

1 Title: To establish procedures for the review of electronic surveillance programs.
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4 Be it enacted by the Senate and House of Representatives of the United States of
5 America in Congress assembled,

6 SECTION 1. SHORT TITLE.

7 This Act may be cited as the “National Security Surveillance Act of 2006”.

8 SEC. 2. FINDINGS.

9 Congress finds the following:

10 (1) After the terrorist attacks of September 11, 2001, President Bush authorized
11 the National Security Agency to intercept communications between people inside
12 the United States, including American citizens, and terrorism suspects overseas.

13 (2) One of the lessons learned from September 11, 2001, is that the enemies who
14 seek to greatly harm and terrorize our Nation utilize technologies and techniques
15 that defy conventional law enforcement practices.

16 (3) The Commander in Chief requires the ability and means to detect and track an
17 enemy that can master and exploit modern technology.

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

24 (5) In 2004, Justice Sandra Day O’Connor explained in her plurality opinion for
25 the Supreme Court in *Hamdi v. Rumsfeld*: “We have long since made clear that a
26 state of war is not a blank check for the President when it comes to the rights of the
27 Nation’s citizens. *Youngstown Sheet & Tube*, 343 U.S., at 587, 72 S.Ct. 863.
28 Whatever power the United States Constitution envisions for the Executive in its
29 exchanges with other nations or with enemy organizations in times of conflict, it
30 most assuredly envisions a role for all three branches when individual liberties are at
31 stake.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (citations omitted).

32 (6) Similarly, as Justice Jackson famously observed in his *Youngstown*
33 concurrence: “When the President acts pursuant to an express or implied
34 authorization of Congress, his authority is at its maximum, for it includes all that he
35 possesses in his own right plus all that Congress can delegate.... When the President
36 acts in absence of either a congressional grant or denial of authority, he can only rely
37 upon his own independent powers, but there is a zone of twilight in which he and
38 Congress may have concurrent authority, or in which its distribution is uncertain.
39 Therefore, congressional inertia, indifference or quiescence may sometimes, at least
40 as a practical matter, enable, if not invite, measures on independent presidential
41 responsibility... When the President takes measures incompatible with the expressed

1 or implied will of Congress, his power is at its lowest ebb, for then he can rely only
2 upon his own constitutional powers minus any constitutional powers of Congress
3 over the matter. Courts can sustain exclusive Presidential control in such a case only
4 by disabling the Congress from acting upon the subject.”. *Youngstown Sheet &*
5 *Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

6 (7) The Constitution provides Congress with broad powers of oversight over
7 national security and foreign policy, under article I, section 8 of the Constitution of
8 the United States, which confers on Congress numerous powers, including the
9 powers—

10 (A) “To declare War, grant Letters of Marque and Reprisal, and make Rules
11 concerning Captures on Land and Water”;

12 (B) “To raise and support Armies”;

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

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

16 (E) “To provide for calling forth the Militia to execute the Laws of the
17 Union, suppress Insurrections and repel Invasions”; and

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

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

25 (9) While Attorney General Alberto Gonzales explained that the executive branch
26 reviews the electronic surveillance program of the National Security Agency every
27 45 days to ensure that the program is not overly broad, it is the belief of Congress
28 that approval and supervision of electronic surveillance programs should be
29 conducted outside of the executive branch, by the Article III court established under
30 section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803). It
31 is also the belief of Congress that it is appropriate for an Article III court to pass
32 upon the constitutionality of electronic surveillance programs that may implicate the
33 rights of Americans.

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

38 (11) In 1975, then-Attorney General Edward Levi, a strong defender of executive
39 authority, testified that in times of conflict, the President needs the power to conduct
40 long-range electronic surveillance and that a foreign intelligence surveillance court
41 should be empowered to issue special warrants in these circumstances.

