and what minimization procedures apply to information acquired by each device.]

[(b) Whenever the target of the electronic surveillance is a foreign power, as defined in section 101(a) (1), (2), or (3), and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power, the application need not contain the information required by paragraphs (6), (7)(E), (8), and (11) of subsection (a), but shall state whether physical entry is required to effect the surveillance and shall contain such information about the surveillance techniques and communications or other information concerning United States persons likely to be obtained as may be necessary to assess the proposed minimization procedures.]

[(c)] *(b)* The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

[(d)] *(c)* The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 105.

[(e)] *(d)*(1)(A) Upon written request of the Director of the Federal Bureau of Investigation, the Secretary of Defense, the Secretary of State, [or the Director of National Intelligence] *the Director of National Intelligence, or the Director of the Central Intelligence Agency*, the Attorney General shall personally review under subsection (a) an application under that subsection for a target described in section 101(b)(2).

* * * * * * *

ISSUANCE OF AN ORDER

SEC. 105. (a) Upon an application made pursuant to section 104, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that—

[(1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;]

[(2)] *(1)* the application has been made by a Federal officer and approved by the Attorney General;

[(3)] *(2)* on the basis of the facts submitted by the applicant there is probable cause to believe that—

(A) * * *

* * * * * * *

[(4)] *(3)* the proposed minimization procedures meet the definition of minimization procedures under section 101(h); and

[(5)] *(4)* the application which has been filed contains all statements and certifications required by section 104 and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section [104(a)(7)(E)] *104(a)(6)(D)* and any other information furnished under section [104(d)] *104(c)*.

* * * * * * *

(c)(1) SPECIFICATIONS.—An order approving an electronic surveillance under this section shall specify—

(A) * * *

* * * * * * *

(D) the means by which the electronic surveillance will be effected and whether physical entry will be used to effect the surveillance; *and*

(E) the period of time during which the electronic surveillance is approved[; and].

[(F) whenever more than one electronic, mechanical, or other surveillance device is to be used under the order, the authorized coverage of the devices involved and what minimization procedures shall apply to information subject to acquisition by each device.]

* * * * * * *

[(d) Whenever the target of the electronic surveillance is a foreign power, as defined in section 101(a) (1), (2), or (3), and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power, the order used need not contain the information required by subparagraphs (C), (D), and (F) of subsection (c)(1), but shall generally describe the information sought, the communications or activities to be subjected to the surveillance, and the type of electronic surveillance involved, including whether physical entry is required.]

[(e)] *(d)*(1) An order issued under this section may approve an electronic surveillance for the period necessary to achieve its purpose, or for ninety days, whichever is less, except that (A) an order under this section shall approve an electronic surveillance targeted against a foreign power, as defined in section 101(a), (1), (2), or (3), for the period specified in the application or for one year, whichever is less, and (B) an order under this Act for a surveillance targeted against an agent of a foreign power who is not a United States person may be for the period specified in the application or for 120 days, whichever is less.

[(2) Extensions of an order issued under this title may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order, except that (A) an extension of an order under this Act for a surveillance targeted against a foreign power, a defined in section 101(a) (5) or (6), or against a foreign power as defined in section 101(a)(4) that is not a United States person, may be for a period not to exceed one year if the judge finds probable cause to believe that no communication of any individual United States person will be acquired during the period, and (B) an extension of an order under this Act for a surveillance targeted against an agent of a foreign power who is not a United States person may be for a period not to exceed 1 year.]

(2) Extensions of an order issued under this title may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order and may be for a period not to exceed one year.

* * * * * * *

(4) An order issued under this section shall remain in force during the authorized period of surveillance notwithstanding the absence of the target from the United States, unless the Government files a motion to extinguish the order and the court grants the motion.

[(f) Notwithstanding any other provision of this title, when the Attorney General reasonably determines that—

[(1) 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; and

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

he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 103 is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this

title is made to that judge as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he 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 72 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.]

(e) Notwithstanding any other provision of this title, an official appointed by the President with the advice and consent of the Senate that is designated by the President to authorize electronic surveillance may authorize the emergency employment of electronic surveillance if—

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

(3) such official informs the Attorney General of such electronic surveillance;

(4) the Attorney General or a designee of the Attorney General informs a judge having jurisdiction under section 103 of such electronic surveillance as soon as practicable, but in no case more than 7 days after the date on which such electronic surveillance is authorized;

(5) an application in accordance with this title is made to such judge or another judge having jurisdiction under section 103 as soon as practicable, but not more than 7 days after such electronic surveillance is authorized;

(6) such official requires 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 7 days from the time of authorization by such offi-

cial, whichever is earliest. In the event that the application for approval submitted pursuant to paragraph (5) 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 pursuant to paragraph (5) may be reviewed as provided in section 103.

[(g)**]** *(f)* Notwithstanding any other provision of this title, officers, employees, or agents of the United States are authorized in the normal course of their official duties to conduct electronic surveillance not targeted against the communications of any particular person or persons, under procedures approved by the Attorney General, solely to—

(1) * * *

* * * * * * *

[(h)**]** *(g)* Certifications made by the Attorney General pursuant to section 102(a) and applications made and orders granted under this title shall be retained for a period of at least ten years from the date of the certification or application.

[(i)**]** *(h)* No cause of action shall lie in any court against any provider of **[**a wire or**]** *an* electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance in accordance with a court order or request for emergency assistance under this Act for electronic surveillance or **[**physical search**]** *physical search or 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 under section 102B.*

(i) In any case in which the Government makes an application to a judge under this title to conduct electronic surveillance involving communications and the judge grants such application, the judge shall also authorize the installation and use of pen registers and trap and trace devices to acquire dialing, routing, addressing, and signaling information related to such communications and such dialing, routing, addressing, and signaling information shall not be subject to minimization procedures.

USE OF INFORMATION

SEC. 106. (a) * * *

* * * * * * *

(i) In circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any **[**radio**]** communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would

be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the [contents indicates] *contents contain significant foreign intelligence information or indicate* a threat of death or serious bodily harm to any person.

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

(1) * * *

* * * * * * *

(k)(1) * * *

(2) Coordination authorized under paragraph (1) shall not preclude the certification required by section [104(a)(7)(B)] *104(a)(6)(B)* or the entry of an order under section 105.

* * * * * * *

CONGRESSIONAL OVERSIGHT

SEC. 108. (a)(1) On a semiannual basis the Attorney General shall fully inform *each member of* the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, and the Committee on the Judiciary of the Senate, concerning all electronic surveillance under this title. Nothing in this title shall be deemed to limit the authority and responsibility of the appropriate committees of each House of Congress to obtain such information as they may need to carry out their respective functions and duties.

(2) Each report under the first sentence of paragraph (1) shall include a description of—

(A) * * *

(B) each criminal case in which information acquired under this Act has been authorized for use at trial during the period covered by such report; [and]

(C) the total number of emergency employments of electronic surveillance under section [105(f)] *105(e)* and the total number of subsequent orders approving or denying such electronic surveillance[.]*; and*

(D) the authority under which the electronic surveillance is conducted.

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

* * * * * * *

TITLE III—PHYSICAL SEARCHES WITHIN THE UNITED STATES FOR FOREIGN INTELLIGENCE PURPOSES

* * * * * * *

ISSUANCE OF AN ORDER

SEC. 304. (a) * * *

* * * * * * *

(d)(1) * * *

* * * * * * *

(4) An order issued under this section shall remain in force during the authorized period of surveillance notwithstanding the absence of the target from the United States, unless the Government files a motion to extinguish the order and the court grants the motion.

* * * * * * *

SECTION 501 OF THE NATIONAL SECURITY ACT OF 1947

GENERAL CONGRESSIONAL OVERSIGHT PROVISIONS

SEC. 501. (a)(1) The President shall ensure that *each member of* the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this title.

* * * * * * *

(b) The President shall ensure that any illegal intelligence activity is reported promptly to *each member of* the congressional intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.

* * * * * * *

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, SEPTEMBER 20, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (chairman of the committee) presiding.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up the bill H.R. 5825, the Electronic Surveillance Modernization Act, for purposes of—the committee will be in order. Pursuant to notice, I now call up the bill H.R. 5825, the Electronic Surveillance Mod-

ernization Act, for purposes of markup and move its favorable recommendation to the House.

Can we have some order here please? Members, please take—and staff will please take their conversations and press inquiries out into the hallway.

The Chair moves the favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 5825, follows:]

I

109TH CONGRESS
2D SESSION

H. R. 5825

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

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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 subparagraph:

''(D) possesses or is reasonably expected to transmit or receive foreign intelligence information 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 device for the intentional collection of information relating 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 privacy and a warrant would be required for law enforcement purposes, if both the sender and all intended 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:

''(c) 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), respectively;

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

(i) in the matter preceding subparagraph (A), by striking ''or officials designated'' and all that follows through ''consent of the Senate'' and inserting ''designated by the President to authorize electronic surveillance for foreign intelligence purposes'';

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

(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 effected and''; and

(ii) by adding ''and'' at the end; and

(E) in paragraph (8), as redesignated by subparagraph (B), by striking ''; and'' and inserting 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''.

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 report 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 intelligence committees' means the Permanent Select Committee 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)''.

○

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes to explain the bill—once there's order. If there is not order, the Chair is going to start naming names. Thank you.

Today, the committee considers H.R. 5825, the Electronic Surveillance Modernization Act, a bill introduced by Representative Heather Wilson, Chairman Hoekstra and myself. This legislation reflects Congress' ongoing efforts to provide the administration with reasonable tools and authorities to prevent terrorist attacks on our Nation.

H.R. 5825 would return the focus of FISA to protecting those with the fourth amendment expectation of privacy. The bill makes FISA technology neutral and simplifies the process for getting a FISA court order.

When FISA was enacted, domestic communications and international communications were transmitted in a predominantly different manner. Domestic communications were transmitted via wire, while international communications were transmitted via radio. In recent years, international communications are increasingly transmitted through undersea cables which were considered wire. This bill recognized that international communications should be treated the same whether transmitted by wire technology or radio technology. The bill would remove the current technology——

Mr. WATT. Mr. Chairman, we are having trouble hearing you. I am sorry.

Chairman SENSENBRENNER. The gentleman from California is correct.

Mr. WATT. California? Wherever. North Carolina, Mr. Chairman.

Chairman SENSENBRENNER. Well, I was stared at by the gentleman from California, but you are correct.

Mr. WATT. They can't hear you in North Carolina or California, Mr. Chairman.

Chairman SENSENBRENNER. Well, I am more worried about North Carolina, because it is closer.

The bill would remove the current technology distinction between the terms wire and radio communications and would use a technology neutral definition for electronic surveillance.

It would also specifically require that when a person has a reasonable expectation of privacy, FISA applies.

The bill also addresses the government's use of warrantless surveillance to monitor a suspected terrorist's international communications tape.

On December 16 of last year, based on the leak of classified information, the New York Times published a story regarding the terrorist surveillance program operated by the NSA. The President subsequently acknowledged that he had authorized the program after 9/11 to intercept the international communications of those with known links to al Qaeda and related terrorist organizations.

Notwithstanding the administration's position that this program is fully consistent with U.S. law and the Constitution, the President has called on Congress to provide specific authorization for this program and to make additional changes to U.S. laws governing electronic surveillance. The bill attempts to encompass such surveillance without infringing on the President's authority to protect national security.

The Subcommittee on Crime, Terrorism and Homeland Security recently held two hearings on the bill and other legislation relating to the surveillance of electronic communications. At these hearings, there was broad consensus among witnesses and members that this bill could be improved, which is why we are considering it at this markup today.

As I noted earlier, the legislation is a priority for the President and critical to our national efforts to detect and disrupt acts of terrorism before they occur on American soil.

I would note this legislation is expected to come up for consideration on the House floor as early as next week. Therefore, it is imperative that the committee act on the bill today lest we risk foregoing our opportunity to improve it.

I yield back the balance of my time and recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

This is a very important measure, and I state from the outset I strongly support intercepting each and every conversation involving al Qaeda and its supporters. I also support commonsense updates to the Foreign Intelligence Surveillance Act, FISA, in order to have our surveillance capabilities keep pace with modern technologies.

The problem that confronts us in the measure before us is that it is, one, unconstitutional, two, deeply flawed, and of highly questionable timing to boot.

First, let's talk about the flaws. The flaw is that it would radically rewrite FISA, gutting core provisions and safeguards and exposing millions of innocent Americans to warrantless surveillance. Among other things, the bill does nothing to impose limits on unchecked Presidential power to conduct warrantless surveillance, which has been the subject of much discussion here of late.

Secondly, it extends FISA's surveillance to broad new categories of individuals, corporations and the United States having no connection to foreign governments or terrorist organizations. The Computer and Communications Industry Association wrote to the Committee on the Judiciary just yesterday that the mere possibility of widespread, secret, unchecked surveillance of the billions of messages that flow among our customers, especially U.S. citizens, will corrode the fundamental openness and freedom necessary to our communication networks.

The next consideration is that it allows warrantless surveillance of innocent Americans in the United States and allows the government to maintain records and massive databases on such individuals in perpetuity. It grants broad new powers to conduct physical searches on all United States persons, as well as their relatives, landlords, business communication providers, without court approval.

In addition, this measure grants expansive new authority to conduct warrantless surveillance and physical searches without warrant against any and all Americans after an undefined, armed or terrorist attack on any American person or property anywhere in the world for an indefinite duration.

Now, with those—one, two, three, four, five, six—criticisms of the problems of this legislation, I could stop right there. There are six reasons to turn this legislation back on the spot.

But I believe the measure is further unconstitutional for it contravenes the fourth amendment requirement that individualized judicial warrants are required for our government to intercept communications of Americans. The need is particularly vital in the present case, as the individuals will never learn of the surveillance.

Further, by eliminating the requirement that the government show that the warrant is reasonable and narrowly tailored, the bill flies in the face of the fourth amendment's particularity requirement.

Finally, I must also question whether the committee even should be holding this markup at this time. The question of timing—9 months—almost 9 months after we first learned of the warrantless surveillance program, there has been no attempt to conduct an independent inquiry into its legality. Not only has the Congress failed to conduct any sort of investigation but the administration summarily rejected all requests for special counsels as well as reviews by the Department of Justice and the Department of Defense Inspectors General.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. CONYERS. I ask unanimous consent that my remaining statement go into the record.

Chairman SENSENBRENNER. Without objection, so ordered.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Statement of Rep. John Conyers
Committee on the Judiciary
Markup of H.R. 5825, the "Electronic Surveillance Modernization Act"
Sept. 20, 4 PM, 2141 RHOB

Let me state at the outset that I strongly support intercepting each and every conversation involving al Qaeda and its supporters. I also can and do support common sense updates to the Foreign Intelligence Surveillance Act (FISA) and the Fourth Amendment to ensure our surveillance capabilities keep pace with modern technologies. Unfortunately, the legislation before us is deeply flawed, unconstitutional, and of highly-questionable timing.

First, the legislation is deeply flawed because it would radically rewrite FISA, gutting core provisions and safeguards and exposing millions of innocent Americans to warrantless surveillance. Among other things, the bill:

- does nothing to impose limits on unchecked presidential power to conduct warrantless surveillance.

- extends FISA surveillance to broad new categories of individuals and corporations in the U.S. having no connection to foreign governments or terrorist organizations. The Computer and Communications Industry Association wrote to this Committee just yesterday that "the mere possibility of widespread, secret, and unchecked surveillance of the billions of messages that flow among our customers, especially U.S. citizens, will corrode the fundamental openness and freedom necessary to our communications networks."

- allows warrantless surveillance on innocent Americans in the U.S. and allows the government to maintain records and massive databases on such individuals in perpetuity.

- grants broad new powers to conduct physical searches on all U.S. persons as well as their landlords, relatives, and business and

communications providers without court approval.

- grants expansive new authority to conduct warrantless surveillance and physical searches without warrant against any and all Americans after an undefined armed or terrorist attack on any American person or property anywhere in the world for an indefinite duration.

Second, the legislation is unconstitutional because it contravenes the Fourth Amendment requirement that individualized judicial warrants are required for our government to intercept communications of Americans. The need is particularly vital in the present case, as the individuals will never learn of the surveillance. Further, by eliminating the requirement that the government show that the warrant is reasonable and narrowly tailored, the bill flies in the face of the Fourth Amendment's particularity requirement

Finally, I also must question whether the Committee even should be holding this markup at this time. Nearly nine months after we first learned of the warrantless surveillance program, there has been no attempt to conduct an independent inquiry into its legality. Not only has Congress failed to conduct any sort of investigation, but the Administration summarily rejected all requests for special counsels as well as reviews by the Department of Justice and Department of Defense Inspectors General. When the DOJ Office of Professional Responsibility finally opened an investigation, the President himself squashed it by denying the investigators security clearances. Furthermore, the DOJ has completely ignored the numerous questions posed by this Committee, the Wexler Resolution of Inquiry we previously adopted, as well as our request for a full classified briefing on the program.

I also am skeptical regarding the Administration's sudden interest in "modernizing" FISA five years after the September 11 attacks, after we have already approved dozens of such changes, and less than two months before the mid-term election. The current law already allows for streamlined court approved wiretaps and includes an emergency exception which allows wiretapping without a court order for up to 72 hours. If the Attorney General needs more resources, additional time, or the ability to delegate this responsibility to other trusted officials, I am sure the Members of this

Committee could come together to do that. However, there appears to be no cause to revamp FISA on the fly and permit the wholesale interception, storage, and unlimited usage of the contents of the communications of innocent Americans without a warrant.

Finally, we have heard from the technology industry that provisions like those in this bill could lead to retaliation from oppressive regimes. The Computer and Communications Industry Association wrote that its "industry is confronted with escalating monitoring and surveillance by repressive foreign regimes. When challenged, totalitarian states often justify their policies by pointing to U.S. government practices."

I believe that the lesson of the last five years is that if we allow intelligence, military and law enforcement to do their work free of political interference, if we give them requisite resources and modern technologies, if we allow them to "connect the dots" in a straight forward and non-partisan manner, we can protect our citizens. We all want to fight terrorism, but we need to fight it the right way, consistent with our Constitution, and in a manner that serves as a model for the rest of the world. This bill does not meet that test.

Chairman SENSENBRENNER. Without objection, all members may place opening statements in the record at this point.

Are there amendments?

The Chair has an amendment at the desk, which the Clerk will report.

The CLERK. Mr. Chairman, I have two amendments from you.

Chairman SENSENBRENNER. This is the one that is 009 XML.

The CLERK. Mr. Chairman, amendment to H.R. 5825 offered by Mr. Sensenbrenner.

Strike sections 7 and 8, page 12, line 1 through page 16, line 21.

[The amendment follows:]

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AMENDMENT TO H.R. 5825

OFFERED BY MR. Sensenbrenner

Strike sections 7 and 8 (page 12, line 1 through page 16, line 21).

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September 19, 2006 (9:41 a.m.)

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes.

The amendment strikes sections 7 and 8 of the Wilson bill. Section 7 would amend the authorization term of during time of war and section 11 of FISA. Under the Wilson bill, the President through the Attorney General is authorized to collect essential surveillance without a court order to acquire foreign intelligence information for a period of not to exceed 60 days after an armed attack against the U.S.

The current law allows for warrantless surveillance for 15 days after a declaration of war by the Congress. Notification to each member of the two intelligence committees is required.

According to the conference report on FISA, the conferees intended that this period would allow for time for consideration of any amendment to the Act that may be appropriate during a wartime emergency. It went on to say that the conferees expected such amendment would be reported with recommendations within 7 days and that each House would vote on the amendment within 7 days thereafter.

The Wilson bill changed the trigger for declaration of war to an armed attack and extended the time for warrantless surveillance to 60 days. Section 11 was not intended to provide adequate time for the government to conduct warrantless surveillance in a time of war but rather for Congress to act expeditiously after such a declaration of war to amend the law.

Furthermore, the new language is vague and does not allow the Intelligence Committee to work to prevent another attack if they have to wait for an armed attack.

The amendment strikes section 7. Section 8 would govern electronic surveillance after a terrorist attack that would not be covered under FISA. The President, acting through the Attorney General, would have the authority to authorize electronic surveillance to acquire foreign intelligence information without a court order under specified circumstances.

Under this authority, the President would have to submit notification to each member of the Intelligence Committees and of the FISA court. Notification must state that the U.S. has been the subject of a terrorist attack and must identify the terrorist organizations or affiliates of terrorist organizations believed to be responsible for the terrorist attacks.

For someone to be the target of such surveillance there must be a reason to believe that such a person is communicating with a terrorist organization that is reasonably believed to be responsible for the attack. There must be reasonable cause to believe the information obtained from the electronic surveillance may be foreign intelligence information. This section of the bill would require recertification every 45 days and minimization procedures for electronic surveillance conducted under the section. The language again requires the government to wait until after attack.

The mission of the government is to prevent another terrorist attack, and that is the very purpose of the terrorism surveillance programs. At the hearings held by the Subcommittee on Crime, members and witnesses expressed a concern that this trigger would not allow them to prevent an attack. These sections, I believe, should be stricken, while better language should be crafted.

I yield back the balance of my time.

The gentleman from Michigan.

Mr. CONYERS. Mr. Chairman, I find that striking section 7—I rise in support of the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes, and more if he needs it.

Mr. CONYERS. I appreciate the amendment. Because, by eliminating these two sections, you have taken care of at least one, maybe two points of the criticism that I offered initially against the bill.

So I support the amendment and return the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the Chair. Those in favor will say aye; those opposed, no.

The ayes appear to have it. The ayes have it. The amendment is agreed to.

Are there further amendments?

Mr. LUNGREN. Mr. Chairman.

Chairman SENSENBRENNER. Gentleman from California, Mr. Lungren.

Mr. LUNGREN. Mr. Chairman, I have an amendment at the desk.

Mr. CONYERS. Point of procedure, Mr. Chairman. Don't we go to the other side?

Chairman SENSENBRENNER. Well, the gentleman from California is very pushy, so he has been recognized.

The Clerk will report the amendment.

The CLERK. Amendment to H.R. 5825 offered by Mr. Dan E. Lungren of California.

Strike section 2, page 1, line 6, through page 3, line 20, and insert the following:

Section 2. FISA definitions.

Mr. LUNGREN. Mr. Chairman, I ask unanimous consent that the amendment be considered——

Chairman SENSENBRENNER. Just wait till the amendment is distributed, because it is somewhat lengthy.

The clerk will continue to report.

