

1 Purpose: To provide a complete substitute.
2
3

4 H. R. 3773
5

6 To amend the Foreign Intelligence Surveillance Act of 1978
7 to establish a procedure for authorizing certain acquisitions
8 of foreign intelligence, and for other purposes.
9

10 Referred to the Committee on _____ and ordered to be
11 printed

12 Ordered to lie on the table and to be printed

13 AMENDMENT IN THE NATURE OF A SUBSTITUTE INTENDED TO
14 BE PROPOSED BY MR. ROCKEFELLER

15 Viz:

16 ~~HOUSE AMENDMENT TO SENATE AMENDMENT:~~

17 In lieu of the matter proposed to be inserted by the amendment of the Senate House of
18 Representatives to the amendment of the Senate to the text of the bill, insert the following:

19 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

20 (a) Short Title.—This Act may be cited as the “Foreign Intelligence Surveillance Act of 1978
21 Amendments Act of 2008” or the “FISA Amendments Act of 2008”.

22 (b) Table of Contents.—The table of contents for this Act is as follows:

23 Sec.1.Short title; table of contents.

24 TITLE I—FOREIGN INTELLIGENCE SURVEILLANCE

25 Sec.101.Additional procedures regarding certain persons outside the United States.

26 Sec.102.Statement of exclusive means by which electronic surveillance and interception of
27 certain communications may be conducted.

28 Sec.103.Submittal to Congress of certain court orders under the Foreign Intelligence
29 Surveillance Act of 1978.

30 Sec.104.Applications for court orders.

31 Sec.105.Issuance of an order.

32 Sec.106.Use of information.

- 1 Sec.107.Amendments for physical searches.
- 2 Sec.108.Amendments for emergency pen registers and trap and trace devices.
- 3 Sec.109.Foreign intelligence surveillance court **Intelligence Surveillance Court.**
- 4 Sec.110.Review of previous actions.
- 5 Sec.111.Weapons of mass destruction.

6 ~~Sec.112.Statute of limitations.~~ **TITLE II—PROTECTIONS**
7 **FOR ELECTRONIC COMMUNICATION SERVICE**
8 **PROVIDERS**

- 9 ~~TITLE II—PROTECTION OF PERSONS ASSISTING THE GOVERNMENT~~
10 ~~Sec.201.Statutory defenses.~~ **Sec.201.Procedures for implementing statutory defenses under**
11 **the Foreign Intelligence Surveillance Act of 1978.**
12 Sec.202.Technical amendments.

13 ~~TITLE III—COMMISSION ON WARRANTLESS~~
14 ~~ELECTRONIC SURVEILLANCE ACTIVITIES~~
15 **INTELLIGENCE COLLECTION, PRIVACY**
16 **PROTECTION, AND CHANGES IN INFORMATION**
17 **TECHNOLOGY**

- 18 ~~Sec.301.Commission on Warrantless Electronic Surveillance Activities.~~ **Intelligence Collection,**
19 **Privacy Protection, and Changes in Information Technology.**

20 **TITLE IV—OTHER PROVISIONS**

- 21 Sec.401.Severability.
- 22 Sec.402.Effective date.
- 23 Sec.403.Repeals.
- 24 Sec.404.Transition procedures.
- 25 ~~Sec.405.No rights under the FISA Amendments Act of 2008 for~~
26 ~~undocumented aliens.~~
- 27 ~~Sec.406.Surveillance to protect the United States.~~

28 **TITLE I—FOREIGN INTELLIGENCE SURVEILLANCE**
29 **SEC. 101. ADDITIONAL PROCEDURES REGARDING**
30 **CERTAIN PERSONS OUTSIDE THE UNITED STATES.**

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

3 (1) by striking title VII; and

4 (2) by adding after title VI the following new title:

5 **“TITLE VII—ADDITIONAL PROCEDURES REGARDING**
6 **CERTAIN PERSONS OUTSIDE THE UNITED STATES**

7 **“SEC. 701. DEFINITIONS.**

8 “(a) In General.—The terms ‘agent of a foreign power’, ‘Attorney General’, ‘contents’,
9 ‘electronic surveillance’, ‘foreign intelligence information’, ‘foreign power’, ~~‘minimization~~
10 ~~‘procedures’~~, ‘person’, ‘United States’, and ‘United States person’ have the meanings given such
11 terms in section 101, except as specifically provided in this title.