1 (12) This Act clarifies and definitively establishes that the Foreign Intelligence
2 Surveillance Court has the authority to review electronic surveillance programs and
3 pass upon their constitutionality. Such authority is consistent with well-established,
4 longstanding practices.

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

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

18 (15) Federal agents investigating international terrorism by foreign enemies are
19 entitled to tools at least as broad as those used by Federal agents investigating
20 domestic crimes by United States citizens. The Supreme Court, in the “Keith Case”,
21 *United States v. United States District Court for the Eastern District of Michigan*,
22 407 U.S. 297 (1972), recognized that the standards and procedures used to fight
23 ordinary crime may not be applicable to cases involving national security. The Court
24 recognized that national “security surveillance may involve different policy and
25 practical considerations from the surveillance of ordinary crime” and that courts
26 should be more flexible in issuing warrants in national security cases. *United States*
27 *v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297,
28 322 (1972).

29 (16) By authorizing the Foreign Intelligence Surveillance Court to review
30 electronic surveillance programs, Congress preserves the ability of the Commander
31 in Chief to use the necessary means to guard our national security, while also
32 protecting the civil liberties and constitutional rights that we cherish.

33 **SEC. 3. DEFINITIONS.**

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

36 (1) by redesignating title VII as title VIII;

37 (2) by redesignating section 701 as section 801; and

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

39 **“TITLE VII—ELECTRONIC SURVEILLANCE**

40 **“SEC. 701. DEFINITIONS.**

1 “As used in this title—

2 “(1) the terms ‘agent of a foreign power’, ‘Attorney General’, ‘foreign
3 intelligence information’, ‘foreign power’, ‘international terrorism’, ‘minimization
4 procedures’, ‘person’, ‘United States’, and ‘United States person’ have the same
5 meaning as in section 101;

6 “(2) the term ‘congressional intelligence committees’ means the Select
7 Committee on Intelligence of the Senate and the Permanent Select Committee on
8 Intelligence of the House of Representatives;

9 “(3) the term ‘electronic communication’ means any transfer of signs, signals,
10 writing, images, sounds, data, or intelligence of any nature transmitted in whole or
11 in part by a wire, radio, electromagnetic, photoelectronic or photooptical system,
12 cable, or other like connection furnished or operated by any person engaged as a
13 common carrier in providing or operating such facilities for the transmission of
14 communications;

15 “(4) the term ‘electronic surveillance’ means the acquisition by an electronic,
16 mechanical, or other surveillance device of the substance of any electronic
17 communication sent by, received by, or intended to be received by a person who is
18 in the United States, where there is a reasonable possibility that the surveillance will
19 intercept communication in which a person in the United States participating in the
20 communication has a reasonable expectation of privacy;

21 “(5) the term ‘electronic surveillance program’ means a program to engage in
22 electronic surveillance—

23 “(A) to gather foreign intelligence information or to protect against
24 international terrorism or clandestine intelligence activities by obtaining the
25 substance of or information regarding electronic communications sent by,
26 received by, or intended to be received by a foreign power, an agent or agents
27 of a foreign power, or a person or persons who have had communication with a
28 foreign power seeking to commit an act of international terrorism or
29 clandestine intelligence activities against the United States;

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

32 “(C) where effective gathering of foreign intelligence information requires
33 an extended period of electronic surveillance;

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

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

38 (8) the term ‘intercept’ means the acquisition of the substance of any electronic
39 communication by a person through the use of any electronic, mechanical, or other
40 device; and

41 “(9) the term ‘substance’ means any information concerning the words, purport,

1 or meaning of a communication, and does not include information identifying the
2 sender, origin, or recipient of the communication or the date or time of its
3 transmission.”.

4 SEC. 4. FOREIGN INTELLIGENCE SURVEILLANCE 5 COURT JURISDICTION TO REVIEW ELECTRONIC 6 SURVEILLANCE PROGRAMS.

7 Title VII of the Foreign Intelligence Surveillance Act of 1978, as amended by section
8 3, is amended by adding at the end the following:

9 “SEC. 702. FOREIGN INTELLIGENCE 10 SURVEILLANCE COURT JURISDICTION TO REVIEW 11 ELECTRONIC SURVEILLANCE PROGRAMS.