The CLERK. Subsection (a). Agent of a Foreign Power. Subsection (b)(1) of section 101 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S. Code——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

AMENDMENT TO H.R. 5825

OFFERED BY MR. DANIEL E. LUNGREN OF CALIFORNIA

Strike section 2 (page 1, line 6 through page 3, line 20) and insert the following:

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:

"(D) is reasonably expected to possess, control, transmit, or receive foreign intelligence information while such person is in the United States, provided that the official making the certification required by section 104(a)(7) deems such foreign intelligence information to be significant; 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 an electronic, mechanical, or other surveillance device for acquiring information by intentionally directing surveillance at a particular known person who is reasonably believed to be in the United States under circumstances in which that 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 under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, if both the sender and all intended recipients are reasonably believed to be located within the United States.".

(c) CONTENTS.—Subsection (n) of such section is amended to read as follows:

"(n) 'Contents', when used with respect to a communication, includes any information concerning the substance, purport, or meaning of that communication.".

Strike section 3 (page 3, line 21 through page 6, line 4) and insert the following:

SEC. 3. AUTHORIZATION FOR ELECTRONIC SURVEILLANCE AND OTHER ACQUISITIONS FOR FOREIGN INTELLIGENCE PURPOSES.

(a) IN GENERAL.—The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is further amended by striking section 102 and inserting the following:

"AUTHORIZATION FOR ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE PURPOSES

"SEC. 102. (a) IN GENERAL.—Notwithstanding any other law, the President, acting through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that—

"(1) the electronic surveillance is directed at—

"(A) the acquisition of the contents of communications of foreign powers, as defined in paragraph (1), (2), or (3) of section 101(a), or an agent of a foreign power, as defined in subparagraph (A) or (B) of section 101(b)(1); or

"(B) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign

power, as defined in paragraph (1), (2), or (3) of section 101(a); and

"(2) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 101(h);

if the Attorney General reports such minimization procedures and any changes thereto to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate at least 30 days prior to the effective date of such minimization procedures, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

"(b) MINIMIZATION PROCEDURES.—An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the minimization procedures. The Attorney General shall assess compliance with such procedures and shall report such assessments to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate under the provisions of section 108(a).

"(c) SUBMISSION OF CERTIFICATION.—The Attorney General shall immediately transmit under seal to the court

established under section 103(a) a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless—

"(1) an application for a court order with respect to the surveillance is made under section 104; or

"(2) the certification is necessary to determine the legality of the surveillance under section 106(f).

"AUTHORIZATION FOR ACQUISITION OF FOREIGN INTELLIGENCE INFORMATION

"SEC. 102A. (a) IN GENERAL.—Notwithstanding any other law, the President, acting through the Attorney General may, for periods of up to one year, authorize the acquisition of foreign intelligence information concerning a person reasonably believed to be outside the United States if the Attorney General certifies in writing under oath that—

"(1) the acquisition does not constitute electronic surveillance;

"(2) the acquisition involves obtaining the foreign intelligence information from or with the assistance of a wire or electronic communications service provider, custodian, or other person (including any officer, employee, agent, or other specified person of

such service provider, custodian, or other person) who has access to wire or electronic communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications;

"(3) a significant purpose of the acquisition is to obtain foreign intelligence information; and

"(4) the proposed minimization procedures with respect to such acquisition activity meet the definition of minimization procedures under section 101(h).

"(b) SPECIFIC PLACE NOT REQUIRED.—A certification under subsection (a) is not required to identify the specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed.

"(c) SUBMISSION OF CERTIFICATION.—The Attorney General shall immediately transmit under seal to the court established under section 103(a) a copy of a certification made under subsection (a). Such certification shall be maintained under security measures established by the Chief Justice of the United States and the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless the certification is

necessary to determine the legality of the acquisition under section 102B.

"(d) MINIMIZATION PROCEDURES.—An acquisition under this section may be conducted only in accordance with the certification of the Attorney General and the minimization procedures adopted by the Attorney General. The Attorney General shall assess compliance with such procedures and shall report such assessments to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate under section 108(a).

"DIRECTIVES RELATING TO ELECTRONIC SURVEILLANCE AND OTHER ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION

"SEC. 102B. (a) DIRECTIVE.—With respect to an authorization of electronic surveillance under section 102 or an authorization of an acquisition under section 102A, the Attorney General may direct a person to—

"(1) immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition of foreign intelligence information in such a manner as will protect the secrecy of the electronic surveillance or acquisition and produce a minimum of interference with the services that such person is providing to the target; and

"(2) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the electronic surveillance or acquisition or the aid furnished that such person wishes to maintain.

"(b) COMPENSATION.—The Government shall compensate, at the prevailing rate, a person for providing information, facilities, or assistance pursuant to subsection (a).

"(c) FAILURE TO COMPLY.—In the case of a failure to comply with a directive issued pursuant to subsection (a), the Attorney General may petition the court established under section 103(a) to compel compliance with the directive. The court shall issue an order requiring the person or entity to comply with the directive if it finds that the directive was issued in accordance with section 102(a) or 102A(a) and is otherwise lawful. Failure to obey an order of the court may be punished by the court as contempt of court. Any process under this section may be served in any judicial district in which the person or entity may be found.

"(d) REVIEW OF PETITIONS.—(1) IN GENERAL.—(A) CHALLENGE.—A person receiving a directive issued pursuant to subsection (a) may challenge the legality of

that directive by filing a petition with the pool established under section 103(e)(1).

"(B) ASSIGNMENT OF JUDGE.—The presiding judge designated pursuant to section 103(b) shall assign a petition filed under subparagraph (A) to one of the judges serving in the pool established by section 103(e)(1). Not later than 24 hours after the assignment of such petition, the assigned judge shall conduct an initial review of the directive. If the assigned judge determines that the petition is frivolous, the assigned judge shall deny the petition and affirm the directive or any part of the directive that is the subject of the petition. If the assigned judge determines the petition is not frivolous, the assigned judge shall, within 72 hours, consider the petition in accordance with the procedures established under section 103(e)(2) and provide a written statement for the record of the reasons for any determination under this subsection.

"(2) STANDARD OF REVIEW.—A judge considering a petition to modify or set aside a directive may grant such petition only if the judge finds that such directive does not meet the requirements of this section or is otherwise unlawful. If the judge does not modify or set aside the directive, the judge shall affirm such directive, and order the recipient to comply with such directive.

"(3) DIRECTIVES NOT MODIFIED.—Any directive not explicitly modified or set aside under this subsection shall remain in full effect.

"(e) APPEALS.—The Government or a person receiving a directive reviewed pursuant to subsection (d) may file a petition with the court of review established under section 103(b) for review of the decision issued pursuant to subsection (d) not later than 7 days after the issuance of such decision. Such court of review shall have jurisdiction to consider such petitions and shall provide for the record a written statement of the reasons for its decision. On petition by the Government or any person receiving such directive for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

"(f) PROCEEDINGS.—Judicial proceedings under this section shall be concluded as expeditiously as possible. The record of proceedings, including petitions filed, orders granted, and statements of reasons for decision, shall be maintained under security measures established by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.

"(g) SEALED PETITIONS.—All petitions under this section shall be filed under seal. In any proceedings under

this section, the court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information.

"(h) LIABILITY.—No cause of action shall lie in any court against any person for providing any information, facilities, or assistance in accordance with a directive under this section.

"(i) USE OF INFORMATION.—Information acquired pursuant to a directive by the Attorney General under this section concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by section 102(a) or 102A(a). No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this section shall lose its privileged character. No information from an electronic surveillance under section 102 or an acquisition pursuant to section 102A may be used or disclosed by Federal officers or employees except for lawful purposes.

"(j) USE IN LAW ENFORCEMENT.—No information acquired pursuant to this section shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any infor-

mation derived from such information, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

"(k) DISCLOSURE IN TRIAL.—If the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance conducted under section 102 or an acquisition authorized pursuant to section 102A, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to disclose or use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to disclose or use such information.

"(l) DISCLOSURE IN STATE TRIALS.—If a State or political subdivision of a State intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision of a State, against an aggrieved person, any information obtained or derived from

an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A, the State or political subdivision of such State shall notify the aggrieved person, the court, or other authority in which the information is to be disclosed or used and the Attorney General that the State or political subdivision intends to disclose or use such information.

"(m) MOTION TO EXCLUDE EVIDENCE.—(1) IN GENERAL.—Any person against whom evidence obtained or derived from an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A is to be, or has been, used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance or such acquisition on the grounds that—

"(A) the information was unlawfully acquired; or

"(B) the electronic surveillance or acquisition was not properly made in conformity with an authorization under section 102(a) or 102A(a).

"(2) TIMING.—A person moving to suppress evidence under paragraph (1) shall make the motion to suppress

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

"(n) REVIEW OF MOTIONS.—If a court or other authority is notified pursuant to subsection (k) or (l), a motion is made pursuant to subsection (m), or a motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State—

"(1) to discover or obtain an Attorney General directive or other materials relating to an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A, or

"(2) to discover, obtain, or suppress evidence or information obtained or derived from an electronic surveillance authorized pursuant to section 102 or an acquisition authorized pursuant to section 102A,

the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States,

review in camera and ex parte the application, order, and such other materials relating to such electronic surveillance or such acquisition as may be necessary to determine whether such electronic surveillance or such acquisition authorized under this section was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the directive or other materials relating to the acquisition only where such disclosure is necessary to make an accurate determination of the legality of the acquisition.

"(o) DETERMINATIONS.—If, pursuant to subsection (n), a United States district court determines that the acquisition authorized under this section was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived or otherwise grant the motion of the aggrieved person. If the court determines that such acquisition was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

"(p) BINDING ORDERS.—Orders granting motions or requests under subsection (m), decisions under this section that an electronic surveillance or an acquisition was not lawfully authorized or conducted, and orders of the United

States district court requiring review or granting disclosure of directives, orders, or other materials relating to such acquisition shall be final orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.

"(q) COORDINATION.—(1) IN GENERAL.—Federal officers who acquire foreign intelligence information may consult with Federal law enforcement officers or law enforcement personnel of a State or political subdivision of a State, including the chief executive officer of that State or political subdivision who has the authority to appoint or direct the chief law enforcement officer of that State or political subdivision, to coordinate efforts to investigate or protect against—

"(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(B) sabotage, international terrorism, or the development or proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

"(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

"(2) CERTIFICATION REQUIRED.—Coordination authorized under paragraph (1) shall not preclude the certification required by section 102(a) or 102A(a).

"(r) RETENTION OF DIRECTIVES AND ORDERS.—A directive made or an order granted under this section shall be retained for a period of not less than 10 years from the date on which such directive or such order is made.".

(b) TABLE OF CONTENTS.—The table of contents in the first section of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended by inserting after the item relating to section 102 the following:

"102A. Authorization for acquisition of foreign intelligence information.
"102B. Directives relating to electronic surveillance and other acquisitions of foreign intelligence information.".

Strike sections 4 and 5 (page 6, line 5 through page 11, line 17) and insert the following:

SEC. 4. JURISDICTION OF FISA COURT.

Section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803) is amended by adding at the end the following new subsection:

"(g) Applications for a court order under this title are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to the court having jurisdiction under this section, and a judge to whom an application is made may, notwithstanding any other law, grant an order, in conformity with

section 105, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information.".

SEC. 5. 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) in paragraph (6), by striking "detailed description" and inserting "summary description";

(B) in paragraph (7)—

(i) in the matter preceding subparagraph (A), by striking "or officials designated" and all that follows through "consent of the Senate" and inserting "designated by the President to authorize electronic surveillance for foreign intelligence purposes";

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

(iii) by striking subparagraph (D); and

(iv) by redesignating subparagraph (E) as subparagraph (D);

(C) in paragraph (8), by striking "a statement of the means" and inserting "a summary statement of the means";

(D) in paragraph (9)—

(i) by striking "a statement" and inserting "a summary statement"; and

(ii) by striking "application;" and inserting "application; and";

(E) in paragraph (10), by striking "thereafter; and" and inserting "thereafter."; and

(F) by striking paragraph (11).

(2) by striking subsection (b);

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

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

SEC. 6. 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) through (5) as paragraphs (1) through (4), respectively;

(2) in subsection (c)(1)—

(A) in subparagraph (D), by striking "surveillance;" and inserting "surveillance; and";

(B) in subparagraph (E), by striking "approved; and" and inserting "approved."; and

(C) by striking subparagraph (F);

(3) by striking subsection (d);

(4) by redesignating subsections (e) through (i) as subsections (d) through (h), respectively;

(5) in subsection (d), as redesignated by paragraph (4), by amending paragraph (2) to read as follows:

"(2) Extensions of an order issued under this title may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order and may be 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, an official appointed by the President with the advice and consent of the Senate that is designated by the President

to authorize electronic surveillance may authorize the emergency employment of electronic surveillance if—

"(1) such official 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) such official determines that the factual basis for issuance of an order under this title to approve such electronic surveillance exists;

"(3) such official informs the Attorney General of such electronic surveillance;

"(4) the Attorney General or a designee of the Attorney General informs a judge having jurisdiction under section 103 of such electronic surveillance as soon as practicable, but in no case more than 7 days after the date on which such electronic surveillance is authorized;

"(5) an application in accordance with this title is made to such judge or another judge having jurisdiction under section 103 as soon as practicable, but not more than 7 days after such electronic surveillance is authorized;

"(6) such official requires 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 7 days from the time of authorization by such official, whichever is earliest. In the event that the application for approval submitted pursuant to paragraph (5) 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 pursuant to paragraph (5) may be reviewed as provided in section 103.";

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

(A) by striking "a wire or" and inserting "an"; and

(B) by striking "physical search" and inserting "physical search or 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 under section 102B."; and

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

"(j) In any case in which the Government makes an application to a judge under this title to conduct electronic surveillance involving communications and the judge grants such application, the judge shall also authorize the installation and use of pen registers and trap and trace devices to acquire dialing, routing, addressing, and signaling information related to such communications and such dialing, routing, addressing, and signaling information shall not be subject to minimization procedures.".

Page 18, after line 3 insert the following new section:

SEC. 10. INTERNATIONAL MOVEMENT OF TARGETS.

(a) ELECTRONIC SURVEILLANCE.—Section 105(d) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(d)) is amended by adding at the end the following new paragraph:

"(4) An order issued under this section shall remain in force during the authorized period of surveillance notwithstanding the absence of the target from the United States, unless the Government files a motion to extinguish the order and the court grants the motion.".

(b) PHYSICAL SEARCH.—Section 304(d) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1824(d)) is amended by adding at the end the following new paragraph:

"(4) An order issued under this section shall remain in force during the authorized period of surveillance notwithstanding the absence of the target from the United States, unless the Government files a motion to extinguish the order and the court grants the motion.".

Strike paragraph (1) of section 10 (page 18, lines 7 and 8) and insert the following:

(1) in section 101(h)(4), by striking "approved pursuant to section 102(a)," and inserting "authorized pursuant to section 102 or any acquisition authorized pursuant to section 102A";

Page 18, after line 13 insert the following new paragraph:

(3) in section 105(g), as redesignated by section 5(4), by striking "section 102(a)" and inserting "section 102 or 102A".

Chairman SENSENBRENNER. The gentleman will be recognized for 5 minutes.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

I support the goals to update, streamline and make FISA technology neutral. At the same time, I am concerned that the bill's language needed to be amended to ensure that the safeguards built in FISA remain and that the original purpose of FISA is clarified.

Section 2(a) of the bill would add a new category to the definition of a, quote, agent of a foreign power, end quote, to ensure that the definition captures non-U.S. persons who possess or receive foreign intelligence information. While I support amending this definition, my amendment would narrow the application of this provision to situations in which the relevant foreign intelligence information is deemed, quote, significant.

Section 2(b) would amend FISA's definition of electronic surveillance in a manner that would return FISA to its original purpose by focusing on where and on whom the surveillance is being directed. The definition, as I would amend it, would turn on targeting on a particular known person, A, believed to be in the United States, B, in circumstances which that person has, (i), a reasonable expectation of privacy or, (ii), a warrant would be required for law enforcement purposes.

The testimony that we heard at subcommittee from both the Department of Justice witness and the NSA witness suggested the need for what is essentially a technical amendment to the bill in order to clarify this definition by emphasizing that the key is, quote, intentionally directing the surveillance at a particular known person, end quote.

I believe we need to focus on the target to determine what applies and does not apply and whether fourth amendment privacy rights are implicated. A non-U.S. person who is a terrorist in Afghanistan does not have the same privacy rights of U.S. person, and our surveillance laws should reflect that, and I believe my amendment does so.

Section 3 of the bill would amend the current section 102(a) certification process to expand the circumstances under which the government may conduct electronic surveillance without court order of foreign powers or agents of foreign powers. Currently, under 102(a)(1)(A), the only time the government could use this authority was when the means of communications are exclusively used by a foreign power or foreign power to a foreign power or controlled by the foreign power. In 1978, this technology was standard.

When communications were controlled by a foreign power, there was no reason to go to a FISA court, because it was technical intelligence under the open and exclusive control of a foreign power or was a foreign power talking to another foreign power. Consequently, there was little chance that a U.S. person would be involved.

Now communications are done differently, where the technology used to communicate could be a U.S.-controlled telecommunications company or a U.S. person or U.S. persons working at the embassy.

The drafters of FISA were trying to carve out foreign to foreign communications. The testimony before the subcommittee explained that this technology has changed, making it impossible to use this provision. So H.R. 5825 expands this section to cover agents of a

foreign power and makes the application of the law technology neutral.

I share the sentiment embodied in the language. However, I believe it goes too far and that we should restrict the expansion of the current law to agents of foreign powers that are actually connected to foreign powers.

Section 3 of the bill would also provide a new and streamlined Attorney General certification process, permitting the Attorney General to direct electronic communication service providers to provide certain information to facilities or technical assistance for period of up to 1 year, provided that the provision of these resources does not constitute electronic surveillance.

I think if we are going to add such a process we need to restrict the manner in which the information is to be obtained and create a mechanism for the FISA court to review and enforce the directives as well as allowing for challenges to the process, and that is what my amendment would seek to do.

Section 4 would significantly streamline the FISA application process, would eliminate requirements to provide certain categories of information currently necessary to a FISA application. I would hope that we all support this objective, but I would suggest that some of the application requirements that 5825 would eliminate, such as detailed statements concerning prior FISA applications involving the target, and the means by which surveillance will be affected, is too blunt of an instrument rather than eliminate the requirements of——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. LUNGREN. Mr. Chairman, I ask unanimous consent for 3 additional minutes

Chairman SENSENBRENNER. Without objection.

Mr. LUNGREN. Rather than eliminate the requirement of this information, which is in the bill as introduced, my amendment would require general summary statements to be brought forward. Section 5 of the bill would require the maximum duration of FISA orders to be 1 year. There was no argument made at the subcommittee for this change. Furthermore, the other changes we have made to streamline the process render such a change unnecessary, and my amendment would strike this change in the law.

Section 5 of H.R. 5825 would also amend FISA's emergency authorization provision by allowing surveillance to continue for 5 days prior to court approval. I agreed with the administration's testimony, and expanded duration for emergency application of 7 days, and also allow senior officials rather than the Attorney General solely to authorize such surveillance.

Finally, section 10 of the bill would continue a FISA- ordered coverage on a target even after they left the United States unless the government filed a motion to extinguish the order and the court granted the motion, and that is section 10 of this.

So what I have attempted to do is to respond to a number of the concerns expressed by the minority side, shared by a number on the majority side, that the bill as originally introduced, while going in the right direction overall, probably went a little too far. And so what we have tried to do is narrow the focus, put it more towards

the direction I think we all talked about in our discussions after the two hearings that we had.

I think it still goes in the direction the administration wants. I believe it gives them what they need but I believe it maintains a number of the protections that we have in the past, on a bipartisan basis, put into the FISA law, and I would ask support for the amendment.

Chairman SENSENBRENNER. The time of the gentleman has expired. For what purpose does the gentleman seek recognition?

Mr. CONYERS. I rise to strike the requisite number of words.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. Mr. Chairman, I would like to ask the author of this amendment, Mr. Lungren, how many sections are changed within these 25 pages of amendment?

How many places?

Mr. LUNGREN. Section 2(a), 2(b), section 3.

Mr. CONYERS. Just the number. Sounds like it is about a dozen to me.

Mr. LUNGREN. Six sections in the bill, in the underlying bill.

Mr. CONYERS. Has the gentleman from California had an opportunity to discuss this with other members of the Committee on the judiciary?

Mr. LUNGREN. We have had discussions through staff with other members on the Judiciary, as I understand it. And also I might say that most of these were brought up to me during our hearings by members of the committee, including members of the minority. I was trying to respond to specific concerns raised where people articulated the position that they believed we needed to bring FISA up to date, we needed to make it technology neutral, but they thought that the language in the underlying bill went beyond what was necessary.

Mr. CONYERS. Well, what I would like to ask the gentleman, I thank him for his summary of what he was trying to do, which is something I think we would agree with, but I would like the gentleman to know that no one on my staff remembers being discussed—having any discussions about the provision, and it would seem to me that in the fullness of our cooperation that if the gentleman could withdraw this amendment—he counted six changes I think—it seemed to me that there were more sections cited in his presentation. We may be able to respond favorably to the objectives stated by the gentleman from California or, in the alternative, we might be able to form amendments that would make it more acceptable to us.

But at this point it is impossible for this member to gain any appreciation of the significant changes that the gentleman has attempted. And so I would ask that this be withheld until we have had an opportunity to examine this with the care that is required. This did not come up during the hearings. There was no markup in the subcommittee. And we are confronted with what I think are huge changes, some of which may be favorable to the majority of the members of the subcommittee.

Mr. LUNGREN. Would the gentleman yield? The only thing I can say in response is I am not, obviously, responsible for the timetable set as we are dealing with—in the ending weeks of a Congress. I

attended and even chaired one of the hearings that we had on this, trying to make sure that everybody had ample opportunity to ask questions, made a conscientious effort to try and identify the areas of concerns of members on both sides, particularly on the minority side, and have tried to work with staff to develop this. I am under the time gun as well. And so I am worried if I withdraw this and don't bring it at this time, we may miss the opportunity for our committee to actually work it out.

Mr. CONYERS. Let me just ask the gentlemen, could we break this down into individual amendments that we can consider one at a time? Six different sections being modified, 25 pages I think is—this sounds like a "trust me" amendment if I have ever seen one.

Mr. LUNGREN. You and I have always trusted one another.

Mr. CONYERS. I would love to trust you, but not in 25 pages' worth.

Mr. SCHIFF. Would the gentleman yield?