12 “(b) Additional Definitions.—

13 “(1) CONGRESSIONAL INTELLIGENCE COMMITTEES.—The term ‘congressional intelligence
14 committees’ means—

15 “(A) the Select Committee on Intelligence of the Senate; and

16 “(B) the Permanent Select Committee on Intelligence of the House of
17 Representatives.

18 “(2) FOREIGN INTELLIGENCE SURVEILLANCE COURT; COURT.—The terms ‘Foreign
19 Intelligence Surveillance Court’ and ‘Court’ mean the court established by section 103(a).

20 “(3) FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW; COURT OF REVIEW.—The
21 terms ‘Foreign Intelligence Surveillance Court of Review’ and ‘Court of Review’ mean the
22 court established by section 103(b).

23 “(4) ELECTRONIC COMMUNICATION SERVICE PROVIDER.—The term ‘electronic
24 communication service provider’ means—

25 “(A) a telecommunications carrier, as that term is defined in section 3 of the
26 Communications Act of 1934 (47 U.S.C. 153);

27 “(B) a provider of electronic communication service, as that term is defined in
28 section 2510 of title 18, United States Code;

29 “(C) a provider of a remote computing service, as that term is defined in section
30 2711 of title 18, United States Code;

31 “(D) any other communication service provider who has access to wire or electronic
32 communications either as such communications are transmitted or as such
33 communications are stored; or

34 “(E) an officer, employee, or agent of an entity described in subparagraph (A), (B),
35 (C), or (D).

36 “(5) INTELLIGENCE COMMUNITY.—The term ‘intelligence community’ has the meaning
37 given the term in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

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1 "SEC. 702. PROCEDURES FOR TARGETING CERTAIN
2 PERSONS OUTSIDE THE UNITED STATES OTHER THAN
3 UNITED STATES PERSONS.

4 "(a) Authorization.—Notwithstanding any other provision of law, pursuant to an order issued
5 in accordance with subsection (i)(3) or a determination under subsection (g)(1)(B)(ii), the
6 Attorney General and the Director of National Intelligence may authorize jointly, for a period of
7 up to 1 year from the effective date of the authorization, the targeting of persons reasonably
8 believed to be located outside the United States to acquire foreign intelligence information.

9 "(b) Limitations.—An acquisition authorized under subsection (a)—

10 "(1) may not intentionally target any person known at the time of acquisition to be
11 located in the United States;

12 "(2) may not intentionally target a person reasonably believed to be located outside the
13 United States if the purpose of such acquisition is in order to target a particular, known
14 person reasonably believed to be in the United States;

15 "(3) may not intentionally target a United States person reasonably believed to be located
16 outside the United States;

17 "(4) may not intentionally acquire any communication as to which the sender and all
18 intended recipients are known at the time of the acquisition to be located in the United
19 States; and

20 "(5) shall be conducted in a manner consistent with the fourth amendment to the
21 Constitution of the United States.

22 "(c) Conduct of Acquisition.—An Acquisition.—

23 "(1) IN GENERAL.—An acquisition authorized under subsection (a) may be conducted
24 only in accordance with—

25 ~~"(1) a~~ "(A) the certification made by the Attorney General and the Director of
26 National Intelligence pursuant to subsection (g) or a determination under paragraph
27 ~~(1)(B) of such subsection; and submitted in accordance with subsection (g); and~~

28 ~~"(2) the procedures and guidelines required pursuant to subsections (d), (e), and~~
29 ~~(f)."~~ "(B) the targeting and minimization procedures submitted in accordance with
30 subsections (d) and (e).

31 ** 1 ~~(m)~~ "(2) CONSTRUCTION.—Nothing in title I of this Act shall be construed to
32 require an application under section 104 for an acquisition that is targeted in accordance
33 with this section at a person reasonably believed to be located outside the United States.

34 "(d) Targeting Procedures.—

35 "(1) REQUIREMENT TO ADOPT.—The Attorney General, in consultation with the Director
36 of National Intelligence, shall adopt targeting procedures that are reasonably designed to
37 ensure that any acquisition authorized under subsection (a) is limited to targeting persons
38 reasonably believed to be located outside the United States and does not result in the
39 intentional acquisition of any communication as to which the sender and all intended

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1 recipients are known at the time of the acquisition to be located in the United States.

2 “(2) JUDICIAL REVIEW.—The procedures required by paragraph (1) shall be subject to
3 judicial review pursuant to subsection (i).