12 “(a) In General. — The Foreign Intelligence Surveillance Court shall have jurisdiction
13 to issue an order under this title, lasting not longer than 45 days, that authorizes an
14 electronic surveillance program to obtain foreign intelligence information or to protect
15 against international terrorism or clandestine intelligence activities.

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

20 “(c) Modifications and Appeal in Event Application Is Denied. —

21 “(1) IN GENERAL. — In the event that the Foreign Intelligence Surveillance Court
22 refuses to approve an application under subsection (a), the court shall state its
23 reasons in a written opinion.

24 “(2) OPINION. — The court shall submit a written opinion described in paragraph
25 (1) to the Attorney General and to each member of the congressional intelligence
26 committees (or any subcommittee thereof designated for oversight of electronic
27 surveillance programs under this title).

28 “(3) RESUBMISSION OR APPEAL. — The Attorney General shall be permitted to
29 submit a new application under section 703 for the electronic surveillance program,
30 reflecting modifications to address the concerns set forth in the written opinion of
31 the Foreign Intelligence Surveillance Court. There shall be no limit on the number of
32 times the Attorney General may seek approval of an electronic surveillance
33 program. Alternatively, the Attorney General shall be permitted to appeal the
34 decision of the Foreign Intelligence Surveillance Court to the Foreign Intelligence
35 Surveillance Court of Review.

36 “(d) Communications Subject to This Title. —

37 “(1) IN GENERAL. — The provisions of this title requiring authorization by the
38 Foreign Intelligence Surveillance Court apply only to interception of the substance
39 of electronic communications sent by, received by, or intended to be received by a

1 person who is in the United States, where there is a reasonable possibility that a
2 participant in the communication has a reasonable expectation of privacy.

3 “(2) EXCLUSION.—The provisions of this title requiring authorization by the
4 Foreign Intelligence Surveillance Court do not apply to information identifying the
5 sender, origin, or recipient of the electronic communication or the date or time of its
6 transmission that is obtained without review of the substance of the electronic
7 communication.

8 “(e) Existing Programs Subject to This Title.—

9 “(1) IN GENERAL.—The Attorney General shall submit an application to the
10 Foreign Intelligence Surveillance Court for any electronic surveillance program to
11 obtain foreign intelligence information or to protect against international terrorism
12 or clandestine intelligence activities.

13 “(2) EXISTING PROGRAMS.—Not later than 45 days after the date of enactment of
14 this title, the Attorney General shall submit an application under this title for
15 approval of the electronic surveillance program sometimes referred to as the
16 ‘Terrorist Surveillance Program’ and discussed by the Attorney General before the
17 Committee on the Judiciary of the United States Senate on February 6, 2006. Not
18 later than 120 days after the date of enactment of this title, the Attorney General
19 shall submit applications under this title for approval of any other electronic
20 surveillance program in existence on the date of enactment of this title that has not
21 been submitted to the Foreign Intelligence Surveillance Court.”

22 SEC. 5. APPLICATIONS FOR APPROVAL OF 23 ELECTRONIC SURVEILLANCE PROGRAMS.

24 Title VII of the Foreign Intelligence Surveillance Act of 1978, as amended by section
25 4, is amended by adding at the end the following:

26 “SEC. 703. APPLICATIONS FOR APPROVAL OF 27 ELECTRONIC SURVEILLANCE PROGRAMS.