Mr. CONYERS. I ask for unanimous consent to proceed for an additional minute.

Chairman SENSENBRENNER. Without objection.

Mr. SCHIFF. I thank the gentleman for yielding. Mr. Flake and I have been working on a substitute amendment that we are prepared to offer today that addresses a lot of the concerns shared on both side of the aisle as well, and I could go through the provisions of that amendment and ask how it differs from what you are proposing, Mr. Lungren. I don't know if we are going to have the opportunity to go through all the details of your proposal, all the details of ours, and all the details of the base bill.

This illustrates, I think, the difficulty in marking up a bill like this on such short order when we have just had the first classified hearing on these issues less than a week ago.

In the substitute that Mr. Flake and I are offering, we provide that the authorization to use military force is not an exception to FISA. We provide that FISA is the exclusive means by which domestic electronic surveillance for foreign intelligence purposes can be conducted.

Mr. CONYERS. Mr. Speaker, I ask for 2 additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. CONYERS. I continue to yield to the gentleman.

Mr. SCHIFF. I thank the gentleman. We require that the President submit to the Intelligence Committee and to the Judiciary Committee a classified report on the TSB program and any other program that is used for intelligence purposes that is outside of FISA.

We also provide and authorize the Chief Justice of the Supreme Court to appoint additional FISA court judges.

Mr. CONYERS. Could I ask my friend to suspend, because I want to offer a motion to table so that your amendment can be brought—your substitute, without being prejudiced if this happens to go through.

Mr. SCHIFF. I appreciate it. Whatever the procedural mechanism. I think the reason we are having such trouble here today is that, unlike the PATRIOT bill procedure where the judiciary—the Justice Department came to this committee with a proposal that we could analyze in detail, that we had weeks, particularly with the reauthorization to go over and study, the Justice Department

hasn't come to this committee for a bill changing FISA. It has been 5 years since 9/11. The Justice Department hasn't come to us for a bill. But we have different member bills.

Mr. CONYERS. Mr. Chairman, I make a motion to table the Lungren amendment.

Chairman SENSENBRENNER. The Chair would observe that the motion is not timely made. Under House rule 16, clause 4, paren (e) paren (ii) the motion to table only lies before debate begins on an amendment or a motion. The question——

Mr. NADLER. Mr. Chairman.

Chairman SENSENBRENNER. The time of the gentleman from Michigan has expired. For what purposes does the gentleman from New York seek recognition?

Mr. NADLER. In view of the fact that none of us have any idea what is in this bill, and we should consider it properly, I move we stand adjourned until tomorrow morning.

Chairman SENSENBRENNER. The question is on the motion to adjourn.

Those in favor will say aye.

Opposed, no.

The noes appear to have it.

Mr. NADLER. rollcall vote.

Chairman SENSENBRENNER. rollcall vote is ordered on the motion to adjourn.

Those in favor of adjourning will, as your names are called, answer aye.

Those opposed, no.

The Clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK. Mr. Coble.

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith.

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly.

[No response.]

The CLERK. Mr. Goodlatte.

[No response.]

The CLERK. Mr. Chabot.

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no.

Mr. Lungren.

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

Mr. Jenkins.

[No response.]

The CLERK. Mr. Cannon.

Mr. CANNON. No.

The CLERK. Mr. Cannon, no.

Mr. Bachus.

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no.

Mr. Inglis.

Mr. INGLIS. Pass.
The CLERK. Mr. Inglis, pass.
Mr. Hostettler.
[No response.]
The CLERK. Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
[No response.]
The CLERK. Mr. Flake.
Mr. FLAKE. Pass.
The CLERK. Mr. Flake, pass.
Mr. Pence.
Mr. PENCE. No.
The CLERK. Mr. Pence, no.
Mr. Forbes.
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no.
Mr. Franks.
Mr. FRANKS. No.
The CLERK. Mr. Franks, no.
Mr. Gohmert.
Mr. GOHMERT. How am I recorded?
The CLERK. Mr. Chairman, Mr. Gohmert has not yet voted.
Mr. GOHMERT. Then I vote no.
The CLERK. Mr. Gohmert, no.
Mr. Conyers.
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Berman.
[No response.]
The CLERK. Mr. Boucher.
[No response.]
The CLERK. Mr. Nadler.
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt.
Mr. WATT. Mr. Watt, aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren.
[No response.]
The CLERK. Ms. Jackson Lee.
[No response.]
The CLERK. Ms. Waters.

[No response.]
The CLERK. Mr. Meehan.
[No response.]
The CLERK. Mr. Delahunt.
[No response.]
The CLERK. Mr. Wexler.
[No response.]
The CLERK. Mr. Weiner.
Mr. WEINER. No.
The CLERK. Mr. Weiner, no.
Mr. Schiff.
[No response.]
The CLERK. Ms. Sánchez.
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye.
Mr. Van Hollen.
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Ms. Wasserman Schultz, aye.
Mr. Chairman.
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their vote? The gentleman from South Carolina, Mr. Inglis.
Mr. INGLIS. No.
The CLERK. Mr. Inglis, no.
Chairman SENSENBRENNER. The gentleman from Arizona, Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Chairman SENSENBRENNER. The gentleman from Tennessee, Mr. Jenkins.
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no.
Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Chairman SENSENBRENNER. The gentleman from California, Mr. Berman.
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Meehan.
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye.
Chairman SENSENBRENNER. Further members who wish to cast or their change vote? The Clerk will report.
Mr. WATT. Mr. Chairman, might I inquire how I am listed?
The CLERK. Mr. Watt is recorded as aye.
Chairman SENSENBRENNER. Gentlewoman from California, Ms. Lofgren.
Ms. LOFGREN. Aye.

The CLERK. Ms. Lofgren, aye.
Chairman SENSENBRENNER. The Clerk will report.
The gentleman from Florida, Mr. Wexler.
Mr. WEXLER. Yes
The CLERK. Mr. Wexler, aye.
Chairman SENSENBRENNER. The Clerk will report.
The other gentlelady from California, Ms. Waters.
Ms. WATERS. Yes.
The CLERK. Ms. Waters, aye.
Mr. WEINER. Mr. Chairman, how am I recorded?
Chairman SENSENBRENNER. The gentleman from New York.
The CLERK. Mr. Chairman, Mr. Weiner is recorded as no.
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Chairman SENSENBRENNER. The Clerk will report.
The CLERK. Mr. Chairman, there are 14 ayes and 17 nays.
Chairman SENSENBRENNER. The motion to adjourn is not agreed to. The question is on agreeing to the amendment offered——
Mr. WEINER. Mr. Chairman.
Chairman SENSENBRENNER. For what purpose does the gentleman from New York——
Mr. WEINER. Make a point of order. A quorum is not present.
Chairman SENSENBRENNER. The Clerk will call the roll.
The CLERK. Mr. Hyde.
[No response.]
The CLERK. Mr. Coble.
[No response.]
The CLERK. Mr. Smith.
[No response.]
The CLERK. Mr. Gallegly.
[No response.]
The CLERK. Mr. Goodlatte.
[No response.]
The CLERK. Mr. Chabot.
Mr. CHABOT. Present.
The CLERK. Mr. Chabot, present.
Mr. Lungren.
Mr. LUNGREN. Present.
The CLERK. Mr. Lungren, present.
Mr. Jenkins.
[No response.]
The CLERK. Mr. Cannon.
[No response.]
The CLERK. Mr. Bachus.
Mr. CANNON. Present.
The CLERK. Mr. Cannon present.
Mr. Bachus.
[No response.]
The CLERK. Mr. Inglis.
Mr. INGLIS. Present.
The CLERK. Mr. Inglis, present. Mr. Hostettler.
[No response.]
The CLERK. Mr. Green.
Mr. GREEN. Present.
The CLERK. Mr. Green, present.

Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
[No response.]
The CLERK. Mr. Flake.
Mr. FLAKE. Present.
The CLERK. Mr. Flake, present.
Mr. Pence.
Mr. PENCE. Present.
The CLERK. Mr. Pence, present.
Mr. Forbes.
Mr. FORBES. Present.
The CLERK. Mr. Forbes, present.
Mr. King.
Mr. KING. Present.
The CLERK. Mr. King, present.
Mr. Feeney.
Mr. FEENEY. Present.
The CLERK. Mr. Feeney, present.
Mr. Franks.
Mr. FRANKS. Present.
The CLERK. Mr. Franks, present.
Mr. Gohmert.
[No response.]
The CLERK. Mr. Conyers.
[No response.]
The CLERK. Mr. Berman.
[No response.]
The CLERK. Mr. Boucher.
[No response.]
The CLERK. Mr. Nadler.
[No response.]
The CLERK. Mr. Scott.
[No response.]
The CLERK. Mr. Watt.
[No response.]
The CLERK. Ms. Lofgren.
[No response.]
The CLERK. Ms. Jackson Lee.
[No response.]
The CLERK. Ms. Waters.
[No response.]
The CLERK. Mr. Meehan.
[No response.]
The CLERK. Mr. Delahunt.
[No response.]
The CLERK. Mr. Wexler.
[No response.]
The CLERK. Mr. Weiner.
Mr. FEENEY. Mr. Chairman, a point of order.
Chairman SENSENBRENNER. The Clerk will continue calling the roll.
The CLERK. Mr. Schiff.
[No response.]
The CLERK. Ms. Sánchez.

[No response.]
The CLERK. Mr. Van Hollen.
[No response.]
The CLERK. Ms. Wasserman Schultz.
[No response.]
The CLERK. Mr. Chairman.
Chairman SENSENBRENNER. Present.
Members in the Chamber who wish to record their presence. The gentleman from Texas, Mr. Smith.
Mr. SMITH. I vote present.
The CLERK. Present.
Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.
Mr. COBLE. Present.
The CLERK. Mr. Coble, present.
Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus.
Mr. BACHUS. Present.
The CLERK. Mr. Bachus, present.
Chairman SENSENBRENNER. The gentleman from Tennessee, Mr. Jenkins.
Mr. JENKINS. Present.
The CLERK. Mr. Jenkins, present.
Mr. FEENEY. Mr. Chairman, a point of order with respect to the rollcall.
Chairman SENSENBRENNER. The gentleman will state his point of order.
Mr. FEENEY. The gentleman from New York was here to raise the absence of a quorum. Is his presence imputed as here for purposes of the quorum?
Chairman SENSENBRENNER. No.
The Clerk will report.
The CLERK. Mr. Chairman, there are 16 members present.
Chairman SENSENBRENNER. A working quorum is present. The question is on agreeing to the amendment offered by the gentleman from California, Mr. Lungren.
Those in favor will say aye.
Opposed, no.
The ayes appear to have it. The ayes have it and the amendment is agreed to.
Mr. FLAKE. I request a rollcall vote.
Chairman SENSENBRENNER. Rollcall is ordered. Those in favor of the Lungren amendment will, as your names are called, answer aye. Those opposed, no.
And the Clerk will call the roll.
The CLERK. Mr. Hyde.
[No response.]
The CLERK. Mr. Coble.
Mr. COBLE. Aye.
The CLERK. Mr. Coble, aye.
Mr. Smith.
Mr. SMITH. Aye.
The CLERK. Mr. Smith, aye.
Mr. Gallegly.
[No response.]

The CLERK. Mr. Goodlatte.
[No response.]
The CLERK. Mr. Chabot.
Mr. CHABOT. Aye.
The CLERK. Mr. Chabot, aye.
Mr. Lungren.
Mr. LUNGREN. Aye.
The CLERK. Mr. Lungren, aye.
Mr. Jenkins.
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye.
Mr. Cannon.
Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye.
Mr. Bachus.
Mr. BACHUS. Aye.
The CLERK. Mr. Bachus, aye.
Mr. Inglis.
[No response.]
The CLERK. Mr. Hostettler.
[No response.]
The CLERK. Mr. Green.
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye.
Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
[No response.]
The CLERK. Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Mr. Pence.
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye.
Mr. Forbes.
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye.
Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King, aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye.
Mr. Franks.
Mr. FRANKS. Aye.
The CLERK. Mr. Franks, aye.
Mr. Gohmert.
[No response.]
The CLERK. Mr. Conyers.
[No response.]
The CLERK. Mr. Berman.
[No response.]
The CLERK. Mr. Boucher.
[No response.]
The CLERK. Mr. Nadler.

[No response.]
The CLERK. Mr. Scott.
[No response.]
The CLERK. Mr. Watt.
[No response.]
The CLERK. Ms. Lofgren.
[No response.]
The CLERK. Ms. Jackson Lee.
[No response.]
The CLERK. Ms. Waters.
[No response.]
The CLERK. Mr. Meehan.
[No response.]
The CLERK. Mr. Delahunt.
[No response.]
The CLERK. Mr. Wexler.
[No response.]
The CLERK. Mr. Weiner.
[No response.]
The CLERK. Mr. Schiff.
[No response.]
The CLERK. Ms. Sánchez.
[No response.]
The CLERK. Mr. Van Hollen.
[No response.]
The CLERK. Ms. Wasserman Schultz.
[No response.]
The CLERK. Mr. Chairman.
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Further members who wish to cast or change their vote. The gentleman from South Carolina, Mr. Inglis.
Mr. INGLIS. No.
The CLERK. Mr. Inglis, no.
Chairman SENSENBRENNER. The gentleman from Texas, Mr. Gohmert.
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert, aye.
Chairman SENSENBRENNER. Further members who wish to cast or change their votes? The gentleman from California, Mr. Issa.
Mr. ISSA. No.
The CLERK. Mr. Issa, no. On the Lungren amendment, yes.
Chairman SENSENBRENNER. The other gentleman from California, Mr. Gallegly.
Mr. GALLEGLY. Yes.
The CLERK. Mr. Gallegly, aye.
Chairman SENSENBRENNER. Further members who wish to cast or change their vote? If not, the Clerk will report.
The CLERK. Mr. Chairman, there are 17 ayes and 2 nays.
Chairman SENSENBRENNER. The amendment is agreed to.
Are there further amendments? If there are no further amendments——
Mr. FLAKE. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from Arizona seek recognition?

Mr. FEENEY. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. Who has an amendment at the desk? The Clerk will report the Feeney amendment.

Mr. FEENEY. The gentleman from Arizona sought recognition but I do have an amendment at the desk.

Chairman SENSENBRENNER. Does the gentleman from Arizona have an amendment?

I was talking about the other gentleman from Arizona. You sought recognition. For what purpose?

Mr. FLAKE. I will defer to the other gentleman from Arizona.

Chairman SENSENBRENNER. Let's go first to the Feeney amendment. The Clerk will report the Feeney amendment.

The CLERK. Amendment to H.R. 5825 offered by Mr. Feeney of Florida.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and the gentleman from Florida is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT TO H.R. 5825

OFFERED BY MR. FEENEY OF FLORIDA

At the end of the bill, add the following new section:

SEC. ___. REPORT ON MINIMIZATION PROCEDURES.

(a) REPORT.—Not later than two years after the date of the enactment of this Act, and annually thereafter until December 31, 2009, the Director of the National Security Agency, in consultation with the Director of National Intelligence and the Attorney General, shall submit to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate a report on the effectiveness and use of minimization procedures applied to information concerning United States persons acquired by means that were considered electronic surveillance as that term was defined by section 101(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(f)) on the day before the date of the enactment of this Act but no longer constitutes electronic surveillance as of the effective date of this Act.

(b) REQUIREMENTS.—A report submitted under subsection (a) shall include—

(1) a description of the implementation, during the course of communications intelligence activities conducted by the National Security Agency, of procedures established to minimize the acquisition, retention, and dissemination of nonpublicly available information concerning United States persons;

(2) the number of significant violations, if any, of such minimization procedures during the 18 months following the effective date of this Act; and

(3) summary descriptions of such violations.

(c) RETENTION OF INFORMATION.—Information concerning United States persons shall not be retained solely for the purpose of complying with the reporting requirements of this section.

(d) MINIMIZATION PROCEDURES DEFINED.—In this section, the term "minimization procedures" has the meaning given the term in section 101(h) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(h)).

Mr. FEENEY. Thank you. This is an important bill to give the proper tools to our law enforcement and Intelligence Community to detect and prevent terrorism. However, there are some legitimate fourth amendment concerns, especially when you only have one branch of government, the executive, involved in reviewing its own policies without another branch being involved.

What this amendment does is to provide for reporting to Congress on an annual basis so we can have better congressional oversight on the treatment of U.S. persons information for several years and would help Congress see whether the changes that we have made with this bill have had the desired effects. Specifically, the report on an annual basis would be to the U.S. Intelligence Committee and the United States House, the United States Senate. It would require a description of the minimization procedures implemented by the NSA to protect the information pertaining to U.S. persons, the number of significant violations of those procedures, and summary descriptions for each and every one of those violations.

Mr. Chairman, I think this requirement would permit Congress to conduct efficient and effective oversight of this program and would commend it to my colleagues.

Chairman SENSENBRENNER. Does the gentleman yield back? The question is on agreeing to the Feeney amendment.

Those in favor say aye.

Opposed, no.

The ayes appear to have it. The ayes have it and the amendment is agreed to.

We now have how many votes? Three votes. Without objection, the committee stands recessed until immediately after the third vote. Members should please come back promptly and the committee stands in recess.

[Recess.]

Chairman SENSENBRENNER. The committee will be in order. A working quorum is present.

When the committee recessed for the votes, pending was a motion by the Chair to report the bill H.R. 5825 favorably. The bill was considered as read and open for amendment at any point and several amendments had been agreed to. Are there further amendments?

Mr. SCHIFF. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from California, Mr. Schiff, seek recognition?

Mr. SCHIFF. I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment in the nature of a substitute to H.R. 5825 offered by Mr. Schiff of California and Mr. Flake of Arizona: Strike all after the enacting clause and insert the following.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and the gentleman from California is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 5825 OFFERED BY MR. SCHIFF OF CALIFORNIA AND MR. FLAKE OF ARIZONA

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "NSA Oversight Act".

SEC. 2. FINDINGS.

Congress finds the following:

(1) On September 11, 2001, acts of treacherous violence were committed against the United States and its citizens.

(2) Such acts render it both necessary and appropriate that the United States exercise its right to self-defense by protecting United States citizens both at home and abroad.

(3) The Federal Government has a duty to pursue al Qaeda and other enemies of the United States with all available tools, including the use of electronic surveillance, to thwart future attacks on the United States and to destroy the enemy.

(4) The President of the United States possesses the inherent authority to engage in electronic surveillance of the enemy outside of the United States consistent with his authority as Commander-in-Chief under Article II of the Constitution.

(5) Congress possesses the authority to regulate electronic surveillance within the United States.

(6) The Fourth Amendment to the Constitution guarantees to the American people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that courts shall issue "warrants" to authorize searches and seizures, based upon probable cause.

(7) The Supreme Court has consistently held for nearly 40 years that the monitoring and recording of private conversations constitutes a "search and seizure" within the meaning of the Fourth Amendment.

(8) The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) was enacted to provide the legal authority for the Federal Government to engage in searches of Americans in connection with intelligence gathering and counterintelligence.

(9) The Foreign Intelligence Surveillance Act of 1978 was enacted with the express purpose of being the exclusive means by which the Federal Government conducts electronic surveillance for the purpose of gathering foreign intelligence information.

(10) Warrantless electronic surveillance of Americans inside the United States conducted without congressional authorization may have a serious impact on the civil liberties of citizens of the United States.

(11) United States citizens, such as journalists, academics, and researchers studying global terrorism, who have made international phone calls subsequent to the terrorist attacks of September 11, 2001, and are law-abiding citizens, may have the reasonable fear of being the subject of such surveillance.

(12) Since the nature and criteria of the National Security Agency (NSA) program is highly classified and unknown to the public, many other Americans who make frequent international calls, such as Americans engaged in international business, Americans with family overseas, and others, have a legitimate concern they may be the inadvertent targets of eavesdropping.

(13) The President has sought and signed legislation including the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (Public Law 107–56), and the Intelligence Reform and Terrorism Protection Act of 2004 (Public Law 108–458), that have expanded authorities under the Foreign Intelligence Surveillance Act of 1978.

(14) It may be necessary and desirable to amend the Foreign Intelligence Surveillance Act of 1978 to address new challenges in the Global War on Terrorism. The President should submit a request for legislation to Congress to amend the Foreign Intelligence Surveillance Act of 1978 if the President desires that the electronic surveillance authority provided by such Act be further modified.

(15) The Authorization for Use of Military Force (Public Law 107–40), passed by Congress on September 14, 2001, authorized military action against those responsible for the attacks on September 11, 2001, but did not contain legal authorization nor approve of domestic electronic surveillance for the purpose of gathering foreign intelligence information except as provided by the For-

eign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

SEC. 3. REITERATION THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 AS THE EXCLUSIVE MEANS BY WHICH DOMESTIC ELECTRONIC SURVEILLANCE MAY BE CONDUCTED TO GATHER FOREIGN INTELLIGENCE INFORMATION.

(a) EXCLUSIVE MEANS.—Notwithstanding any other provision of law, the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) shall be the exclusive means by which electronic surveillance for the purpose of gathering foreign intelligence information may be conducted.

(b) FUTURE CONGRESSIONAL ACTION.—Subsection (a) shall apply until specific statutory authorization for electronic surveillance for the purpose of gathering foreign intelligence information, other than as an amendment the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), is enacted. Such specific statutory authorization shall be the only exception to subsection (a).

SEC. 4. DISCLOSURE REQUIREMENTS.

(a) REPORT.—As soon as practicable after the date of the enactment of this Act, but not later than 14 days after such date, the President shall submit to the Perma-

nent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate a report—

(1) on the Terrorist Surveillance Program of the National Security Agency;

(2) on any program which involves the electronic surveillance of United States persons in the United States for foreign intelligence purposes, and which is conducted by any department, agency, or other element of the Federal Government, or by any entity at the direction of a department, agency, or other element of the Federal Government, without fully complying with the procedures set forth in the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

(3) including a description of each United States person who has been the subject of such electronic surveillance not authorized to be conducted under the Foreign Intelligence Surveillance Act of 1978, and the basis for the selection of each person for such electronic surveillance.

(b) FORM.—The report submitted under subsection (a) may be submitted in classified form.

SEC. 5. FOREIGN INTELLIGENCE SURVEILLANCE COURT MATTERS.

