Title: To establish procedures for the review of electronic surveillance programs.

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 “National Security Surveillance Act of 2006”.

SEC. 2. FINDINGS.

Congress finds the following:

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

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

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

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

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

(6) Similarly, as Justice Jackson famously observed in his Youngstown concurrence: “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.... When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility... When the President takes measures incompatible with the expressed
or implied will of Congress, his power is at its lowest ebb, for then he can rely only
upon his own constitutional powers minus any constitutional powers of Congress
over the matter. Courts can sustain exclusive Presidential control in such a case only
by disabling the Congress from acting upon the subject.”. Youngstown Sheet &

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

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

(B) “To raise and support Armies”;

(C) “To provide and maintain a Navy”;

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

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

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

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

(9) While Attorney General Alberto Gonzales explained that the executive branch
reviews the electronic surveillance program of the National Security Agency every
45 days to ensure that the program is not overly broad, it is the belief of Congress
that approval and supervision of electronic surveillance programs should be
conducted outside of the executive branch, by the Article III court established under
is also the belief of Congress that it is appropriate for an Article III court to pass
upon the constitutionality of electronic surveillance programs that may implicate the
rights of Americans.

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

(11) In 1975, then-Attorney General Edward Levi, a strong defender of executive
authority, testified that in times of conflict, the President needs the power to conduct
long-range electronic surveillance and that a foreign intelligence surveillance court
should be empowered to issue special warrants in these circumstances.
This Act clarifies and definitively establishes that the Foreign Intelligence Surveillance Court has the authority to review electronic surveillance programs and pass upon their constitutionality. Such authority is consistent with well-established, longstanding practices.

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

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

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

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

SEC. 3. DEFINITIONS.

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

(1) by redesignating title VII as title VIII;

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

(3) by inserting after title VI the following:

“TITLE VII—ELECTRONIC SURVEILLANCE

“SEC. 701. DEFINITIONS.”
“As used in this title—


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

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

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

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

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

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

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

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

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

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

“(9) the term ‘substance’ means any information concerning the words, purport,
or meaning of a communication, and does not include information identifying the
sender, origin, or recipient of the communication or the date or time of its
transmission.”.

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

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

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

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

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

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

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

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

“(3) Resubmission or Appeal.—The Attorney General shall be permitted to
submit a new application under section 703 for the electronic surveillance program,
reflecting modifications to address the concerns set forth in the written opinion of
the Foreign Intelligence Surveillance Court. There shall be no limit on the number of
times the Attorney General may seek approval of an electronic surveillance
program. Alternatively, the Attorney General shall be permitted to appeal the
decision of the Foreign Intelligence Surveillance Court to the Foreign Intelligence
Surveillance Court of Review.

“(d) Communications Subject to This Title.—

“(1) In General.—The provisions of this title requiring authorization by the
Foreign Intelligence Surveillance Court apply only to interception of the substance
of electronic communications sent by, received by, or intended to be received by a
person who is in the United States, where there is a reasonable possibility that a
participant in the communication has a reasonable expectation of privacy.

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

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

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

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

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

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

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

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

“(1) be made by the Attorney General;

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

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

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

“(5) include the name, if known, identity, or description of the foreign power or
agent of a foreign power seeking to commit an act of international terrorism or
clandestine intelligence activities against the United States that the electronic
surveillance program seeks to monitor or detect;

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

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

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

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

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

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

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

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

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

“(A) the minimization procedures implemented;

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

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

“(D) the identity, if known, or a description of any United States person
whose communications sent or received in the United States were intercepted
by the electronic surveillance program; and

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

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

SEC. 6. APPROVAL OF ELECTRONIC
SURVEILLANCE PROGRAMS.

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

“SEC. 704. APPROVAL OF ELECTRONIC
SURVEILLANCE PROGRAMS.

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

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

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

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

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

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

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

“(b) Evaluation of the Implementation of the Electronic Surveillance Program.—In
determining whether the implementation of the electronic surveillance program supports
approval of the application for purposes of subsection (a)(6), the Foreign Intelligence
Surveillance Court shall consider the performance of the electronic surveillance program
for at least 3 previously authorized periods, to the extent such information is available,
and shall—
“(1) evaluate whether the electronic surveillance program has been implemented in accordance with the proposal by the Federal Government by comparing—

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

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

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

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

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

SEC. 7. CONGRESSIONAL OVERSIGHT.

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

“SEC. 705. CONGRESSIONAL OVERSIGHT.

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

“(b) Semi-Annual Reports.—

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

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

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

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

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

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

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

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

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

SEC. 8. EMERGENCY AUTHORIZATION.

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

“SEC. 706. EMERGENCY AUTHORIZATION.

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

SEC. 9. CONFORMING AMENDMENT.

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

“TITLE VII—ELECTRONIC SURVEILLANCE

“Sec.701. Definitions.

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

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

“Sec.704. Approval of electronic surveillance programs.

“Sec.705. Congressional oversight.


“TITLE VIII—EFFECTIVE DATE

“Sec.801. Effective date.”.