28 “(a) In General.—Each application for approval of an electronic surveillance program
29 under this title shall—

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

31 “(2) include a statement of the authority conferred on the Attorney General by the
32 President of the United States;

33 “(3) include a statement setting forth the legal basis for the conclusion by the
34 Attorney General that the electronic surveillance program is consistent with the
35 requirements of the Constitution of the United States;

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

38 “(5) include the name, if known, identity, or description of the foreign power or
39 agent of a foreign power seeking to commit an act of international terrorism or

1 clandestine intelligence activities against the United States that the electronic
2 surveillance program seeks to monitor or detect;

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

5 “(7) include a statement of the facts and circumstances relied upon by the
6 Attorney General to justify the belief that at least 1 of the participants in the
7 communications to be intercepted by the electronic surveillance program will be the
8 foreign power or agent of a foreign power that is specified under paragraph (5), or a
9 person who has had communication with the foreign power or agent of a foreign
10 power that is specified under paragraph (5), and is seeking to commit an act of
11 international terrorism or clandestine intelligence activities against the United
12 States;

13 “(8) include a statement of the proposed minimization procedures;

14 “(9) include a detailed description of the nature of the information sought and the
15 type of communication to be intercepted by the electronic surveillance program;

16 “(10) include an estimate of the number of communications to be intercepted by
17 the electronic surveillance program during the requested authorization period;

18 “(11) specify the date that the electronic surveillance program that is the subject
19 of the application was initiated, if it was initiated before submission of the
20 application;

21 “(12) certify that any electronic surveillance of a person in the United States
22 under this title shall cease 45 days after the date of the authorization, unless the
23 Government has obtained judicial authorization for continued surveillance of the
24 person in the United States under section 104 or another Federal statute;

25 “(13) include a statement of the facts concerning all previous applications that
26 have been made to the Foreign Intelligence Surveillance Court under this title
27 involving the electronic surveillance program in the application, including the
28 minimization procedures and the means and operational procedures proposed, and
29 the Foreign Intelligence Surveillance Court’s decision on each previous application;
30 and

31 “(14) include a statement of the facts concerning the implementation of the
32 electronic surveillance program described in the application, including, for any
33 period of operation of the program authorized at least 45 days prior to the date of
34 submission of the application—

35 “(A) the minimization procedures implemented;

36 “(B) the means and operational procedures by which the surveillance was
37 executed and effected;

38 “(C) the number of communications subjected to the electronic surveillance
39 program;

40 “(D) the identity, if known, or a description of any United States person
41 whose communications sent or received in the United States were intercepted

1 by the electronic surveillance program; and

2 “(E) a description of the foreign intelligence information obtained through
3 the electronic surveillance program.

4 “(b) Additional Information. — The Foreign Intelligence Surveillance Court may
5 require the Attorney General to furnish such other information as may be necessary to
6 make a determination under section 704.”.

7 **SEC. 6. APPROVAL OF ELECTRONIC** 8 **SURVEILLANCE PROGRAMS.**

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

11 **“SEC. 704. APPROVAL OF ELECTRONIC** 12 **SURVEILLANCE PROGRAMS.**

13 “(a) Necessary Findings. — Upon receipt of an application under section 703, the
14 Foreign Intelligence Surveillance Court shall enter an ex parte order as requested, or as
15 modified, approving the electronic surveillance program if it finds that—

16 “(1) the President has authorized the Attorney General to make the application for
17 electronic surveillance for foreign intelligence information;

18 “(2) approval of the electronic surveillance program in the application is
19 consistent with the duty of the Foreign Intelligence Surveillance Court to uphold the
20 Constitution of the United States;

21 “(3) there is probable cause to believe that the electronic surveillance program
22 will intercept communications of the foreign power or agent of a foreign power
23 specified in the application, or a person who has had communication with the
24 foreign power or agent of a foreign power that is specified in the application and is
25 seeking to commit an act of international terrorism or clandestine intelligence
26 activities against the United States;

27 “(4) the proposed minimization procedures meet the definition of minimization
28 procedures under section 101(h);

29 “(5) the application contains all statements and certifications required by section
30 703; and

31 “(6) an evaluation of the implementation of the electronic surveillance program,
32 as described in subsection (b), supports approval of the application.