(a) AUTHORITY FOR ADDITIONAL JUDGES.—The first sentence of section 103(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(a)) is amended by striking "judicial circuits" and inserting "judicial circuits, and any additional district court judges that the Chief Justice considers necessary for the prompt and timely consideration of applications under section 104,";

(b) CONSIDERATION OF EMERGENCY APPLICATIONS.—Section 105(f) of such Act (50 U.S.C. 1805(f)) is amended by adding at the end the following new sentence: "The judge receiving an application under this subsection shall review such application within 24 hours of the application being submitted."

SEC. 6. STREAMLINING FISA APPLICATION PROCESS.

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

(1) in subsection (a)—

(A) in paragraph (7)—

(i) in subparagraph (C), by striking "techniques;" and inserting "techniques; and";

(ii) by striking subparagraph (D); and

(iii) by redesignating subparagraph (E) as subparagraph (D); and

(B) in paragraph (8), by striking "a statement of the means" and inserting "a summary statement of the means"; and

(2) in subsection (e)(1)(A), by striking "or the Director of National Intelligence" and inserting "the Director of National Intelligence, or the Director of the Central Intelligence Agency".

(a) CONFORMING AMENDMENT.—Section 105(a)(5) of such Act (50 U.S.C. 1805(a)(5)) is amended by striking "104(a)(7)(E)" and inserting "104(a)(7)(D)".

SEC. 7. EXTENSION OF PERIOD FOR APPLICATIONS FOR ORDERS FOR EMERGENCY ELECTRONIC SURVEILLANCE.

Section 105(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(f)) is further amended by striking "72 hours" each place it appears and inserting "168 hours".

SEC. 8. ENHANCEMENT OF ELECTRONIC SURVEILLANCE AUTHORITY IN WARTIME.

Section 111 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1811) is amended by striking "the Congress" and inserting "the Congress or an authorization for the use of military force described in section 2(c)(2) of the War Powers Resolution (50 U.S.C. 1541(c)(2)) if such authorization contains a specific authorization for electronic surveillance under this section.".

SEC. 9. ACQUISITION OF COMMUNICATIONS BETWEEN PARTIES NOT IN THE UNITED STATES.

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:

"ACQUISITION OF COMMUNICATIONS BETWEEN PARTIES NOT IN THE UNITED STATES

"SEC. 112. (a) IN GENERAL.—Notwithstanding any other provision of this Act, a court order is not required for the acquisition of the contents of any communication between persons that are not located within the United States for the purpose of collecting foreign intelligence information, without respect to whether the communication passes through the United States or the surveillance device is located within the United States.

"(b) TREATMENT OF INTERCEPTED COMMUNICATIONS INVOLVING A DOMESTIC PARTY.—If an acquisition described in subsection (a) inadvertently collects a communication in which at least one party to the communication is within the United States—

"(1) in the case of a communication acquired inside the United States, the contents of such communication shall be handled in accordance with minimization procedures adopted by the Attorney General that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 168 hours unless a court order under section 105 is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person; and

"(2) in the case of a communication acquired outside the United States, the contents of such communication shall be handled in accordance with minimization procedures adopted by the Attorney General."; and

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

"112. Acquisition of communications between parties not in the United States.".

SEC. 10. ADDITIONAL PERSONNEL FOR PREPARATION AND CONSIDERATION OF APPLICATIONS FOR ORDERS APPROVING ELECTRONIC SURVEILLANCE.

(a) OFFICE OF INTELLIGENCE POLICY AND REVIEW.—

(1) IN GENERAL.—Notwithstanding any other provision of law and in addition to personnel otherwise authorized for assignment to the Office of Intelligence Policy and Review of the Department of Justice under any other provision of law, the Attorney General may hire and assign additional personnel to the Office of Intelligence Policy and Review as may be necessary to carry out the prompt and timely preparation, modification, and review of applications under section 104 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804) for orders approving electronic surveillance for foreign intelligence purposes under section 105 of such Act (50 U.S.C. 1805).

(2) ASSIGNMENT.—The Attorney General shall assign additional personnel hired and assigned pursuant to paragraph (1) to and among appropriate offices of the National Security Agency in order that

such personnel may directly assist personnel of the National Security Agency in preparing applications under section 104 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804).

(b) NATIONAL SECURITY BRANCH OF THE FBI.—

(1) IN GENERAL.—Notwithstanding any other provision of law and in addition to personnel otherwise authorized for assignment to the National Security Branch of the Federal Bureau of Investigation under any other provision of law, the Director of the Federal Bureau of Investigation may hire and assign additional personnel to the National Security Branch as may be necessary to carry out the prompt and timely preparation of applications under section 104 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804) for orders approving electronic surveillance for foreign intelligence purposes under section 105 of such Act (50 U.S.C. 1805).

(2) ASSIGNMENT.—The Director of the Federal Bureau of Investigation shall assign personnel hired and assigned pursuant to paragraph (1) to and among the field offices of the Federal Bureau of Investigation in order that such personnel may directly assist personnel of the Federal Bureau of Investigation in such field offices in preparing applications

under section 104 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804).

(e) NATIONAL SECURITY AGENCY.—Notwithstanding any other provision of law and in addition to personnel otherwise authorized for assignment to the National Security Agency under any other provision of law, the Director of the National Security Agency may hire and assign additional personnel as may be necessary to carry out the prompt and timely preparation of applications under section 104 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804) for orders approving electronic surveillance for foreign intelligence purposes under section 105 of such Act (50 U.S.C. 1805).

(d) FOREIGN INTELLIGENCE SURVEILLANCE COURT.—Notwithstanding any other provision of law and in addition to personnel otherwise authorized for assignment to the court established under section 103(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(b)) under any other provision of law, the presiding judge designated under section 103(b) of such Act may hire and assign additional personnel as may be necessary to carry out the prompt and timely consideration of applications under section 104 of such Act (50 U.S.C. 1804) for orders approving electronic surveillance for foreign in-

telligence purposes under section 105 of that Act (50 U.S.C. 1805).

SEC. 11. DEFINITIONS.

In this Act:

(1) The term "electronic surveillance" has the meaning given the term in section 101(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(f)).

(2) The term "foreign intelligence information" has the meaning given the term in section 101(e) of such Act (50 U.S.C. 1801(e)).

Mr. SCHIFF. Mr. Chairman, Ranking Member, members of the committee, today I offer a bipartisan amendment——

Chairman SENSENBRENNER. The committee will be in order and the chatter in the room shall adjourn. The committee will not adjourn.

The gentleman from California may continue.

Mr. SCHIFF. Thank you, Mr. Chairman. Today I offer a bipartisan amendment with Representative Flake of Arizona to address the issue before us today. This amendment recognizes two important principles: first, that our government must have all the tools necessary and all the authority required to pursue al Qaeda and other terrorists who would seek to harm our country; and second, that we are a Nation of laws and that concern over administrative burden as we use all the tools available to fight terrorism should not supersede devotion to the Constitution and the expectation of privacy of each United States citizen.

While the President possesses the inherent authority to engage in electronic surveillance of the enemy outside the country, Congress possesses the authority to regulate foreign intelligence surveillance within the United States. And in fact, Congress has spoken in this area through the Foreign Intelligence Surveillance Act.

When Congress passed this statute it intended to provide the sole authority for such surveillance on American soil. Our amendment reinforces existing law, that the government must obtain a court order when U.S. persons are targeted or surveillance occurs in the United States.

When Mr. Flake and I questioned the Attorney General when he testified before this committee in April, he would not rule out having the pure authority without going to court to tap the calls between two Americans on American soil.

So what is the limiting principle if this program can change from day to day without the input of Congress? The only limiting principle is the good faith of the executive, which, when the executive shows that it is infallible, might be a sufficient limiting principle. But the executive is no more infallible than we are here in Congress, and so we have a role to play.

The Schiff-Flake substitute responds to these issues that have been raised by officials at NSA and the Department of Justice over the last several months in testimony to Congress. First, addressing the point Mr. Deitz made in committee, we explicitly make clear that foreign-to-foreign communications are outside of FISA and don't require court order. If a communication to which a U.S. person is a party is inadvertently intercepted, minimization procedures approved by the Attorney General should be followed.

Second, we extend the FISA emergency exception from 72 hours to 168 hours, 7 days. This permits law enforcement to initiate surveillance in an emergency situation before going to the FISA court for a warrant.

If the current 72 hours has been sufficient for the 5 years since 9/11, surely 7 days can be considered a significant improvement. This authority can also be used to thwart imminent attacks.

Third, we expand the FISA wartime exception to provide that, in addition to a declaration of war by Congress, that the authorization to use military force can also trigger the FISA wartime exception for the purposes of allowing 15 days of warrantless surveillance if

there is an explicit provision authorizing electronic surveillance under that FISA provision.

Finally, our amendment streamlines the FISA application process, provides authorization to appoint additional FISA judges and additional personnel at DOJ, the FBI and NSA to ensure speed and agility in drafting and considering FISA order applications.

Electronic surveillance of al Qaeda operatives and others seeking to harm our country must continue. It simply can and should comply with FISA, and I urge my colleagues to support this amendment.

Let me go through very quickly the specific provisions. First, the authorization to use military force is not an exception to FISA. Second, we reiterate that FISA is the exclusive means by which domestic electronic surveillance for intelligence purposes can be conducted. Third, we require information to be provided to the Intelligence and Judiciary Committees, in classified form, on the TSP program or any other program involving electronic surveillance of U.S. persons in the United States for foreign intelligence that is outside of FISA.

Fifth, we authorize the Chief Justice of the United States to appoint additional FISA court judges if necessary.

Six, we streamline the FISA application process.

Seventh, we authorize emergency electronic surveillance for up to 7 days.

Eighth, we enhance the surveillance authority in wartime by providing that FISA, through the authorization, use military force when the explicit references made can be triggered.

Ninth, we make it clear that the acquisition of communications between foreigner to foreigner——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. SCHIFF. Would the gentleman give me 30 additional seconds?

Finally, tenth, we authorize the Foreign Intelligence Surveillance Court, DOJ, FBI, and NSA to hire additional staff for the preparation and consideration of applications for electronic surveillance.

These are the ten steps that are outlined in the substitute bill, and I would urge its favorable consideration.

Chairman SENSENBRENNER. The time of the gentleman has once again expired. For what purposes does the gentleman from Utah, Mr. Cannon, seek recognition?

Mr. CANNON. Strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman. I am just trying to understand this amendment. And if the gentleman from California would indulge me, looking at page 5, line 9, line starting (a), Exclusive Means. Would the gentleman mind looking that through and explaining it, because it sounds to me like this does extraordinarily change the nature of what we are doing here.

Mr. SCHIFF. Would you restate the provision you are referring to?

Mr. CANNON. On page 5 of your amendment, line 9, paren (a), Exclusive Means: Notwithstanding any other provision of law the Foreign Intelligence Surveillance Act of 1978, et cetera, shall be the exclusive means by which electronic surveillance for the purposes of gathering foreign intelligence information may be conducted.

Mr. SCHIFF. Yes. As I was relating, we are reiterating that the Foreign Intelligence Surveillance Act is the exclusive means by which domestic electronic surveillance can be conducted. This is designed to distinguished between foreign-to-foreign communications which are within the prerogative of the executive and which Mr. Deitz testified were problematic under FISA because if the communication touched down in the United States or was gathered in the United States, notwithstanding the fact it was between two foreigners on foreign soil, that FISA was implicated. We want to make it clear FISA is not implicated in those circumstances.

But where we are talking about the surveillance of Americans on American soil, that if it is not authorized by FISA, it is not authorized. Because none of us on this committee know what is in the President's terrorist surveillance program.

Mr. CANNON. Reclaiming my time. If you have an American citizen who has decided to become a terrorist and is residing in a Middle Eastern country but communicates by means of the Internet, a voice on the Internet, and uses a server that is in the United States, you are saying that that communication can't be intercepted except under FISA.

Mr. SCHIFF. No. What I am saying is that when you have surveillance of Americans on American soil, that that is exclusively within FISA. So if we are conducting surveillance today under the TSP program, it needs to be brought under FISA if we are surveilling Americans on American soil.

Mr. CANNON. Reclaiming my time and looking forward to help understand this. Section 4 Disclosure Requirements, line 23 of page 5, just skip a paragraph, it says: Report—as soon as practicable, et cetera, the President shall submit to the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives, and for the House and also for the Senate, and then it lists substantial things that need to be—do we want to change the nature of this committee? And in my office, I have a new office in Rayburn, I have a safe that is locked open so we won't get something locked in. Are we all going to have to have safes and use this committee and use information in this committee the way the Intelligence Committees operate?

Mr. SCHIFF. If the gentleman would yield. No, I wouldn't recommend anyone bring classified information out of the classified setting. What this provides, though, is that if we are the Judiciary Committee and we have jurisdiction over the U.S. Constitution and we are not informed of when surveillance is being done of Americans without a court order, we cannot uphold our constitutional duty to ensure that its provisions are being adhered to.

Now, members of this committee have gone to classified briefings, some members decided not to go. Every member has to make that decision for themselves. But for my own part, if I am being asked to authorize a program or if I am being asked to amend FISA or make wholesale changes to the law without even knowing why they are necessary, I don't think I can do my constitutional duty. So I do think that things that are within——

Mr. CANNON. Reclaiming my time, since I think it is quickly advancing. Let me just say that we are sort of like an appellate court here. I don't think we ought to be involved in the facts as—particularly as suggested by this amendment. I think this amendment

does substantial damage to the underlying bill, and I encourage my colleagues to reject this amendment and I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the—for what purposes does——

Mr. NADLER. Strike the last word.

I will be very brief. I will say this provision does not do substantial damage. It basically restates current law and says with respect to people in the United States, FISA is exclusive.

I yield back.

Chairman SENSENBRENNER. For what purposes does the gentleman from Arizona seek recognition?

Mr. FLAKE. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. FLAKE. I thank the Chairman. Let me just state it from my perspective from this side of the aisle. I believe that the war on terrorism is going to be won or lost through the gathering of intelligence. That is the most important thing we can do. The last thing I want to do is to hamstring the administration in ways that they shouldn't be hamstrung.

I believe—and none of us know what is going on in the TSP—but my guess is it is some pretty important stuff and we ought to be glad that some intelligence there is being gathered. But for those of us who believe that there is likely vital intelligence being gathered, what happens 2 years from now? Are we to assume the war on terrorism is going to be won in the next 2 years? Because if it isn't, unless we have institutionalized this program under FISA, the next President could simply say, I don't want to exercise my Article II powers, and this program is done away with. What kind of gaps would that leave in our intelligence?

I have yet to hear a persuasive case why we can't institutionalize the TSP or any other surveillance programs that are going on under FISA. And I think that is the effort here, that is what we are trying to do. We simply cannot continue to have two programs, or more than two, one run on the books and one run off the books. And unless there is some kind of exclusivity provision that, Mr. Cannon, you alluded to or pointed out, unless we have an exclusivity provision that actually works, we will continue to have an on-the-book program and an off-the-book program. And we can make all kind of changes, we can spend until tomorrow this time, or all week, making changes to streamline FISA or to make it more nimble or to react better, and it will mean nothing because if the President simply says, I have authority to go outside of it, then he will go outside of it and we won't even know what is going on.

Are we a committee of oversight or not? Do we have some jurisdiction here? I would argue that we do. And if we do, we ought to ensure that the tools are given for the President to conduct necessary surveillance. And that is what we have attempted to do within this.

Mr. Schiff did a great job explaining what the bill is about. It simply makes it easier. We have been given compelling evidence that FISA needs to be changed. There are some changes; we wish we would have heard about these changes sooner, I might add, but changes need to be made. We are willing to make those changes.

But what I think we should not be willing to do is to concede that we will have a program run off the books.

I can say, as one who believes that we need to gather intelligence, I worry tremendously about what will happen 2 years from now if we haven't institutionalized this program, if we leave it up to the next President to decide whether or not we ought to be gathering this intelligence. So with that, I yield back.

Chairman SENSENBRENNER. For what purpose does the gentleman from Michigan seek recognition?

Mr. CONYERS. I rise in support of——

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. I will be brief because I think when we get through with the several amendments, we will be able to dispose of this, hopefully, successfully and we will be finished for the day. So I join with those who compliment the gentleman from California and the gentleman from Arizona on some reasonableness here.

The most important thing to me is that we extend the emergency provision from 72 hours to 168 hours; from 3 days to 7 days. We make it clear that there is an exclusivity provision in this measure that means that domestic electronic surveillance for foreign intelligence purposes will be controlled under FISA. It will be specific. And we also make clear that the authorization for the use of military force is not an exception.

We increase the forces here. We put in more manpower, we improve the system, we try to get more personnel for speed and agility. And for that reason, I urge the members on both sides of the committee to support this substitute, and I return the unused time.

Chairman SENSENBRENNER. The question is on agreeing to the amendment in the nature of a substitute offered by the gentleman from California, Mr. Schiff.

Those in favor will say aye; opposed, no.

The noes appear to have it.

Record vote is ordered.

Those in favor of the Schiff amendment in the nature of a substitute will, as your name is called, answer aye.

Those opposed, no.

And the Clerk will call the roll.

The CLERK. Mr. Hyde.

Mr. HYDE. No.

The CLERK. Mr. Hyde, no.

Mr. Coble.

[No response.]

The CLERK. Mr. Smith.

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly.

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no.

Mr. Goodlatte.

[No response.]

The CLERK. Mr. Chabot.

[No response.]

The CLERK. Mr. Chabot.

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no.
The CLERK. Mr. Lungren.
Mr. LUNGREN. No.
The CLERK. Mr. Lungren, no.
Mr. Jenkins.
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no.
Mr. Cannon.
Mr. CANNON. No.
The CLERK. Mr. Cannon, no.
Mr. Bachus.
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no.
Mr. Inglis.
Mr. INGLIS. Aye.
The CLERK. Mr. Inglis, aye.
Mr. Hostettler.
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
Mr. ISSA. No.
The CLERK. Mr. Issa, no.
Mr. Flake.
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye.
Mr. Pence.
Mr. PENCE. No.
The CLERK. Mr. Pence, no.
Mr. Forbes.
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Feeney.
The CLERK. Mr. Feeney, no.
Mr. Franks.
Mr. FRANKS. No.
The CLERK. Mr. Franks, no.
Mr. Gohmert.
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no.
Mr. Conyers.
Mr. CONYERS. Ate.
The CLERK. Mr. Conyers, aye.
Mr. Berman.
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Mr. Boucher.
Mr. BOUCHER. Aye.

The CLERK. Mr. Boucher, aye.
Mr. Nadler.
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt.
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Ms. Jackson Lee.
[No response.]
The CLERK. Ms. Waters.
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.
Mr. Meehan.
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye.
Mr. Delahunt.
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye.
Mr. Wexler.
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler, aye.
Mr. Weiner.
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Ms. Sánchez.
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye.
Mr. Van Hollen.
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Ms. Wasserman Schultz, aye.
Mr. Chairman.
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their vote. The gentleman from North Carolina, Mr. Coble.
Mr. COBLE. No.
The CLERK. Mr. Coble, no.
Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte, no.
Chairman SENSENBRENNER. Further members who wish to cast or change their vote. If not, the Clerk will report.

For what purpose does the gentlewoman from Florida, Ms. Wasserman Schultz, seek recognition?

Mrs. WASSERMAN SCHULTZ. How am I recorded?

The CLERK. Mr. Chairman, Ms. Wasserman Schultz is recorded as aye.

Mr. Chairman, there are 18 ayes and 20 nays.

Chairman SENSENBRENNER. The amendment in the nature of a substitute is not agreed to.

[Intervening business.]

Chairman SENSENBRENNER. The unfinished business of the committee is the motion to report the bill, 5825.

Mr. CANNON. Mr. Chairman.

Chairman SENSENBRENNER. When the committee broke for the last series of votes, the Chair made a motion to report the bill favorably. The bill was considered as read and open for amendment at any point. Several amendments had been adopted. Are there further amendments?

Mr. CANNON. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from——

Mr. CANNON. Mr. Chairman, I have an amendment at the desk.

Mr. NADLER. Mr. Chairman, I reserve a point of order.

Chairman SENSENBRENNER. A point of order is reserved. The Clerk will report the amendment.

The CLERK. Mr. Chairman, I have two Cannon amendments.

Chairman SENSENBRENNER. Which one does the gentleman wish reported?

Mr. CANNON. I think we shall show you which amendment is appropriate.

Chairman SENSENBRENNER. Well, the Clerk has to report the amendment.

Mr. CANNON. They have the appropriate amendment.

Chairman SENSENBRENNER. There are two amendments, gentleman from Utah. Which one do you wish to offer?

Mr. CANNON. The one that the clerk has, is now passing out.

The CLERK. Amendment to H.R. 5825 offered by Mr. Cannon of Utah. Page 18, after line three insert the following new section. Section 10 compliance with court orders and——

[The amendment follows:]

AMENDMENT TO H.R. 5825

OFFERED BY MR. CANNON OF UTAH

Page 18, after line 3 insert the following new section:

SEC. 10. COMPLIANCE WITH COURT ORDERS AND ANTITERRORISM PROGRAMS.

(a) IN GENERAL.—Notwithstanding any other provision of law, and in addition to the immunities, privileges, and defenses provided by any other provision of law, no action shall lie or be maintained in any court, and no penalty, sanction, or other form of remedy or relief shall be imposed by any court or any other body, against any person for an activity arising from or relating to the provision to an element of the intelligence community of any information (including records or other information pertaining to a customer), facilities, or assistance during the period of time beginning on September 11, 2001, and ending on the date of the enactment of this Act, in connection with any alleged intelligence program involving electronic surveillance that the Attorney General or a designee of the Attorney General certifies, in a manner consistent with the protection of State secrets, is, was, or would be intended to protect the United States from a terrorist attack. This

section shall apply to all actions or proceedings pending on or after the effective date of this Act.

(b) JURISDICTION.—Any action or claim described in subsection (a) that is brought in a State court shall be deemed to arise under the Constitution and laws of the United States and shall be removable pursuant to section 1441 of title 28, United States Code.

(c) DEFINITIONS.—In this section:

(1) The term "electronic surveillance" has the meaning given the term in section 101(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(f)) on the day before the date of the enactment of this Act.

(2) The term "intelligence community" has the meaning given the term in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

(3) The term "person" has the meaning given the term in section 2510(6) of title 18, United States Code.

Page 18, line 4, redesignate section 10 as section 11.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and subject to the reservation of the gentleman from New York. The gentleman from Utah is recognized for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman. The debate before us centers on what the legitimate roles of Congress and the executive branch are in terms of foreign policy and intelligence gathering matters. It is an issue that goes to the heart of the Constitution.

Mr. NADLER. Mr. Chairman, I cannot hear the gentleman.

Mr. CANNON. Is it the mike that is inadequate, my voice, or too much noise in the background? I can't hear you.

The Constitution leaves little doubt that the President is expected to have the primary role of conducting foreign policy, but Congress has a role and the debate today indulges us in defining that role. This amendment does not delve into the constitutional relationship between Congress and the Executive. This amendment deals with an issue of fairness. It deals with the issue of whether individuals or companies that comply with government orders are liable to third parties for following these orders.

This amendment would eliminate the 60-plus lawsuits that have been filed because companies complied with government orders. Absent an effective immunity provision that allows a company to avoid these legal quagmires, an individual or company will be reluctant to cooperate with any authorized government surveillance program, and that will severely undercut this country's terror fighting capabilities and the safety of our constituents. Should these claims proceed to judgment, the financial liabilities could add up to hundreds of billions of dollars, enough to destroy any industry. Although I do not believe these suits will succeed, the defense costs alone will be considerable. But what is worse is the chilling effect on compliance for future requests. We can argue what the law is, but we all agree that we should encourage compliance with our laws.

This amendment will separate questionable litigation from a national security imperative and focuses our attention where it should be, which is what is constitutionally allowed. If the overall program is illegal or unconstitutional, that is for us and the courts to decide. Judges who are sought out in a forum shopping frenzy should not issue decisions that could undermine our protection from a future terrorist attack through the revelation of classified sources or methods.

If you oppose the program administered by this administration, if you don't believe in the constitutional theories regarding the executive's authority, that is an issue for discussion. That is our right as Members of Congress to debate. But it does not relate to this amendment.

I urge support of this amendment, which will provide liability protection for those who comply with the certification from the Attorney General. I reserve the balance of my time. I yield back.

Chairman SENSENBRENNER. Does the gentleman from New York insist on his point of order?

Mr. NADLER. Yes, I do.

Chairman SENSENBRENNER. The gentleman will state his point of order.

Mr. NADLER. Mr. Chairman, I raise a point of order against the amendment because it is not germane to the bill. This amendment would exempt from liability any individual or corporation for any activity arising from any intelligence program certified by the Attorney General to be intended to protect the United States from a terrorist attack, not just FISA. The amendment is nongermane for several reasons.

First, the bill is limited to the Foreign Intelligence Surveillance Act only and does not extend to any other intelligence program that may arise, as does this amendment.

Second, the underlying bill does not pertain to or raise any liability issues arising under intelligence programs. In these two regards the amendment introduces new issues outside the scope of the bill and, as such, is nongermane.

Chairman SENSENBRENNER. The Chair is prepared to rule. The underlying bill pertains only to FISA. The amendment by the gentleman from Utah extends liability protection to private parties for, quote, an activity arising from or relating to the provision of an element of the Intelligence Community, unquote. As such, the amendment exceeds the scope of the underlying bill and is thus nongermane, and the Chair sustains the point of order.

Are there further amendments.

Mr. CANNON. Mr. Chairman, I have an amendment at the desk. It is the other amendment.

Chairman SENSENBRENNER. The Clerk will report the other amendment.

The CLERK. Amendment to H.R. 5820.

Mr. NADLER. Mr. Chairman, I reserve a point of order on this amendment.

Chairman SENSENBRENNER. The point order is reserved.

The CLERK. Offered by Mr. Cannon of Utah. Page 18 after line three insert the following new section. Section 10.

[The amendment follows:]

AMENDMENT TO H.R. 5825

OFFERED BY MR. CANNON OF UTAH

Page 18, after line 3 insert the following new section:

SEC. 10. COMPLIANCE WITH COURT ORDERS AND ANTITERRORISM PROGRAMS.

(a) IN GENERAL.—Notwithstanding any other provision of law, and in addition to the immunities, privileges, and defenses provided by any other provision of law, no action shall lie or be maintained in any court, and no penalty, sanction, or other form of remedy or relief shall be imposed by any court or any other body, against any person for an activity arising from or relating to [redacted] any alleged intelligence program involving electronic surveillance that the Attorney General or a designee of the Attorney General certifies, in a manner consistent with the protection of State secrets, is, was, or would be intended to protect the United States from a terrorist attack. This

section shall apply to all actions or proceedings pending on or after the effective date of this Act.

(b) JURISDICTION.—Any action or claim described in subsection (a) that is brought in a State court shall be deemed to arise under the Constitution and laws of the United States and shall be removable pursuant to section 1441 of title 28, United States Code.

(c) DEFINITIONS.—In this section:

(1) The term "electronic surveillance" has the meaning given the term in section 101(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(f)) on the day before the date of the enactment of this Act.

[redacted] The term "intelligence community" has the meaning given the term in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

(2) The term "person" has the meaning given the term in section 2510(6) of title 18, United States Code.

Page 18, line 4, redesignate section 10 as section 11.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman from Utah is recognized for 5 minutes subject to the reservation of the gentleman from New York.

Mr. CANNON. This amendment is similar to the prior amendment but it strikes out the language beginning on the latter part of line 9, "the provision," to "and ending on," as you will see in the amendment that is being passed out. And I think that that goes to the heart of the gentleman's concern about germaneness, and I move its favorable passage.

Chairman SENSENBRENNER. Does the gentleman from New York insist on his point of order?

Mr. NADLER. Yes, Mr. Chairman, I do.

Chairman SENSENBRENNER. The gentleman will state his point of order.

Mr. NADLER. Mr. Chairman, it is the same point of order as the other amendment. The change in the amendment does not cure the problem. It still says against any person for an activity arising from or relating to any alleged intelligence program involving electronic surveillance, the Attorney General, et cetera. Whether or not it is under FISA, so that, and remember, we did not make FISA exclusive in the underlying bill as some of us wanted to. So there are or could be intelligence programs outside of FISA which fall under the scope of this amendment which do not fall within the scope of the bill. Therefore, the bill, the amendment exceeds the scope of the bill.

Chairman SENSENBRENNER. The Chair is prepared to rule.

Mr. NADLER. And is therefore not germane.

Chairman SENSENBRENNER. The Chair is prepared to rule. The Chair does not believe that the doctored amendment that is before us exceeds the scope of the bill because on page two, lines 8 through 13, inclusive, the term electronic surveillance as defined is the meaning given the term by the Foreign Intelligence Surveillance Act, as amended. So the Chair overrules the point of order.

Mr. SCOTT. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from Virginia seek recognition?

Mr. SCOTT. To raise another point of order that this bill has a removal clause in it under page two, line three that isn't part of the original bill.

Chairman SENSENBRENNER. Well, that point of order is not timely because it was raised and not reserved after the gentleman from Utah was recognized to explain the amendment.

The question is on the amendment offered by the gentleman from Utah, Mr. Cannon. Those in favor will say aye. Opposed, no. The ayes appear to have it. The ayes have it and the amendment is agreed to.

Mr. WATT. Recorded vote, Mr. Chairman.

Chairman SENSENBRENNER. A recorded vote has been requested by the gentleman from North Carolina. Those in favor of the amendment offered by the gentleman from Utah, Mr. Cannon, will, as your names are called, answer aye. Those opposed, no. And the Clerk will call the roll.

The CLERK. Mr. Hyde.

Mr. HYDE. Aye.

The CLERK. Mr. Hyde votes aye.
Mr. Coble.
Mr. COBLE. Aye.
The CLERK. Mr. Coble votes aye.
Mr. Smith.
Mr. SMITH. Aye.
The CLERK. Mr. Smith votes aye.
Mr. Gallegly.
Mr. GALLEGLY. Aye.
The CLERK. Mr. Gallegly votes aye.
Mr. Goodlatte.
[No response.]
The CLERK.Mr. Chabot.
Mr. CHABOT. Aye.
The CLERK. Mr. Chabot votes aye.
Mr. Lungren.
Mr. LUNGREN. Aye.
The CLERK. Mr. Lungren votes aye.
Mr. Jenkins.
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins votes aye.
Mr. Cannon.
Mr. CANNON. Aye.
The CLERK. Mr. Cannon votes aye.
Mr. Bachus.
Mr. BACHUS. Aye.
The CLERK. Mr. Bachus votes aye.
Mr. Inglis.
Mr. INGLIS. Aye.
The CLERK. Mr. Inglis votes aye.
Mr. Hostettler.
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler votes aye.
Mr. Green.
[No response.]
The CLERK. Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
Mr. ISSA. Aye.
The CLERK. Mr. Issa votes aye.
Mr. Flake.
Mr. FLAKE. Aye.
The CLERK. Mr. Flake votes aye.
Mr. Pence.
Mr. PENCE. Aye.
The CLERK. Mr. Pence votes aye.
Mr. Forbes.
Mr. FORBES. Aye.
The CLERK. Mr. Forbes votes aye.
Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King votes aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney votes aye.

Mr. Franks.
Mr. FRANKS. Aye.
The CLERK. Mr. Franks votes aye.
Mr. Gohmert.
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert votes aye.
Mr. Conyers.
Mr. CONYERS. No.
The CLERK. Mr. Conyers votes no.
Mr. Berman.
Mr. BERMAN. No.
The CLERK. Mr. Berman votes no.
Mr. Boucher.
[No response.]
The CLERK. Mr. Nadler.
Mr. NADLER. No.
The CLERK. Mr. Nadler votes no.
Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott votes no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt votes no.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren votes no.
Ms. Jackson Lee.
[No response.]
The CLERK. Ms. Waters.
Ms. WATERS. No.
The CLERK. Ms. Waters votes no.
Mr. Meehan.
Mr. MEEHAN. No.
The CLERK. Mr. Meehan votes no.
Mr. Delahunt.
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt votes no.
Mr. Wexler.
Mr. WEXLER. No.
The CLERK. Mr. Wexler votes no.
Mr. Weiner.
Mr. WEINER. No.
The CLERK. Mr. Weiner votes no.
Mr. Schiff.
Mr. SCHIFF. No.
The CLERK. Mr. Schiff votes no.
Ms. Sánchez.
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez votes no.
Mr. Van Hollen.
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen votes no.
Ms. Wasserman Schultz.
[No response.]
The CLERK. Mr. Chairman.

Chairman SENSENBRENNER. Aye.

Chairman SENSENBRENNER. Members who wish to cast or change their vote. Gentleman from Wisconsin, Mr. Green.

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye.

Chairman SENSENBRENNER. Gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Ms. JACKSON LEE. Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. No.

The CLERK. Ms. Jackson Lee, no.

Chairman SENSENBRENNER. The Clerk will report.

The CLERK. Mr. Chairman, there are 22 ayes and 16 nays.

Chairman SENSENBRENNER. Then the amendment is agreed to. Are there further amendments?

Ms. JACKSON LEE. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The gentlewoman from Texas has an amendment at the desk which will the Clerk will report.

Mr. SMITH. Mr. Chairman, I reserve a point of order.

Chairman SENSENBRENNER. A point of order is reserved by the gentleman from Texas.

The CLERK. Amendment to H.R. 5825, offered by Ms. Jackson Lee of Texas. Strike section 9(a) on page 17, lines one through three and insert the following: One, in subsection (a) one by striking the house permanent select Committee on Intelligence and all that follows through of the Senate and inserting——

Ms. JACKSON LEE. I am sorry. I think you have the wrong amendment. This has to do with the inclusion the judiciary committee. 001 X M L. Section 11.

The CLERK. Amendment to H.R. 5825, offered by Ms. Jackson Lee. At the end of the bill add the following new section, section 11 reiteration of FISA as executive authorization of electronic surveillance for foreign intelligence purposes, subsection (a), in general notwithstanding——

[The information follows:]

AMENDMENT TO H.R. 5825 # 3

OFFERED BY M S. Jackson Lee

At the end of the bill, add the following new section:

SEC. 11. REITERATION OF FISA AS EXCLUSIVE AUTHORIZATION OF ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE PURPOSES.

(a) IN GENERAL.—Notwithstanding any other provision of law, the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) shall be the exclusive means by which electronic surveillance may be conducted for the purpose of collecting foreign intelligence information.

(b) DEFINITIONS.—In this section:

(1) The term "electronic surveillance" has the meaning given the term in section 101(f) of such Act (50 U.S.C. 1801(f)).

(2) The term "foreign intelligence information" has the meaning given the term in section 101(e) of such Act (50 U.S.C. 1801(e)).

Chairman SENSENBRENNER. Subject to the reservation of the gentleman from Texas, the gentlewoman from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. I thank the distinguished chairman. I am going to take a little bit of my time. This is a very simple amendment.

Mr. SCOTT. Mr. Chairman, has the amendment been passed out?

Chairman SENSENBRENNER. I have it.

Mr. WATT. We don't.

Ms. JACKSON LEE. Section 11. She read the correct amendment.

Chairman SENSENBRENNER. Does the gentleman wish to have the Clerk rereport the amendment?

Mr. SCOTT. I think it is on the way. No, Mr. Chairman. I think it is on the way now. We just hadn't received it. So I'll withdraw my reservation.

Chairman SENSENBRENNER. The gentlewoman from Texas is recognized for 5 minutes subject to the reservation.

Ms. JACKSON LEE. Mr. Chairman, if I might, I want to make sure they have the correct amendment. It is an amendment to—yes, thank you. The amendment presently before the members reiterates that FISA is the exclusive procedure and authority for wiretapping Americans to gather foreign intelligence. In the absence of the reaffirmation of this critically important principle, H.R. 5825 would have the unacceptable consequence of rewarding the President's refusal to follow FISA by exempting him from following these procedures. The effect of this would be to allow any President to make up his own rules. This would make tangible President Nixon's 1977 claim to David Frost, when the President does it it means that it is not illegal.

Without my amendment, Mr. Chairman, H.R. 5825 would undo the Congress manifest intent in passing FISA which was designed to curb the practice by which the executive branch may conduct warrantless electronic surveillance on its own unilateral determination. It is more than a truism that real security for the American people comes not from deferring to the President, but from preserving the separation of powers. My amendment does precisely that and is for this reason worthy of support. I would ask my colleagues to leave the rights of the American people within the protection of the independent Federal judiciary, and ask my colleagues to support the amendment.

Chairman SENSENBRENNER. Does the gentleman from Texas insist on his point of order?

Mr. SMITH. Mr. Chairman, I'll withdraw my point of order.

Chairman SENSENBRENNER. Before recognizing Mr. Lungren, let me say that the next votes are anticipated on the House floor about 5:30. The Rules Committee will be meeting on the immigration bills that will be coming up in the House tomorrow. If we do not get this bill reported out by 5:30 then we will reconvene here at 7:00 tonight to finish our work on this bill. Members are advised to temper their remarks if they don't want to come back.

For what purpose does the gentleman from California seek recognition?

Mr. LUNGREN. Mr. Chairman, in opposition to the amendment.

Chairman SENSENBRENNER. And the gentleman's recognized for 5 minutes.

Mr. LUNGREN. I will temper my remarks if possible. Mr. Chairman, this amendment, as I read it, would require all electronic surveillance to be done under FISA. As such, it is so broadly drafted that it could prevent our soldiers from intercepting battlefield communications in Iraq or al Qaeda phone calls originating outside the United States to persons inside the U.S. because it could do grave damage to the safety of our military and our ability to detect and deter terrorist threats, even though that may not be intent of the gentlelady from Texas, I would urge my colleagues not only to look at this amendment carefully but to oppose it.

The amendment is over broad and could prohibit the intercept of enemy communications on the battlefield. As drafted, the amendment would require all electronic surveillance to be conducted pursuant to FISA. The FISA definition of electronic surveillance sets forth four circumstances under which the government must obtain a warrant in order to intercept communications. This amendment would mean that those four circumstances are the only means by which the executive branch may obtain any electronic surveillance. By implication, any other electronic surveillance which does not fall within those four circumstances would be prohibited. Thus, if an insurgent in Iraq uses a cell phone to communicate with his terrorist friends and that call is the requisite nexus with the United States, our military would be required to obtain a FISA warrant to intercept the call or any such interception would be illegal.

I don't believe that is what we intend, and I certainty can't imagine that we intend our soldiers to obtain FISA warrants before engaging in that activity. Additionally, if the call does not have the requisite FISA nexus, any interception would be illegal since FISA would be exclusive means, according to the terms of the amendment. I am certain that is not what the drafters of the amendment intended; however, that is what we have here.

The amendment also impermissibly restricts the President's recognized inherent authority to collect intelligence needed to protect the U.S. The amendment also hamstrings the Nation's traditional longstanding inherent constitutional authority as Commander in Chief. The President's traditional and longstanding inherent constitutional authority to collect the intelligence needed to protect our Nation.

As I have tried to point out from time to time, as we have dealt with this issue from the beginning of our republic and throughout recent history, Presidents have acted pursuant to their inherent authority to collect foreign intelligence without a warrant. Congress has acknowledged repeatedly that such authority exists. Our Federal courts have repeatedly reaffirmed the power of the President to act independent of Congressional authorization in the area of foreign intelligence. The FISA court itself has recognized this. No one can serious doubt that framers vested in the Commander in Chief all authority inherent to protect our Nation and citizens from foreign threats. In reliance on this constitutional principle Presidents, Democrat and Republican, throughout history have utilized their inherent authority to collect foreign intelligence information within the U.S. using warrantless surveillance. Beginning in at least 1940 Presidents Roosevelt, Truman, Johnson and Carter, as well as Republican Presidents, ordered warrantless wiretaps to protect our citizens against spies, saboteurs and foreign subver-

sives. This is not and should not be a partisan principle. It is one that recognize the need of Presidents to act with deliberate speed and in keeping with their constitutional responsibilities to protect our citizens as they have in the past from Nazi saboteurs, Russian spies and the likes of the terrorists that we see today who seek to do harm against the United States.

Indeed, Presidents of both parties have recognized the importance of the Executive's inherent authority. While FISA itself was first debated in 1978, Attorney General Griffin Bell made it clear that President Carter acknowledged and intended to preserve his inherent authority to protect Americans against foreign threats. Bell testified that the FISA bill Congress had drafted failed to recognize the President's inherent authority, but that the regulation did not and indeed could not take away the power from the President under the Constitution. President Clinton's Justice Department apparently took the same view. Jamie Gorelich, Deputy Attorney General in the Clinton administration, testified in 1994 during FISA reauthorization that the Department of Justice believes and case history supports the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes. And the long and short of it is, this amendment, if adopted, would change the history, would be inconsistent with the history of the United States and the authority of the President as recognized by Presidents, both Democrat and Republican, and Supreme Court decisions as well as FISA Court decisions.

Ms. LOFGREN. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentlewoman from California, Ms. Lofgren, seek recognition?

Ms. LOFGREN. To strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. LOFGREN. And to yield to my colleague from Texas.

Ms. JACKSON LEE. I thank the distinguished gentlewoman. I hope, as my good friend from California on the other side of the aisle seemed to not be able to contain his glee, I would like to put a more serious approach and spin on this. And with all of his commentary, this is a restatement of basic existing law. And all that it says is that it rejects the elimination of exclusivity of the procedures of FISA to collect electronic data and electronic surveillance. And we have made the argument, those of us who find fault with this legislation, that in fact you are able to secure surveillance with present FISA and certain additional reform. Mr. Lungren has suggested that that is not possible and cited a litany of high commentary from Republican and Democratic Presidents. But Mr. Schiff provided a reasonable response to how the protection of intelligence could also include the protection of the rights of Americans. So now attempt to do it by amendment. And this amendment is not overbroad. It is not difficult to understand. It simply restores the idea of FISA being the main focus of the FISA—excuse me, of electronic surveillance.

So I would indicate to my colleagues that this amendment is reasonable; it is constrained and it is serious. And unfortunately, as we abolish the Constitution in this particular committee at this time, we are not able to see the forest for the trees. And I yield back.

Mr. CANNON. Would the gentlewoman yield?

Ms. LOFGREN. I would be happy to yield further to Mr. Schiff.

Mr. SCHIFF. I thank the gentlewoman for yielding. I just wanted to state briefly that I disagree with my colleague from California's legal interpretation of the breadth of this amendment. I think the amendment is fairly narrow. It defines the term "electronic surveillance" as that which is given in FISA, so it does not apply to the terrorists on the battlefield in some foreign country, foreign to foreign communication. It makes reference to section 1801(f) of FISA, which pertains to surveillance of known U.S. persons who are in the U.S., communications to or from a person in the U.S., communications where all intended, the sender and all intended recipients are in the United States. So the sections that it makes reference to, by and large, apply to whether the information is gathered through technology in the United States or of U.S. persons, so I think it is fairly narrow.

I do believe that FISA is the exclusive authorization for domestic surveillance, and I think that is essentially what the amendment sets out. And I yield back.

Ms. LOFGREN. And with that, I would yield back, Mr. Chairman.

Chairman SENSENBRENNER. The question is on agreeing to the amendment offered by the gentlewoman from Texas, Ms. Jackson Lee. Those in favor will say aye. Those opposed, no. The noes appear to have it. The noes have it. The amendment is not agreed to. Are there further amendments?

Ms. JACKSON LEE. I have an amendment at the desk.

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas seek recognition?

Ms. JACKSON LEE. I have an amendment at the desk, Mr. Chairman. I am going to try and give the, it looks as if it is amendment 358.XML.

Chairman SENSENBRENNER. How many amendments does the gentlewoman from Texas have?

Ms. JACKSON LEE. Mr. Chairman, this will be my last amendment.

Chairman SENSENBRENNER. Okay. The Clerk will report. Point of order is reserved.

The CLERK. Amendment to H.R. 5825 offered by Ms. Jackson Lee of Texas. Strike section 9(a) one page 17, lines one through three, and insert the following. In subsection (a) one——

[The amendment follows:]

AMENDMENT TO H.R. 5825

OFFERED BY MS. JACKSON-LEE OF TEXAS

Strike section 9(a)(1) (page 17, lines 1 through 3) and insert the following:

(1) in subsection (a)(1), by striking "the House Permanent Select Committee on Intelligence" and all that follows through "of the Senate," and inserting "each member of the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate"; and

In section 9(a)(2)(C) (page 17, line 9), strike "and" at the end.

In section 9(a)(3) (page 17, line 17), strike the final period and insert "; and".

At the end of section 9(a) (page 17, after line 17), add the following new paragraph:

(4) by striking subsection (b) and inserting the following:

"(b) On a semiannual basis, the Attorney General shall submit to the Committees on the Judiciary of the House of Representatives and the Senate copies of minimization procedures in effect at any time during the previous 180 days. A report submitted under this subsection may be submitted in classified form.".