33 “(b) Evaluation of the Implementation of the Electronic Surveillance Program. — In
34 determining whether the implementation of the electronic surveillance program supports
35 approval of the application for purposes of subsection (a)(6), the Foreign Intelligence
36 Surveillance Court shall consider the performance of the electronic surveillance program
37 for at least 3 previously authorized periods, to the extent such information is available,
38 and shall—

1 “(1) evaluate whether the electronic surveillance program has been implemented
2 in accordance with the proposal by the Federal Government by comparing —

3 “(A) the minimization procedures proposed with the minimization
4 procedures implemented;

5 “(B) the nature of the information sought with the nature of the information
6 obtained; and

7 “(C) the means and operational procedures proposed with the means and
8 operational procedures implemented;

9 “(2) consider the number of communications intercepted by the electronic
10 surveillance program and the length of time the electronic surveillance program has
11 been in existence; and

12 “(3) consider the effectiveness of the electronic surveillance program, as reflected
13 by the foreign intelligence information obtained.”.

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

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

17 **“SEC. 705. CONGRESSIONAL OVERSIGHT.**

18 “(a) In General. — The President shall submit to each member of the congressional
19 intelligence committees (or any subcommittee thereof designated for oversight of
20 electronic surveillance programs under this title) a report on the management and
21 operational details of the electronic surveillance program generally and on any specific
22 surveillance conducted under the electronic surveillance program whenever requested by
23 either of the committees, or any such subcommittee, as applicable.

24 “(b) Semi-Annual Reports. —

25 “(1) IN GENERAL. — In addition to any reports required under subsection (a), the
26 President shall, not later than 6 months after the date of enactment of this Act and
27 every 6 months thereafter, fully inform each member of the congressional
28 intelligence committees (or any subcommittee thereof designated for oversight of
29 electronic surveillance programs under this title) on all electronic surveillance
30 conducted under the electronic surveillance program.

31 “(2) CONTENTS. — Each report under paragraph (1) shall include the following:

32 “(A) A complete discussion of the management, operational details,
33 effectiveness, and necessity of the electronic surveillance program generally,
34 and of the management, operational details, effectiveness, and necessity of all
35 electronic surveillance conducted under the program, during the 6-month
36 period ending on the date of such report.

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

39 “(C) The total number of United States persons targeted for electronic

1 surveillance under the electronic surveillance program.

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

6 “(E) Any other information specified, in writing, to be included in such
7 report by the congressional intelligence committees or any subcommittees
8 thereof designated for oversight of the electronic surveillance program.

9 “(F) A description of the nature of the information sought under the
10 electronic surveillance program, the types of communications subjected to such
11 program, and whether the information sought under such program could be
12 reasonably obtained by less intrusive investigative techniques in a timely and
13 effective manner.

14 “(c) Form of Reports. — Any report or information submitted under this section shall be
15 submitted in classified form.”.

16 **SEC. 8. EMERGENCY AUTHORIZATION.**

17 Title VII of the Foreign Intelligence Surveillance Act of 1978, as amended by section
18 6, is amended by adding at the end the following:

19 **“SEC. 706. EMERGENCY AUTHORIZATION.**

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

24 **SEC. 9. CONFORMING AMENDMENT.**

25 The table of contents for the Foreign Intelligence Surveillance Act of 1978 is amended
26 by striking the items related to title VII and section 701 and inserting the following:

27 **“TITLE VII—ELECTRONIC SURVEILLANCE**

28 “Sec.701.Definitions.

29 “Sec.702.Foreign Intelligence Surveillance Court jurisdiction to review electronic
30 surveillance programs.

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

32 “Sec.704.Approval of electronic surveillance programs.

33 “Sec.705.Congressional oversight.

34 “Sec. 706. Emergency Authorization.

35 **“TITLE VIII—EFFECTIVE DATE**

36 “Sec.801.Effective date.”.