Strike section 9(b)(1) (page 17, lines 21 through 23) and insert the following:

(1) in subsection (a)(1), by striking "the congressional intelligence committees" and inserting "each member of the congressional intelligence committees and the Committees on the Judiciary of the House of Representatives and the Senate"; and

Chairman SENSENBRENNER. Without objection, the amendment is considered as read. The gentlewoman from Texas, subject to the reservation, is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. As I have watched the ins and outs of our hearings and this markup this afternoon, I can't help but feel enormously disappointed, not because we are not crafty and know the ins and outs of committee procedures, we understand how to reconsider a vote that was fair and meaningful. But, of course, we have made light of what I think will be devastating consequences out of the military tribunal vote, where we now put our military soldiers in jeopardy, and this legislation, where we have rejected the fairness litmus test.

The American people have been so terrorized and frightened by the representations of our government that you may be right, that they are swayed toward the extinguishing of their own rights, the loss of their own dignity, the collection of data without restraints, the sending of young men and women off to war without the protection of the Geneva Convention under the pretense that we would be safer. I beg to differ. And I think this committee has an enormous responsibility to not view this in the lightheartedness that I sense.

A gentleman earlier in the debate wanted to make light of the Armed Services members who voted for the military tribunals. Well, I had information that Democrats voted for Mr. Skelton's substitute, 32 to 26, but it failed. So frankly, we now will leave this room with the stomping of the Constitution and the ignoring of the Geneva Convention and the potential of detainees that happen to be wearing the American flag on their sleeves in more jeopardy than they have ever been, and we will leave this room with the concept of congressional oversight being literally ignored. And I might say that we have some competition. I know that I will get a response from the other side of the aisle, but we have some competition with the era of the 1950's, because we are not listening to combined voices of reasons, Democrat and Republicans.

John McCain, Senator Graham, Senator Warner, bipartisan voices that have raised their voices on the military tribunal and some who have raised their voices on the electronic surveillance. Because data shopping, if you will, with no understanding whether or not are you getting information that is not necessary, is really a concern. And my amendment is simply this, to add the Judiciary Committee to the names of the committees that would receive the information from the Attorney General about whether or not they are minimizing the amount of data that would be collected.

So we are just simply asking that the Intelligence Committee and the Judiciary Committee would be the committees that the Attorney General would report to when they report about the status of the electronic data collection under FISA, simple, not broad, narrow, and it simply adds our jurisdiction to the responsibility of the Attorney General. I would hope, in a spirit of oversight and reflection of the rights of the American people, that this committee that has the responsibility of holding the Constitution in its hands would at least allow itself to be reported to as the Intelligence Committee is reported to.

I would ask my colleagues to support this amendment. I yield back.

Chairman SENSENBRENNER. Does the gentleman from Texas insist upon his point of order?

Mr. SMITH. No, Mr. Chairman, I do not insist on my point of order.

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes in opposition to the amendment and will take it.

Looking at this amendment, this amendment is going to jeopardize any intelligence agent and anybody in the United States or outside the United States that utilizes intelligence. What the gentlewoman from Texas' amendment does is it requires that these highly classified reports be sent to each member of the congressional Intelligence Committees and the Committee on the Judiciary of both the House of Representatives and the Senate. You might as well send a copy to the New York Times and the Washington Post and every other newspaper in the country because this place is leaky as a sieve, and all of us know it.

I think this amendment is a shocking amendment because this country will have no secrets if this amendment becomes law.

Ms. JACKSON LEE. Will the gentleman yield?

Chairman SENSENBRENNER. No, I won't.

Ms. JACKSON LEE. Well, speak for yourself because I don't consider myself a leaky sieve.

Chairman SENSENBRENNER. But there are plenty of leaky sieves around here, you know. And sending 40 copies here and one to each member of the Intelligence Committee and those on the other side of the Capitol building means that it is going to become a matter of public record, and people will die as a result of it. This amendment ought to be rejected. And I yield back the balance of my time.

Mr. NADLER. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. Strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. I just want to understand the Chairman's objection. The amendment says they have got to send all this stuff to every member of the two Intelligence Committees and the two Judiciary Committees, correct?

Chairman SENSENBRENNER. If the gentleman will yield, that is correct.

Mr. NADLER. And what is the current law?

Chairman SENSENBRENNER. The current law says that it goes to the Intelligence Committee as an institution and members can go to the Intelligence Committee and look at it. And that was one of the parts of the Church Commission report to try to give Congress oversight, but not take out an ad on the front page of the newspaper.

Mr. NADLER. Reclaiming my time. So, in other words, when you say to the Intelligence Committee as an institution, it goes to the chairman and he or she sets up some place where members can look at it but not take copies; is that what you are saying?

Chairman SENSENBRENNER. If the gentleman will yield, that is the current law.

Mr. NADLER. And if the law were changed—reclaiming my time again. And if the law were changed to say to the Judiciary Committee as an institution in the same way as to the Intelligence Committee, would you think that would be objectionable?

Chairman SENSENBRENNER. If the gentleman will yield.

Mr. NADLER. Yes.

Chairman SENSENBRENNER. The answer to that question is yes, because members of the Judiciary Committee can walk across the street and see intelligence reports in the committee that the House has established to collect and review intelligence reports and to do oversight over the Intelligence Community.

Mr. NADLER. And further, if the gentleman would yield. I am sorry, reclaiming my time. And under the current law, members of the Judiciary Committee have the same right as members of the Intelligence Committee to see that information at the Intelligence Committee office?

Chairman SENSENBRENNER. The rules were changed, I believe two Congresses ago, to give us access to that type of information.

Mr. NADLER. I thank the gentleman. I am told that that the rules were changed, but it is not in statute. It would be better if it were in the statute. But under those circumstances, I think it would be a good idea.

Ms. JACKSON LEE. Would the gentleman yield for a moment please?

Mr. NADLER. Yes, I yield.

Ms. JACKSON LEE. I thank the distinguished gentleman. Again, I would like to put on the record that I don't consider my colleagues here a leaking coffee pot. And I would argue that it would be appropriate to change existing law and I would even accept a friendly amendment that it be to the chairman and Ranking Member of the Judiciary Committee. But I beg to differ with the chairman's interpretation of what kinds of leaks would occur because frankly, to be very honest with you, who in this room could raise their hand and not read a story about leaks coming from the Intelligence Committee? This is a question of oversight, and I would hold my colleagues to the kind of standard, the kind of standard that would argue for saving lives. And I would not put on my colleagues that they would jeopardize lives by going and providing intelligence to the New York Times or to the Sacramento Bee.

And I ask my colleagues to support this amendment. I would accept a friendly amendment that would limit it to the chairs of the committee.

Mr. NADLER. Thank you. Reclaiming my time. I would just—Mr. Chairman, I am informed that although the—we were told a moment ago that the current law is correct, the underlying bill that we are considering today, that we are presumably going to report, changes that so that that information goes not to the Intelligence Committee institutionally, but to every member of the Intelligence Committee. If that is the case, I would—then I wonder, since we have jurisdiction over FISA, why that shouldn't be the Judiciary Committee also.

Chairman SENSENBRENNER. If the gentleman will yield, that is not our jurisdiction under House Rule X. That is what the problem is.

Mr. NADLER. Wait a minute. Well, now I am really confused. Under the underlying Wilson bill that we are having, am I correct that, in fact, the information will go to every member of the Intelligence Committees?

Chairman SENSENBRENNER. If the gentleman will yield, the answer to the question is yes, because rule X gives them oversight responsibility over this. Rule X does not give this committee oversight responsibility.

Mr. NADLER. But we have oversight responsibility over FISA, do we not?

Chairman SENSENBRENNER. If the gentleman will yield. The answer to the question is yes. But that is different than actually providing intelligence to members of this committee which is outside of our rule X jurisdiction.

Mr. NADLER. Let me just say that I find what the chairman said a few minutes ago about keeping the number of people down who get this, all be it others can look at it, a useful thing. But if the Intelligence Committee as a whole, both Intelligence Committees, I don't—I think it is a slur on the members of this committee to say that this committee is more of a sieve than the Intelligence Committee. I am not sure that either is a sieve. But I think, given our FISA jurisdiction, we should have the same access as the members of the Intelligence Committee.

Chairman SENSENBRENNER. The question occurs on the amendment offered by the gentlewoman from Texas, Ms. Jackson Lee. Those in favor will say aye. Opposed, no. The noes appear to have it. The noes have it. The amendment is not agreed to.

Mr. FLAKE. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Arizona, Mr. Flake.

Mr. FLAKE. I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

Mr. FLAKE. This is a section 2 finding, and I would ask unanimous consent, given the changes that were made with the Lungren amendment, to place this in the appropriate place in the bill.

Chairman SENSENBRENNER. Without objection, the modification referred to by the gentleman of Arizona is agreed to, and the Clerk will report the amendment.

The CLERK. Amendment to H.R. 5825 offered by Mr. Flake of Arizona. Page one, after line 5 insert the following new section. Section two finding. Congress finds article I, section 8, clause 18 of the Constitution, known as the necessary and proper clause, grants Congress clear and unequivocal authority to regulate the President's inherent power to gather foreign intelligence.

[The amendment follows:]

AMENDMENT TO H.R. 5825

OFFERED BY MR. FLAKE OF ARIZONA

Page 1, after line 5 insert the following new section:

SEC. 2. FINDING.

Congress finds that article I, section 8, clause 18 of the Constitution, known as the "necessary and proper clause", grants Congress clear and unequivocal authority to regulate the President's inherent power to gather foreign intelligence.

Chairman SENSENBRENNER. The gentleman from Arizona is recognized for 5 minutes.

Mr. FLAKE. Thank you, Mr. Chairman. This amendment simply states the Congressional finding that Congress has the authority to regulate the President's inherent power to gather foreign intelligence. The Constitution clearly states in article I, section 8, clause 18 that Congress shall have the power to, quote, make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States in any department or officer thereof. The President's inherent power to gather foreign intelligence is a power vested by the Constitution. And therefore, according to this clause, Congress can regulate it when it is, quote, necessary and proper.

After years of abuses of wiretapping in America, where wiretapping was done by the executive branch without congressional regulation, Congress decided to finally create FISA under this authority. The President, at that time, agreed and signed FISA into law. I believe this is an important constitutional argument to make when talking about whether Congress can or cannot regulate the NSA wiretap program.

I urge my colleagues to adopt the amendment, and I would simply state that this is, this could be termed the "we are not potted plants" amendment. It simply states that——

Mr. NADLER. Would the gentleman yield?

Mr. FLAKE. Just 1 minute. It simply states that, and if you disagree with this amendment, apparently you might disagree with all of FISA because FISA was an effort to assert congressional authority after years of abuses by the executive branch. When FISA was implemented in 1978 the Congress agreed that Congress has the power to regulate the President's actions or the President's inherent authority. This is simply reaffirming that prerogative. And with that I will yield to the gentleman from New York.

Mr. NADLER. Yeah. I commend the gentleman for his amendment. I would just ask, I would ask if he would remove the word "inherent" because I don't want to get into a debate as to whether the President has that inherent power under the Constitution. I think that power probably derives from his power as Commander in Chief once the Congress has declared war. It doesn't change the meaning of your amendment. But it is clear that Congress is granted the clear and unequivocal power to regulate the President's power to gather foreign intelligence. We don't have to get into a separate debate as to where that power comes from.

Mr. FLAKE. I would resist that change. I think we do agree that the President has inherent authority, but the argument here is does Congress have the ability to regulate it. And I don't know that there is a serious question or argument about whether or not the President has inherent authorities as Commander in Chief.

Mr. SCHIFF. Would the gentleman yield?

Mr. FLAKE. I would.

Mr. SCHIFF. I would just like to voice my agreement with my colleague from Arizona. I don't think there is an argument about whether the President has inherent authority to gather foreign intelligence certainly on foreign battlefields. The President does so. So I see no objection to the inclusion of the term "inherent." and

the question is whether Congress has the power to regulate that, particularly when it involves U.S. persons on U.S. soil. And I voice my support in favor of your amendment.

Mr. FLAKE. I thank the gentleman. And reclaiming my time, again, this is simply stating that Congress has authority to regulate. We know the previous Congresses have asserted that authority because we have FISA and we are simply wanting to reiterate that. And I can't imagine that we would at this point say no, we don't have that authority and we are giving it all up, we have no right. That would be to say that we don't take FISA seriously at all. And I know that this committee does and that this Congress can and does take its oversight responsibility seriously. With that, I yield back.

Chairman SENSENBRENNER. Before recognizing the gentleman from California to speak in opposition to the amendment, the Chair will state that 3 minutes ago, while the potted plant from Arizona was waxing eloquently, we got an e-mail that there will be no more votes on the floor today. This was done in deference to keeping this committee in session.

However, the Rules Committee is waiting upon us to grant a rule relative to the immigration bills, and they are currently scheduled at 6:15. I think they would really appreciate it if we wrapped it up by then. For what purpose does the——

Mr. CONYERS. Will the gentleman yield?

Chairman SENSENBRENNER. I yield to the gentleman from Michigan.

Mr. CONYERS. We have only one amendment. That should be quickly disposed of. It is an important amendment and I think that will close it down.

Chairman SENSENBRENNER. Okay. The gentleman from California is recognized for 5 minutes in opposition to this amendment, with the admonition that the clock is running quickly.

Mr. LUNGREN. Thank you very much, Mr. Chairman. I have always tried to look at a clock running quickly. I rise in opposition to the gentleman's amendment because this is a very, very serious question of constitutional law. It goes to the question of the proper relationship of the two branches of government established under article I and article II. And the gentleman refers to the necessary and proper clause, which I think, properly understood, means that Congress has the powers that are necessary and proper to carry out the express powers given to it in the Constitution. If the person has inherent power, we don't have the right to regulate it. And that was stated in the FISA appellate court decision, "In Re: Sealed." it does not mean we are potted plants and that we are powerless. If you go to the underlying understanding of the relationship between the two branches of government, the Executive and Legislative, our power remains in the power of the purse and ultimately the power of impeachment. Now, I realize the last one is an extreme matter and I am not suggesting we bring it out easily. But the framers of the Constitution appeared to try and balance the tension or deal with the tension that exists with the two branches in this area as in others, but particularly in this area, but again allowing us the power of the purse. We can restrict, if you will, the President's use of his inherent powers by the power of the purse,

which is different than regulating that power as a substantive matter.

And that is where I find a real problem with us stating this as a finding. I think this finding is an opinion, but I think this opinion is actually contrary to the greatest weight of constitutional writings that have taken place on that. And for that reason, I would ask that the gentleman's amendment be voted down.

Chairman SENSENBRENNER. The question is on the——

Mr. HOSTETTLER. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from Indiana, Mr. Hostettler, seek recognition?

Mr. HOSTETTLER. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Mr. Chairman, I won't take near the 5 minutes. But I just want to highlight a portion of the Constitution, article I, section 8, that the gentleman from Arizona references. And there are a number of powers that are given to Congress in article I, section 8 that are enumerated and limit the power of Congress. But in one area that Congress has sole, explicit and exclusive authority is found in article I, section 8, I believe, subsection (14). But to preface that, Congress, in subsection (11) of article I, section 8 has the power to declare war, (12), to raise and support armies, (13), to provide and maintain a navy, and then finally, to make rules for the government and regulation of the land and naval forces. Article I, section 8 gives sole exclusive explicit authority to Congress to make rules for the government and regulation of the land and naval forces. There are no limitations in the Constitution for governing and regulating the land and naval forces. This obviously was before the creation of an air force. But many of us believe that this power extends there. And so I would simply say that according to the Constitution and the clear wording of the Constitution, when married to the necessary and proper clause that the gentleman from Arizona states, that, in fact, this is exclusive authority of the Congress to regulate all elements of the land and naval forces. And I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Arizona, Mr. Flake.

Mr. VAN HOLLEN. Mr. Chairman.

Chairman SENSENBRENNER. Gentleman from Maryland, Mr. Van Hollen.

Mr. VAN HOLLEN. I thank you, Mr. Chairman. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. VAN HOLLEN. I thank you, Mr. Chairman. I am supporting the amendment by Mr. Flake. And it seems to me that our entire discussion on the piece of legislation that has been before the committee today with respect to electronic surveillance is premised on the understanding that Congress has some regulatory authority over this area. If not, this whole discussion and exercise has been for nothing because the President could totally disregard what the committee has done so far. And whether you are for or against the final bill, the final bill does attempt to regulate this area. And the amendment by Mr. Flake simply says we have the power to do

what we have already done today and what this committee may do in the future with regard to this area.

Now, I would find it unbelievable that we would say that everything we have done today is, we have no authority really to do it; that if the President wanted, the President could totally ignore it. And I further find it in the realm of sort of never, never land that we have spent, as a committee, many, many sessions with respect to the PATRIOT Act where we have also debated at length regarding provisions of FISA. And if we don't have any authority to do that, what is the point? And all this amendment does is underscore the fact that we have an important role in this area and that the President can't totally ignore FISA, which is on the books today, that the President can't ignore what we are about to do, the President can't ignore what we have done in the PATRIOT Act. It is a simple statement, I think, of the fact that Congress has an important role to play. If you don't support this amendment, we might as well pack it up and forget about the legislation we are dealing with today. That may be what the President would like us to do, but it certainly seems to me it is not what Congress should do.

Mr. FLAKE. Will the gentleman yield?

Mr. VAN HOLLEN. I would be happy to yield.

Mr. FLAKE. Thank you. You said it much better than I did. But that is exactly what this is about. If we are going through this entire exercise today, we would, by voting down this amendment, we would be saying it really doesn't matter. And I would submit that we will walk out that door a lot less relevant than when we walked in here this morning because we had that authority, that power. It has been recognized by previous Congresses. I think that we ought to recognize it today.

The gentleman from Florida had a suggestion, and I would like to hear that.

Mr. FEENEY. I would ask unanimous consent to change the language of the amendment to strike the words "and unequivocal." by definition of a checks and balance system, our powers are equivocated, all three legislative branches, number one. And Number two, the power to regulate, if we had unequivocal powers to regulate, would basically be the power to eliminate. And the finding that the gentleman from Arizona has in this amendment says that the President does have inherent power. So I suggest if you would take out the word "unequivocal" a lot of us could support the amendment and we could move on.

Mr. FLAKE. With that I would agree to take out——

Chairman SENSENBRENNER. Without objection, the modification suggested by the gentleman from Florida is agreed to.

Mr. CONYERS. Mr. Chairman, I move the previous question.

Chairman SENSENBRENNER. Does the gentleman move the previous question on the bill and the amendment?

Mr. CONYERS. No, just the amendment.

Chairman SENSENBRENNER. Without objection, the previous question on the amendment only is ordered. Those in favor of the Flake amendment will say aye. Opposed, no. The ayes appear to have it. The ayes have it. The amendment is agreed is. Are there further amendments?

Mr. NADLER. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to H.R. 5825 offered by Mr. Nadler. Insert at the end the following new section. Section blank, preservation of remedies. Notwithstanding section 10 of this act, the court may consider an action——

[The amendment follows:]

Amendment to H.R. 5825
Offered by Mr. Nadler

Insert at the end the following new section:

Sec. ___. PRESERVATION OF REMEDIES.

Notwithstanding section 10 of this Act, the court may consider an action seeking injunctive relief arising from or relating to any alleged intelligence program involving electronic surveillance, as defined in section 101(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(f) that the Attorney General or a designee of the Attorney General certifies, in a manner consistent with the protection of State secrets, is, was, or would be intended to protect the United States from a terrorist attack.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read. The gentleman from New York is recognized for 5 minutes.

Mr. NADLER. Thank you. I won't take 5 minutes, Mr. Chairman. We adopted an amendment by Mr. Cannon a little while ago and that amendment said that notwithstanding any other provision of law, no action may be maintained in any court, no penalty, sanction or form of remedy or relief shall be imposed by any court against someone for any activity relating to any alleged intelligence program involving electronic surveillance that the Attorney General or his designees certifies is very important because it is necessary to prevent an attack.

I presume the intent of that amendment was to say that as long as someone is acting in good faith he shouldn't have to worry about criminal liability or civil sanctions or damages, and there should be no deterrence to someone doing what he should do as long as the Attorney General certified that this is a very necessary thing. I have no problem with that. And that is what the amendment does. But, I don't think we should also say that just because the Attorney General certifies that some activity is necessary, in his opinion, to deter and attack, if someone thinks that that activity is unconstitutional or is illegal under the law we are passing, or under some other law, he shouldn't be able to go to court and seek an injunction to say it is unconstitutional. I certainly agree with Mr. Cannon. No one who acts should have to worry about civil or criminal liability or damages. There should be no deterrence. And this amendment simply says that is fine. But if someone, if there is a question of constitutionality or legality, just the fact that the Attorney General said something is very necessary shouldn't preclude someone from going to court and asking for an injunction based on the illegality or asserted illegality or unconstitutionality. It is to stop the Attorney General or his designee from breaking the law and having no judicial forum to challenge that.

Mr. CANNON. Would the gentleman yield?

Mr. NADLER. Sure.

Mr. CANNON. The injunctive relief, I am sorry. I have just gotten this. I am trying to sort it through. The injunctive relief would lie against the Attorney General or against the person or corporation that is being asked?

Mr. NADLER. It would lie, well, that would depend on who they sued. It would lie against the people carrying out whatever they allege was illegal.

Mr. CANNON. In other words, so under your amendment, if a telephone company was providing access to information, that telephone company could be the object of an injunction as opposed to the United States?

Mr. NADLER. Yes. They could be enjoined from future action. There could be no penalty against them. There could be no damages, but if what they are doing is determined by a court to be illegal, they could be told to stop doing it anymore.

Mr. CANNON. So, it would seem to me that what you would want to be doing is to stop the Attorney General from asking for information, and that is where the injunction would lie, because if you allow lawsuits for injunctive relief against corporations, or persons, then you end up encouraging the kind of lawsuits that I think my amendment was intended to avoid.

Mr. NADLER. No. Reclaiming my time. I think you have to allow a lawsuit for an injunction against whoever, whoever is carrying out the program or authorizes the program. Maybe it should be against the Attorney General. But I don't think you can limit it to be against the Attorney General because if someone, a telephone company or somebody is doing something pursuant, because the Attorney General said it was okay to do, but it isn't, in fact, okay to do legally, you have to go to court to be able to say to them it is illegal; you are to stop doing it. I don't think you want to go to court to say to the Attorney General, tell them to stop doing it because maybe he has no authority to tell them to stop doing it.

But what your amendment is intended to do, I think, is to say that no one, if the Attorney General asked the telephone company to do something, they shouldn't have to worry about being sued for damages; they shouldn't have to worry about civil or criminal liability. But I think anybody always has to be held subject to a lawsuit to say, stop doing what they are doing if it is illegal.

Mr. CANNON. Would the gentleman yield?

Mr. NADLER. Sure.

Mr. CANNON. My purpose in my amendment was to limit the vexatious lawsuits that cost money to defend and divert resources. I am not sure how I would react to something that allowed an injunction to lie against the Attorney General, but it seems to me that since it is not likely that these lawsuits, 60 or so that are out there, are likely to succeed, all this does is change the nature of the vexatious lawsuit.

Mr. NADLER. Well, reclaiming my time. The 60 or so lawsuits that are out there are for damages and so forth. What you are really talking about is, at least for what they are doing now, probably one lawsuit to say it is illegal. If there is some other program maybe you get one or two lawsuits saying that is illegal. I don't think you are going to get a lot of——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. SCOTT. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from California seek recognition? The gentleman from Alabama.

Mr. BACHUS. Thank you. I would like to ask the gentleman offering the amendment, when you say the court, what court are you talking about?

Mr. NADLER. I presume I am talking about the Federal court because you would go into Federal court if you were alleging against——

Mr. BACHUS. It doesn't say that in your amendment. It just says the court.

Mr. NADLER. Well, this doesn't confer—it is a court of competent jurisdiction by definition. This does not confer jurisdiction on anybody. This simply says we are not taking it away from them.

Mr. BACHUS. I am just saying, you know, without anything else——

Mr. NADLER. Would it make you happier if we said a Federal court of competent jurisdiction?

Mr. BACHUS. That is the Federal court having competent jurisdiction over the——

Mr. NADLER. I am sorry. Reclaiming my time. There is a provision on section 10 in Mr. Cannon's amendment which says, there is a provision that this does not contradict that says any action or claim described in subsection (8) that is brought in a State court shall be deemed to arise under the constitutional——

Mr. BACHUS. I am just saying right now you just said it would allow any court.

Mr. NADLER. Federal court. Because of the provision——

Mr. BACHUS. I think if you are going to consider it ought to be limited to a Federal court having jurisdiction over this program——

Mr. NADLER. I will—reclaiming my time, I think that is what it does, and if it will make you happy I would ask unanimous consent to say a Federal court with appropriate jurisdiction may consider that.

Mr. BACHUS. And you say any alleged intelligence program. Does this mean that anyone could walk into a Federal court and allege that there was an intelligence program and get an injunction?

Mr. NADLER. That language is tracked from Mr. Cannon's amendment which we just voted for and it refers to the same page. All we are trying to say here is that we are not taking away the ability of a Federal court of competent jurisdiction to entertain an injunction. We are taking away their ability to entertain a lawsuit for damages or a criminal action, but we are not taking away their ability to entertain a lawsuit.

Mr. BACHUS. Of course they can then get back, and if they have an injunction, then that would shut down the entire program.

Mr. NADLER. If the court found it was illegal, yes, that is the point of it. If the court found, if the Attorney General says this is, or his designee, this is a very important program necessary to protect us against attack, but this program is totally illegal or unconstitutional, a Federal court of competent jurisdiction, appealable to the Supreme Court, ought to be able to say that. That is the point of the amendment.

Ms. LOFGREN. Would the gentleman yield for a question?

Mr. BACHUS. The gentleman will yield to the gentleman from Ohio.

Mr. NADLER. It is Mr. Bachus's time, I think.

Mr. BACHUS. I yield to the gentleman from Ohio.

Mr. CHABOT. I want to make sure I understand the gentleman's amendment. In essence what we are saying here; thank you, Mr. Lungren. What the gentleman's amendment would do is it would allow a program that essentially is acquiring information to prevent terrorist acts from occurring in our country, in essence is what it is. And you would allow, who would have standing to bring these types of lawsuit, if I could ask the gentleman?

Mr. NADLER. First of all, if the gentleman would yield.

Mr. CHABOT. It is his time.

Mr. BACHUS. My point is, and I will just say to this committee, the gentleman offering the amendment, if the courts have already ruled that this intelligence program is constitutional, then to then allow any court across the country, any Federal court to shut this program down, I don't know how that is appropriate, particularly when they are going in and you could, any Internet provider——

Mr. NADLER. Will the gentleman yield?

Mr. BACHUS. I would yield.

Mr. NADLER. First of all, I would ask unanimous consent to change the amendment to say a Federal court of competent jurisdiction to meet the gentleman's request.

Mr. BACHUS. That would be an improvement.

Chairman SENSENBRENNER. Without objection, the modification referred to by the gentleman from New York is agreed to.

Mr. NADLER. Thank you. And I thank the gentleman for suggesting that. Secondly, the plaintiff presumably would be someone who thinks his constitutional rights are being violated. And our system of government says that if someone thinks his constitu-

tional or other rights are being violated he has the right to go to court and say so. And if the court agrees with him, they can order that constitutional or legal violation to stop.

Mr. BACHUS. Would you be willing to add to that no damages could be assessed against the utilities?

Mr. NADLER. Yes, but I think the underlying——

Mr. BACHUS. Or some indemnification?

Mr. NADLER. Mr. Bachus, the underlying bill says exactly that. The Cannon amendment said exactly that. And all I am doing is narrowing it by saying notwithstanding section 10, section 10 says no relief, no penalty, sanction or other form of remedy or relief shall be imposed. We are not changing that.

Mr. BACHUS. Of course you know the utility is going to then have to pay attorney's fees.

Mr. NADLER. We are not changing that except with respect to——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. SCOTT. Mr. Chairman.

Ms. LOFGREN. Mr. Chairman.

Chairman SENSENBRENNER. You guys really do want to come back after 7:00, don't you? The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. I speak in favor, very briefly in favor of the amendment and just point out that it doesn't go far enough. The underlying problem with the Cannon amendment is it immunizes people from criminal activity. They can be breaking the law. If John Mitchell authorized a criminal wiretap, everybody involved would be immunized by the Cannon amendment, and you can't even get into court to stop it. The Nadler amendment would at least let you get an injunction to stop it, although you can't throw anybody in jail for—he said good faith. There is no good faith exception in here. You can know you are breaking the law. If John Mitchell authorized it you can break the law under the Cannon amendment. Nadler's amendment, all that would do is just let some court stop the thing from going on.

Mr. CANNON. Would the gentleman yield?

Mr. SCOTT. I yield.

Mr. CANNON. Dan, go ahead.

Mr. LUNGREN. As a matter of historical fact, John Mitchell is now dead. But more importantly, as I understand this amendment, it, as a condition precedent to the right to seek injunctive relief, you have to have a program where the Attorney General has certified that it involves the protection of state secrets, is, was or intended to protect the U.S. from terrorist attacks.

Mr. SCOTT. Reclaiming my time. If you have got a slimy Attorney General who makes a certification, everybody breaking the law pursuant to that certification is immunized, knowing they are breaking the law.

Ms. LOFGREN. Would the gentleman yield for a question?

Mr. LUNGREN. If he doesn't certify, you don't have a right.

Mr. SCOTT. That is what the underlying amendment does. At least this amendment will let you stop it.

Ms. LOFGREN. Would the gentleman yield?

Mr. SCOTT. I yield to gentleman from New York.

Mr. NADLER. An Attorney General may not always be honest. He may not always be correct. All this says is if a future Attorney General authorizes a program, makes the certification that it is, you know, all important, and it is illegal, it is criminal, it is whatever, nobody is subject to criminal penalties. Nobody is subject to a damage suit. But you can go to court and seek an injunction to stop that program. That is what my amendment says.

Mr. CANNON. Would the gentleman yield?

Mr. SCOTT. I yield.

Mr. CANNON. But I think we agree on what you are saying. But the implications are significant. If the Attorney General does something wrong, then the Attorney General should be subject to a suit. As I understand the amendment——

Mr. SCOTT. No. No. Your amendment immunized him, too. Nobody can get busted for criminal enterprise. I yield to the gentlelady from California.

Ms. LOFGREN. I think this is being made a lot more complicated than it needs to be, frankly, because the underlying amendment, which I opposed, is very broad. It immunizes past and future, potentially even criminal activity. I will give you a scenario. You have the current Attorney General certifies a program pursuant to the underlying amendment. The next Attorney General finds out that a phone company is doing something that, in her judgment, jeopardizes the state secrets of the United States. It would allow that Attorney General to take, to initiate or to allow another to initiate injunctive relief. You can't, under the amendment that is being offered, you can't do anything without the Attorney General or her designee certifying. So you have got a constraint right there in the amendment. But this, the underlying amendment is so broad that you could actually end up endangering the security. I am sure that the—I know that Mr. Cannon would not have intended that, but the fact is you could end up endangering the security of the United States, even though you didn't mean to because you have completely tied the hands. And I thank the gentleman for yielding. And correct me if my understanding of the amendment is incorrect.

Mr. CANNON. Would the gentleman yield? The amendment before us I think is relatively simple, and the underlying amendment that I made earlier is quite direct. I think the consideration here, the concern here is that if the Attorney General authorizes a program that is somehow defective, there ought to be a process whereby in court that program can be corrected. The question is, should the person who gets the order from the Attorney General, that is person in the way it is described in the amendment——

Mr. SCOTT. Reclaiming our time. That is what the Nadler amendment does. There is no mechanism for getting—under your amendment there is nothing. Once it is certified everybody's——

Mr. CANNON. If the gentleman would yield. If you look at the definition of person, the Attorney General is subject to some kind of——

Mr. SCOTT. Not under your amendment. I yield to the gentleman from New York.

Mr. NADLER. First of all, under your amendment, there is no ability to change it. Nobody can go to court. Second of all——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. NADLER. Mr. Chairman, I would ask for an additional minute.

Mr. CHABOT. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from Ohio seek recognition?

Mr. CHABOT. Mr. Chairman, I move the previous question.

Chairman SENSENBRENNER. Does the gentleman move the previous question on the amendment and the bill?

Mr. CHABOT. Yes, Mr. Chairman.

Chairman SENSENBRENNER. The question is shall the previous question be ordered on the amendment and the bill. It is a nondebatable motion. Those in favor will say aye. Opposed no. The ayes appear to have it. The ayes have it. The previous question is ordered.

The question is on agreeing to the amendment offered by the gentleman from New York, Mr. Nadler. Those in favor will say aye. Opposed, no. The noes appear to have it. The noes have it. The amendment is not agreed to.

Mr. VAN HOLLEN. Mr. Chairman, I move for a rollcall vote.

Chairman SENSENBRENNER. The rollcall is ordered. Those in favor of the Nadler amendment will as your names are called answer aye. Those opposed, no. And the Clerk will call the roll.

The CLERK. Mr. Hyde.
Mr. HYDE. No.
The CLERK. Mr. Hyde votes no.
Mr. Coble.
Mr. COBLE. No.
The CLERK. Mr. Coble votes no.
Mr. Smith.
Mr. SMITH. No.
The CLERK. Mr. Smith votes no.
Mr. Gallegly.
Mr. GALLEGLY. No.
The CLERK. Mr. Gallegly votes no.
Mr. Goodlatte.
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte votes no.
Mr. Chabot.
Mr. CHABOT. No.
The CLERK. Mr. Chabot votes no.
Mr. Lungren.
Mr. LUNGREN. No.
The CLERK. Mr. Lungren votes no.
Mr. Jenkins.
Mr. JENKINS. No.
The CLERK. Mr. Jenkins votes no.
Mr. Cannon.
Mr. CANNON. No.
The CLERK. Mr. Cannon votes no.
Mr. Bachus.
Mr. BACHUS. No.
The CLERK. Mr. Bachus votes no.
Mr. Inglis.

Mr. INGLIS. No.
The CLERK. Mr. Inglis votes no.
Mr. Hostettler.
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler votes no.
Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green votes no.
Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
Mr. ISSA. No.
The CLERK. Mr. Issa votes no.
Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake votes no.
Mr. Pence.
Mr. PENCE. No.
The CLERK. Mr. Pence votes no.
Mr. Forbes.
Mr. FORBES. No.
The CLERK. Mr. Forbes votes no.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King votes no.
Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney votes no.
Mr. Franks.
Mr. FRANKS. No.
The CLERK. Mr. Franks votes no.
Mr. Gohmert.
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert votes no.
Mr. Conyers.
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers votes aye.
Mr. Berman.
[No response.]
The CLERK. Mr. Boucher.
[No response.]
The CLERK. Mr. Nadler.
Mr. NADLER. Aye.
The CLERK. Mr. Nadler votes aye.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott votes aye.
Mr. Watt.
Mr. WATT. Aye.
The CLERK. Mr. Watt votes aye.
Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren votes aye.
Ms. Jackson Lee.
Ms. JACKSON LEE. Pass.

The CLERK. Ms. Jackson Lee passes.
Ms. Waters.
[No response.]
The CLERK. Mr. Meehan.
[No response.]
The CLERK. Mr. Delahunt.
[No response.]
The CLERK. Mr. Wexler.
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler votes aye.
Mr. Weiner.
Mr. WEINER. Aye.
The CLERK. Mr. Weiner votes aye.
Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff votes aye.
Ms. Sánchez.
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez votes aye.
Mr. Van Hollen.
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen votes aye.
Ms. Wasserman Schultz.
[No response.]
The CLERK. Mr. Chairman.
Chairman SENSENBRENNER. No.
Members who wish to cast or change their vote. Gentleman from California, Mr. Berman.
Mr. BERMAN. Aye.
The CLERK. Mr. Berman aye.
Chairman SENSENBRENNER. Gentlewoman from Florida, Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Ms. Wasserman Schultz, aye.
Chairman SENSENBRENNER. Gentlewoman from Texas, Ms. Jackson Lee.
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye.
Chairman SENSENBRENNER. Further members who wish to cast or change their votes? If not, the Clerk will report.
The CLERK. Mr. Chairman, there are 13 ayes and 22 nays.
Chairman SENSENBRENNER. And the——
Mr. SCOTT. Mr. Chairman.
Chairman SENSENBRENNER. The amendment is not.
Mr. SCOTT. Mr. Chairman, Ms. Waters just walked in.
Chairman SENSENBRENNER. The gentlewoman from California, Ms. Waters.
Ms. WATERS. Aye.
Chairman SENSENBRENNER. Waters is an aye.
Mr. SCOTT. Thank you, Mr. Chairman.
Chairman SENSENBRENNER. And the Clerk will report again.
The CLERK. Mr. Chairman, there are 14 ayes and 22 nays.
Chairman SENSENBRENNER. The amendment is not agreed to.
The previous question has been ordered on the question of reporting the bill, H.R. 5825, favorably, as amended. A reporting

quorum is present. The question occurs on the motion to report the bill, H.R. 5825, favorably, as amended.

All those in favor signify by saying aye.

Opposed no.

The ayes appear to have it. A recorded vote is requested. Those in favor of reporting the bill, H.R. 5825, favorably, as amended, will as your names are called say aye. Those opposed, no. The Clerk will call the roll.

The CLERK. Mr. Hyde.
Mr. HYDE. Aye.
The CLERK. Mr. Hyde votes aye.
Mr. Coble.
Mr. COBLE. Aye.
The CLERK. Mr. Coble votes aye.
Mr. Smith.
Mr. SMITH. Aye.
The CLERK. Mr. Smith votes aye.
Mr. Gallegly.
Mr. GALLEGLY. Aye.
The CLERK. Mr. Gallegly votes aye.
Mr. Goodlatte.
Mr. GOODLATTE. Aye.
The CLERK. Mr. Goodlatte votes aye.
Mr. Chabot.
Mr. CHABOT. Aye.
The CLERK. Mr. Chabot votes aye.
Mr. Lungren.
Mr. LUNGREN. Aye.
The CLERK. Mr. Lungren votes aye.
Mr. Jenkins.
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins votes aye.
Mr. Cannon
Mr. CANNON. Aye.
The CLERK. Mr. Cannon aye.
Mr. Bachus.
Mr. BACHUS. Yes.
The CLERK. Mr. Bachus votes yes.
Mr. Inglis.
Mr. INGLIS. No.
The CLERK. Mr. Inglis votes no.
Mr. Hostettler.
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler aye.
Mr. Green.
Mr. GREEN. Aye.
The CLERK. Mr. Green votes aye.
Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
Mr. ISSA. Aye.
The CLERK. Mr. Issa votes aye.
Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake votes no.

Mr. Pence.
Mr. PENCE. Aye.
The CLERK. Mr. Pence votes aye.
Mr. Forbes.
Mr. FORBES. Aye.
The CLERK. Mr. Forbes votes aye.
Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King votes aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney votes aye.
Mr. Franks.
Mr. FRANKS. Aye.
The CLERK. Mr. Franks votes aye.
Mr. Gohmert.
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert votes aye.
Mr. Conyers.
Mr. CONYERS. No.
The CLERK. Mr. Conyers votes no.
Mr. Berman.
[No response.]
The CLERK. Mr. Boucher.
[No response.]
The CLERK. Mr. Nadler.
Mr. NADLER. No.
The CLERK. Mr. Nadler votes no.
Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott votes no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt votes no.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren votes no.
Ms. Jackson Lee.
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee votes no.
Ms. Waters.
Ms. WATERS. No.
The CLERK. Ms. Waters votes no.
Mr. Meehan.
[No response.]
The CLERK. Mr. Delahunt.
[No response.]
The CLERK. Mr. Wexler.
Mr. WEXLER. No.
The CLERK. Mr. Wexler votes no.
Mr. Weiner.
Mr. WEINER. No.
The CLERK. Mr. Weiner votes no.
Mr. Schiff.
Mr. SCHIFF. No.

The CLERK. Mr. Schiff votes no.
Ms. Sánchez.
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez votes no.
Mr. Van Hollen.
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen votes no.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. No.
The CLERK. Ms. Wasserman Schultz votes no.
Mr. Chairman.
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Sensenbrenner votes aye.
Chairman SENSENBRENNER. Are there members who wish to cast or change their votes? The gentleman from California, Mr. Berman.
Mr. BERMAN. No.
The CLERK. Mr. Berman votes no.
Chairman SENSENBRENNER. Further members who wish to cast or change their votes? If not, the Clerk will report.
The CLERK. Mr. Chairman, there are 20 ayes and 16 nays.
Chairman SENSENBRENNER. And the motion to favorably report the bill, as amended, is agreed to.
Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today. Without objection, the staff is directed to make any technical and conforming changes. And all members will be given 2 days, as provided by the House rules, in which to submit additional dissenting or supplemental or minority views.
I think we put in a good day's work for a day's pay and without objection, the subcommittee stands adjourned.
[Whereupon, at 6:08 p.m., the committee was adjourned.]

DISSENTING VIEWS

We strongly support intercepting each and every conversation involving al Qaeda and its supporters. We have in the past and continue to support common sense updates to the Foreign Intelligence Surveillance Act ("FISA") so that our surveillance capabilities can keep pace with modern technologies—as a matter of fact, all of us supported a bipartisan substitute offered by Representatives Schiff (D–CA) and Flake (R–AZ) which would have accomplished these goals without sacrificing our rights and liberties.[1] However, we dissent from the legislation reported by the Judiciary Committee because instead of bringing the President's warrantless surveillance program under the law, it dramatically expands his authority and permits even broader and more intrusive warrantless surveillance of the phone calls and e-mails of innocent Americans. The legislation also raises severe constitutional questions, and was subject to an ill-considered and unfair process.[2]

DESCRIPTION OF THE LEGISLATION

The legislation reported by the Committee proposes numerous significant changes to FISA, which governs the surveillance of foreign powers, terrorist organizations and their agents. These changes would dramatically expand the ability of the Administration to wiretap and gather information on innocent Americans without court approval or legal recourse.

The legislation amends FISA in several ways that would expand the Administration's ability to eavesdrop on telephone calls, e-mails and other communications of U.S. citizens, without obtaining court approval. First, Section 3(b) alters the definition of "electronic surveillance" in a manner that permits the warrantless surveillance of the international communications of any American who is not a specific target.[3] The bill also amends an operative section of FISA to permit warrantless surveillance of Americans for one year if it involves communications with foreign powers. Proposed new sec-

[1] The Majority rejected this bipartisan substitute amendment by a vote of 18–20. The bipartisan amendment included language: (1) clarifying the Authorization for Use of Military Force did not contain legal authority for warrantless wiretapping in the United States; (2) reiterating that FISA is the exclusive means of conducting electronic surveillance for foreign intelligence in the United States; (3) requiring the President must submit a report to Congress on classified surveillance programs; (4) permitting the Chief Justice of the United States can appoint additional FISA judges; (5) streamlining the FISA application process; (6) extending emergency FISA authority from 3 days to 7 days; (7) allowing for use of wartime FISA exception also after congressional authorization for use of military force; (8) clarifying that FISA warrants are not needed for intercepting foreign-foreign communications; and (9) authorizing the hiring of additional intelligence personnel.

[2] The legislation is opposed by technology companies and groups concerned with the civil liberties of Americans, including the Computer & Communications Ind. Ass'n, the ACLU, the Center for National Security Studies, and the Center for Democracy and Technology.

[3] Section 3(b) of the reported bill proposes a number of changes to FISA, one of which amends the definition of "electronic surveillance" in FISA to the (1) interception of communications acquired by targeting a person who is reasonably believed to be in the United States; and (2) interception of any communication if both the sender and all recipients are in the United States.

tion 102 of FISA (added by section 4 of the bill) accomplishes this by eliminating a requirement in current law requiring that when the government wiretaps foreign powers, there should be no substantial likelihood that Americans' conversations will be captured.[4]

Proposed new section 102A of FISA also grants the Administration new unilateral authority to conduct any and all forms of allegedly non-wiretap surveillance on innocent U.S. citizens so long as one of the targets is "reasonably believed to be outside of the United States." This section, for example, would permit the Administration to review call records and other stored communications from communication providers and other persons and perhaps even content if the Attorney General merely certifies the information is not electronic surveillance as defined in FISA.[5]

Under proposed new section 102B of FISA, the Attorney General would be granted the unilateral power to implement the new intelligence authorities identified in new sections 102 and 102A by demanding that any person—including a communications provider, internet company, landlord, or family member—assist with the execution of both electronic surveillance or other acquisition of intelligence information (such parties would also be insulated from legal liability for complying with such a directive). Any individual challenging the directive would have limited rights to challenge the order in court.[6]

The bill also permits the government to permanently retain surveillance information inadvertently collected on innocent Americans pursuant to these and other provisions of FISA.[7] Section 4 of the bill does this by rewriting provisions in existing law that govern the use of information collected pursuant to FISA directives under new section 102B to strike an existing requirement that unintentionally-acquired information be destroyed unless there is a threat of death or serious injury.[8] Section 8 of the bill further permits the government to retain permanently any unintentionally-acquired information collected pursuant to wire, radio, or electronic communications if the government finds foreign intelligence information is present (current law is limited to the retention of radio communications if there is information about a death or serious bodily injury).

In addition and significantly, the bill would eliminate court review of intelligence programs. Section 11 of the bill (incorporating the amendment offered by Representative Chris Cannon (R–UT))

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[4] Section 4(a) of the bill proposes a new section 102 of FISA that would allow the surveillance without a court order of communications of foreign powers but would not contain an exclusivity limitation that exists in current law; as a result, it would apply to all six categories of foreign powers and could permit capture of communications to or from U.S. persons.

Section 4(a) of the bill also proposes a new section 102A of FISA that would allow the government to acquire intelligence information about persons the government asserts are not in the Untied States. In such cases the Attorney General could obtain an order for up to one year without a court order if the acquisition does not constitute electronic surveillance but pertains to foreign intelligence information.

[5] For instance, the Attorney General could say that surveilling communications from inside the United States to outside the United States does not constitute "electronic surveillance" within the definition of FISA. As such, he may argue that the government does not require a warrant and could collect as much content as desired and without limitation.

[6] This cause of action likely is pre-empted by section 11 of the bill, which prohibits any court review of any actions related to any intelligence programs.

[7] See new section 102B of FISA as proposed by the reported bill.

[8] Section 106 of FISA (section 1806 of title 50) governs the use of information collected via FISA.

would preclude any court from hearing any case or imposing any civil or criminal liability over any activity related to any "alleged intelligence program involving electronic surveillance" that is certified by the Attorney General to be intended to protect the United States from a terrorist attack. In addition to having the effect of dismissing all pending challenges to the legality of the president's warrantless surveillance program, this provision would prevent any other legal challenges from being brought in the future concerning any misuse or abuse of surveillance powers.

The legislation contains other provisions that expand Administration power to obtain information, including:

• Section 3(a) of the legislation, which broadens the government's ability to obtain information from foreign persons located within the United States, including individuals and corporations, even if they have no connection to a foreign government or terrorist organization.[9]

• Section 6 of the bill, which permits any official designed by the President, even those involved in leaking classified information, to seek FISA surveillance requests. Currently, only the National Security Adviser or Senate-confirmed presidential appointees with responsibility for national security or defense can submit a certification in a FISA application that the wiretap is needed to collected intelligence.[10]

• Section 7 of the legislation, which makes it more difficult for judges to review extensions of FISA orders. Under the legislation extensions of FISA orders would have to be issued for periods of up to one year; the current limit is 90 days in most cases.

• Section 7 of the legislation also eliminates the requirement that the government obtain a court order prior to installing a pen register or trap-and-trace device. The bill does this by providing that anytime a judge issues an order for electronic surveillance involving communications the judge also must issue an order authorizing the use of pen register and trap-and-trace devices related to such communications.

• Section 7 permits any Senate-confirmed presidential appointee to authorize emergency surveillance, even those that have nothing to do with national security or the Justice Department. Congress recently amended FISA to permit the Deputy Attorney General or

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[9] Section 3(a) of the bill would add to the category of non-U.S. persons who could be agents of foreign powers. It would include anyone (including corporations) who "is reasonably expected to possess, control, transmit, or receive foreign intelligence information while such person is in the United States, provided that the official making the certification [for a FISA order] deems such foreign intelligence information to be significant." Current law defines "foreign intelligence information" as (1) that which can protect the United States against terrorist attack or (2) information with respect to a foreign power or territory that relates to the defense or security or foreign affairs of the United States. 50 U.S.C. § 1801(e).

Under the new definition, it is possible that the foreign employee of a U.S. corporation could be subject to a wiretap if his or her job entails working with encryption technology or computer parts (either of which could constitute foreign intelligence information).

[10] The legislation also broadens the government's authority with respect to emergency FISA surveillance, instances when the government can use FISA surveillance absent a court order. In addition to extending from 3 days to 7 days the period permitted for emergency surveillance, it also would permit any Sentate-confirmed presidential appointee to authorize emergency surveillance; current law limits that authority to Justice Department officials: the Attorney General, Deputy Attorney General, the Assistant Attorney General for National Security.

the Assistant Attorney General for National Security to make such emergency authorizations.[11]

The bill also includes a few provisions nominally designed to rein in surveillance abuses, but which appear in actuality to be mere "window dressing." For example, section 12 of the bill contains a provision requiring the Director of the National Security Agency, in consultation with the Director of National Intelligence and the Attorney General, to submit to the House and Senate intelligence committees a report on minimization procedures.[12] In addition, section 2 of the bill includes a "finding" that the necessary and proper clause of the Constitution grants Congress the authority to regulate the President's power to gather foreign intelligence.[13] This is a non-binding assertion, and given the President's proclivity to interpret laws that fly in the face of supposedly-binding statutory language,[14] cannot be expected to provide any meaningful limitation on the president's authority. Also, Section 9 states that reports on FISA use would go to all members of the intelligence committees (as opposed the committees as a whole as provided in current law). This modest step will do very little to enhance accountability.

Finally, the legislation includes a number of miscellaneous and less controversial provisions. For example, section 7 of the legislation extends from 3 days to 7 days the period permitted for emergency surveillance. Section 6 would permit the government to submit a summary of information supporting a FISA application as opposed to a complete description. Section 10 of the bill provides that if a FISA physical search or surveillance warrant is issued for a person in the United States, then that warrant would continue in effect if the person leaves the United States.

CONCERNS WITH THE LEGISLATION

A. THE LEGISLATION CONTAINS SIGNIFICANT NEW STATUTORY AUTHORIZATIONS THAT THREATEN THE PRIVACY OF INNOCENT AMERICANS

An initial concern with the legislation is that it does not impose any limits on the President's power to conduct warrantless surveillance on innocent Americans in violation of FISA. This is because the bill does not state that it contains the exclusive means for the government to conduct surveillance, warrantless or otherwise.[15] Rather, the legislation appears to assume the president has "inherent authority" to conduct the type of warrantless surveillance first disclosed by The New York Times in December, 2005, and goes beyond that to grant the president even further statutory authority to intercept the communications of innocent Americans without any

[11] Sec. 506(a)(5) of Public Law 109–177.

[12] Section 12 of the reported bill. This report specifically would pertain to the applicability of such procedures to information concerning U.S. persons acquired under FISA electronic surveillance as it has been defined prior to the date of enactment of this bill.

[13] Section 2 of the reported bill.

[14] Charlie Savage, Bush Challenges Hundreds of Laws: President Cites Powers of His Office, Boston Globe, Apr. 30, 2006, at A1.

[15] The Majority rejected two efforts at ensuring that FISA would be the exclusive means of collecting foreign intelligence via electronic surveillance. The Majority first rejected by a vote of 18–20 a bipartisan amendment offered by Representative Jeff Flake (R–AZ) and Representative Adam Schiff (D–CA) that clarified that FISA was the exclusive means of conducting such surveillance. The Majority also defeated by voice vote an amendment offered by Representative Sheila Jackson Lee (D–TX) clarifying such exclusivity.

court approval. The Justice Department even admitted as such when it testified before the Crime Subcommittee that the bill and the warrantless wiretapping program are separate.[16]

Second, the legislation permits vastly expanded government wiretapping of innocent Americans without a warrant and without probable cause. As described above, the bill allows for warrantless wiretapping of virtually all international communications, even if they involve a person within the United States, including U.S. citizens, as long as the government asserts that it was not targeting a U.S. citizen. As Jim Dempsey of the Center for Democracy and Technology testified, "[c]urrently, FISA requires a court order to intercept wire communications into or out of the [United States], many of which involve U.S. citizens. Under the proposed new [definitions in the bill], wire communications to or from the [United States] could be intercepted using the vacuum cleaner of the NSA, without a warrant, so long as the government is not targeting a known person in the [United States]." [17] The Computer and Communications Industry Association—a trade association including Microsoft, Google, and Verizon—agreed, writing that "the mere possibility of widespread, secret, and unchecked surveillance of the billions of messages that flow among our customers, especially U.S. citizens, will corrode the fundamental openness and freedom necessary to our communications networks." [18] The Administration has never articulated why such vast new authority to conduct warrantless surveillance involving innocent Americans is necessary, given that FISA already permits surveillance to be conducted without a warrant on an emergency basis prior to obtaining court review.

Third, the legislation authorizes the Attorney General to unilaterally engage in non-electronic surveillance involving innocent Americans (such as reviewing stored communications and call records) and unilaterally issuing directives against communications providers to obtain both electronic surveillance and other information. We have never received any justification for such broad new and unchecked authority, which was slipped into the legislation at the last minute with no supporting record or adequate explanation.

Fourth, we are concerned that allowing the government to maintain permanent records on innocent U.S. citizens based on the records of their warrantless surveillance would also unnecessarily intrude on the privacy rights of innocent Americans. Under current law, the required destruction of unintentionally-acquired FISA information ensures that the government cannot maintain records on individuals, such as American citizens, who pose no threat to the

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[16] H.R. 5825, the "Electronic Surveillance Modernization Act:" Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 109th Cong., 2d Sess. (Sept. 12, 2006) (statement of John Eisenberg, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dept. of Justice).

[17] Legislative Proposals to Update the Foreign Intelligence Surveillance Act (H.R. 4976, H.R. 5223, H.R. 5371, H.R. 5825, S. 2453, and S. 2455.): Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 109th Cong., 2d Sess. (Sept. 6, 2006).

[18] Letter from Ed Black, President and CEO, Computer & Communications Ind. Ass'n, to the Hon. F. James Sensenbrenner, Jr., and the Hon. John Conyers, Jr., House Comm. on the Judiciary, Sept. 19, 2006. The Association further noted that this unchecked surveillance could lead to retaliation and similar communications surveillance on Americans by other countries. It wrote that its "industry is confronted with escalating monitoring and surveillance by repressive foreign regimes. When challenged, totalitarian states often justify their policies by pointing to U.S. government practices." Id.

nation. The bill would remove entirely any protections that U.S. citizens and lawful permanent residents have from government surveillance. These records could include information related to First Amendment and Second Amendment activity. Again, we have never received a justification for such expanded intrusions on American's privacy.

Fifth, the legislation includes an unprecedented court stripping provision in the form of the Cannon Amendment which would not only terminate pending and future cases challenging the president's controversial warrantless surveillance program, but would nullify the few rights provided to American citizens in the legislation. For example, while the legislation grants persons the nominal right to challenge directives to provide intelligence information to the Attorney General, the Cannon amendment—which supercedes any and all inconsistent laws—strips the court of that authority.

Finally, we would dispute the proponents much repeated assertion that the committee-reported legislation is needed to "modernize" FISA and make it "technology neutral." The Congressional Research Service has confirmed that since its inception in 1978, 51 separate provisions in twelve different laws have updated FISA, many of them made in the last five years.[19] To the extent further changes are required, we all supported the provisions included in the Schiff-Flake substitute which eliminated the law's differential treatment of different technologies and approved warrantless surveillance of all foreign-to-foreign communications which transmit through the U.S.

B. THE LEGISLATION RAISES SIGNIFICANT CONSTITUTIONAL QUESTIONS

The legislation raises serious if not intractable questions under both the Fourth Amendment and the principle of separation of powers and due process.

First, the bill may well violate the Fourth Amendment protections against "unreasonable searches and seizures," and requiring judicially approved warrants issued with "particular[ity]" and "upon probable cause." There is little doubt that the Fourth Amendment fully applies to electronic surveillance. In *Katz* v. *United States,*[20] the Supreme Court held that the Fourth Amendment requires adherence to judicial processes in the case of national security wiretaps, and that searches conducted outside the judicial process, are per se unreasonable under the Fourth Amendment, subject only to emergency and similar exceptions. In *United States* v. *U.S. District Court (the Keith case)*,[21] the Court specifically held that, in the case of intelligence gathering involving do-

[19] Since the September 11 attacks, Congress amended FISA to extend its emergency exemption from 24 to 72 hours, and the PATRIOT Act included some twenty-five separate updates to FISA including: (i) expanding the scope of FISA pen register authority; (ii) lowering the standard for FISA pen-traps; (iii) lowering the legal standard for FISA surveillance; (v) extending the duration of FISA warrants; (vi) expanding the scope of business records that can be sought with a FISA order; (vii) allowing for "John Doe" roving wiretaps; (vii) requiring the intelligence community to set FISA requirements and assist with dissemination of FISA Information; (ix) immunizing those complying with FISA orders; (x) lowering the standard for National Security Letters; and (xi) expanding NSL approval authorities. Subsequent to the passage of the PATRIOT Act, Congress has again at the Administration's request broadened FISA to allow surveillance of "Lone Wolf" terrorists and the FISA courts have streamlined their procedures to accommodate the Administration's requests.

[20] 389 U.S. 347 (1967).

[21] 407 U.S. 297 (1972).

mestic security surveillance, prior judicial approval was required to satisfy the Fourth Amendment.[22] As discussed above, the legislation permits the widespread practice of intercepting the international telephone calls and e-mails of innocent Americans. As such, it would seem to contradict the requirements of the Fourth Amendment, as long interpreted by the courts.

Second, the bill would seem to violate separation of powers and due process requirements.[23] It does so with respect to the Cannon amendment, which would preclude any court from hearing any legal challenges related to intelligence programs involving electronic surveillance. Despite the fact that Article III of the Constitution grants to the courts the judicial power over all cases in law and equity arising under the Constitution and laws of the United States, and harmed individuals have long been understood to be entitled to assert their due process rights in a court of law, the Cannon amendment would bar existing and future lawsuits and preclude any civil or criminal liability, including injunctive relief, for any activity related to any intelligence program involving FISA's definition of electronic surveillance.[24] Such immunity is retroactive to any program in existence dating back to September 11, 2001. As noted above, the practical impact of the Cannon amendment is to nullify the enforceability of any rights granted in the bill or otherwise to protect one's privacy. Kate Martin of the Center for National Security Studies notes the breadth of the Cannon amendment, observing, "the amendment . . . would jeopardize Americans" fundamental right to challenge unconstitutional surveillance of their communications in court."

C. THE LEGISLATION WAS CONSIDERED UNDER A FLAWED AND UNFAIR PROCESS

The entire process by which this legislation traveled through the Judiciary Committee was seriously flawed. At the outset, attempts at conducting independent investigations of the President's program were thwarted at every turn. Nearly nine months after we first learned of the warrantless surveillance program, there has been no attempt to conduct an independent inquiry into its legality. Not only has Congress failed to conduct any sort of investigation, but the Administration summarily rejected all requests for special counsels as well as reviews by the Department of Justice and Department of Defense Inspectors General.[25] When the Justice Department's Office of Professional Responsibility finally opened an investigation, the President himself squashed it by denying the in-

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[22] Id. at 313–14, 317, 319–20. The Court further stated: "These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive Branch." Id. at 317–318.

[23] By denying the courts their historical role as the final legal authority, the legislation appears to usurp judicial power. Since the Supreme Court's ruling in *Marbury* v. *Madison,* the separation of powers doctrine has been well established. See *Marbury* v. *Madison,* 5 U.S. 137 (1803).

[24] It is important to note that the Majority rejected by a vote of 14–22 an amendment offered by Representative Jerrold Nadler (D–NY) to preserve the ability of courts to order injunctive relief for unlawful government programs.

[25] Letter from Glenn A. Fine, Inspector General, Department of Justice, to Congresswoman Zoe Lofgren et. al. (Jan. 4, 2006); Letter from Thomas F. Gimble, Acting Inspector General, Department of Defense, to Congresswoman Zoe Lofgren et. al. (Jan. 10, 2006).

vestigators security clearances.[26] Furthermore, the Department has completely ignored the numerous questions posed by this Committee and the Wexler Resolution of Inquiry the Judiciary Committee previously adopted requesting copies of Administration documents concerning surveillance activities.[27]

Second, Members of the Committee have never been briefed on the nature and extent of the President's warrantless surveillance program. Although, the Justice Department did conduct a briefing for House Judiciary Committee Members on September 12, 2006, that briefing was limited to the tech neutrality portion of the Wilson bill. The NSA failed to honor or even respond to a request made by sixteen Democratic Members of the Judiciary Committee for even a classified briefing on the entirety of the NSA program.[28]

Third, the process by which the markup was conducted was both haphazard and unfair, as the Majority substantially altered the bill without providing Minority Members any notice or opportunity to review the 25 pages of changes. Dispensing with the usual practice of alternating between Majority and Minority amendments, after offering his own amendment, Chairman Sensenbrenner recognized, over Democratic protestations, Representative Dan Lungren (R–CA) to offer an amendment that substantially altered the underlying bill. By virtue of its scope, the Majority's amendment precluded numerous additional Democratic amendments. Representative Conyers raised a "point of procedure," recalling that the normal practice is to alternate between Majority and Minority Members. Chairman Sensenbrenner responded by saying "Well, the Gentleman from California is very pushy so he's been recognized."[29] It is also notable and unfortunate that the Chairman ruled Representative Cannon's amendment which provided that notwithstanding any other law precludes court review of "any alleged intelligence program involving electronic surveillance" to be in order, again over Democratic objections. In point of fact, such an amendment falls outside the jurisdiction of the Judiciary Committee's jurisdiction should not have been considered at our markup.

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[26] Dan Eggen, Bush Thwarted Probe into NSA Wiretapping, Wash. Post, July 19, 2006, at A4 (referring to testimony of Attorney General Alberto Gonzales before the Senate Judiciary Committee).

[27] H. Res. 819, 109th Cong., 2d Sess.

[28] Letters from Democratic Members, U.S. House Comm. on the Judiciary, to Robert Deitz, General Counsel, NSA (Sept. 12, 2006).

[29] Markup of H.R. 5825, the "Electronic Surveillance Modernization Act," House Comm. on the Judiciary, 109th Cong., 2nd Sess. (Sept. 20, 2006). Once debate began on the amendment, Representative Conyers asked that the amendment be withdrawn until the Members had time to digest its contents. Mr. Conyers acknowledged the possibility that Democrats might agree with the substance of the amendment but that more time was needed to review it. He also noted that there were changes to at least 6 sections of the underlying bill, that the amendment was 25 pages long, and that staff for the Minority had not been consulted about any of these changes. He stated that it was "impossible for this Member to gain any appreciation of the significant changes the Gentleman has attempted" and asked that it be withheld until Democrats had the "opportunity to examine it with the care that is required." Id. Representative Schiff also asked for cooperation in light of the fact that he and Representative Flake had been working on a bipartisan substitute to the underlying bill. He noted that there was no way to know how the changes from the Lungren amendment affected the carefully drafted substitute. Id. Representative Conyers moved to table the Lungren amendment but the Chairman prohibited the motion from being offered. Representative Nadler then moved to adjourn the Committee meeting until the following day so that the Members could have a chance to review the amendment. On a party-line vote, this motion was defeated 14–17. The amendment eventually passed the committee by a vote of 17–2.

CONCLUSION

We believe that every communication to and from an al Qaeda member should be subject to government surveillance and support Congress providing the President with the tools needed to accomplish that goal. In doing so, however, Congress must not abdicate its responsibility or negate the role of the courts to act as a check against unilateral presidential powers. We dissent from the legislation before us because it fails to rein in the president's warrantless surveillance program, expands the NSA's authority to expose millions of innocent Americans to warrantless surveillance, jeopardizes the privacy rights of American citizens and raises serious and significant constitutional concerns. The American people deserve better than this bill and this ill-conceived process of legislating.

JOHN CONYERS, Jr.
RICK BOUCHER.
ROBERT C. SCOTT.
ZOE LOFGREN.
MAXINE WATERS.
BILL DELAHUNT.
ANTHONY D. WEINER.
LINDA T. SÁNCHEZ.
DEBBIE WASSERMAN SCHULTZ.
HOWARD L. BERMAN.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MARTIN T. MEEHAN.
ROBERT WEXLER.
ADAM B. SCHIFF.
CHRIS VAN HOLLEN.

ADDITIONAL VIEWS

We could not support H.R. 5825, the "Electronic Surveillance Modernization Act," because of the wholesale changes the legislation would make to our existing regime of domestic electronic surveillance and the impact these changes would have on the expectations of privacy shared by each United States citizen.

Instead, we offered a bipartisan amendment in the nature of a substitute to ensure that the Government has all the tools necessary and all the authority required to pursue al Qaeda and other terrorists who would seek to harm our country. Our amendment also stood for the principle that administrative burden and load, as we use all the tools available to fight terrorism, should not supersede devotion to the Constitution and the expectation of privacy of each United States citizen.

While the President possesses the inherent authority to engage in electronic surveillance of the enemy outside the country, Congress possesses the authority to regulate foreign intelligence surveillance within the United States. Congress has indeed spoken in this area through the Foreign Intelligence Surveillance Act (FISA). When Congress passed FISA, it intended to provide the sole authority for such surveillance on American soil. Our amendment would have reinforced this existing law—that the government must obtain a court order when U.S. persons are targeted or surveillance occurs in the United States.

Our bipartisan substitute also responded to the issues that have been raised by officials at the NSA and the Department of Justice over the last several months in testimony to Congress. First, the proposal made clear that foreign-to-foreign communications are outside of FISA and don't require a court order. If a communication to which a U.S. person is a party is inadvertently intercepted, minimization procedures approved by the AG should be followed.

Second, our amendment provided an extension of the FISA emergency exception from 72 hours to 168 hours, or seven days. This permits law enforcement to initiate surveillance in an emergency situation before going to the FISA court for a warrant. If the current 72 hours has been sufficient in the 5 years since September 11th, surely 7 days can be considered a significant improvement. Importantly, this authority can be used to thwart imminent attacks.

Third, our amendment expanded the FISA "wartime exception" to provide that in addition to a "declaration of war" by Congress, that an "authorization for the use of military force" can also trigger the FISA "wartime exception" for purposes of allowing 15 days of warrantless surveillance if there is an explicit provision authorizing electronic surveillance under that FISA provision.

Finally, our amendment streamlined the FISA application process, provided authorization to appoint additional FISA judges and

additional personnel at DOJ, the FBI, and the NSA, to ensure speed and agility in the drafting and consideration of FISA order applications.

Electronic surveillance of al Qaeda operatives and others seeking to harm our country must continue; it simply can and should comply with FISA. We believe our substitute accomplished these joint goals.

ADAM B. SCHIFF.
JEFF FLAKE.

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