4 “(e) Minimization Procedures.—

5 “(1) REQUIREMENT TO ADOPT.—The Attorney General, in consultation with the Director
6 of National Intelligence, shall adopt minimization procedures ~~that for acquisitions~~
7 ~~authorized under subsection (a) that—~~

8 ~~“(A) in the case of electronic surveillance, meet the definition of minimization~~
9 ~~procedures under section 101(h) or section 301(4), as appropriate, for acquisitions~~
10 ~~authorized under subsection (a).; and~~

11 ~~“(B) in the case of a physical search, meet the definition of minimization procedures~~
12 ~~under section 301(4).~~

13 “(2) JUDICIAL REVIEW.—The minimization procedures required by paragraph (1) shall be
14 subject to judicial review pursuant to subsection (i).

15 “(f) Guidelines for Compliance With Limitations.—

16 “(1) REQUIREMENT TO ADOPT.—The Attorney General, in consultation with the Director
17 of National Intelligence, shall adopt guidelines to ensure—

18 “(A) compliance with the limitations in subsection (b); and

19 “(B) that an application is filed under section 104 or 303, if required by this Act.
20 **section 303, as appropriate, if required by any other section of this Act.**

21 ~~“(2) Criteria.—With respect to subsection (b)(2), the guidelines adopted pursuant to~~
22 ~~paragraph (1) shall contain specific criteria for determining whether a significant purpose of~~
23 ~~an acquisition is to acquire the communications of a specific United States person~~
24 ~~reasonably believed to be located in the United States. Such criteria shall include~~
25 ~~consideration of whether—~~

26 ~~“(A) the department or agency of the Federal Government conducting the acquisition has~~
27 ~~made an inquiry to another department or agency of the Federal Government to gather~~
28 ~~information on the specific United States person;~~

29 ~~“(B) the department or agency of the Federal Government conducting the acquisition has~~
30 ~~provided information that identifies the specific United States person to another department~~
31 ~~or agency of the Federal Government;~~

32 ~~“(C) the department or agency of the Federal Government conducting the acquisition~~
33 ~~determines that the specific United States person has been the subject of ongoing interest or~~
34 ~~repeated investigation by a department or agency of the Federal Government; and~~

35 ~~“(D) the specific United States person is a natural person.~~

36 “(3)“(2) TRAINING.—The Director of National Intelligence shall establish a training
37 program for appropriate ~~personnel of the intelligence community~~ personnel to ensure that
38 the guidelines adopted pursuant to paragraph (1) are properly implemented.

39 “(4) ~~Submission to congress and foreign intelligence surveillance court.—The“(3)~~

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1 **SUBMISSION OF GUIDELINES.**—The Attorney General shall ~~submit~~ **provide** the guidelines
2 adopted pursuant to paragraph (1) to—

3 “(A) the congressional intelligence committees;

4 “(B) the ~~Committees~~ **Committee** on the Judiciary of the **Senate**;

5 “(C) the ~~Committee on the Judiciary of the House of Representatives and the~~
6 **Senate**; and

7 “~~(C)~~“(D) the Foreign Intelligence Surveillance Court.

8 “(g) Certification.—

9 “(1) IN GENERAL.—

10 “(A) ~~REQUIREMENT.~~—~~SUBJECT TO SUBPARAGRAPH (B), IF REQUIREMENT.~~—**In**
11 **order to conduct an acquisition under subsection (a)**, the Attorney General and the
12 Director of National Intelligence ~~seek to authorize an acquisition under this section, the~~
13 ~~Attorney General and the Director of National Intelligence shall provide~~ **shall provide**
14 **to the Foreign Intelligence Surveillance Court**, under oath, a written certification, as
15 ~~described in this subsection.~~

16 “~~(B) Emergency authorization.~~—**If and any supporting affidavit, under seal, in**
17 **accordance with this subsection.**

18 “(B) **TIMING OF SUBMISSION TO THE COURT.**—

19 “(i) **IN GENERAL.**—**Except as provided in clause (ii), the Attorney General**
20 **and Director of National Intelligence shall provide a copy of a certification**
21 **made under this subsection to the Foreign Intelligence Surveillance Court**
22 **prior to the initiation of an acquisition under subsection (a).**

23 “(ii) **EXCEPTION.**—**If the Attorney General and the Director of National**
24 **Intelligence determine that an emergency situation exists, immediate action by the**
25 **Government is required, there should be immediate implementation of the**
26 **authorization and time does not permit the completion of judicial review**
27 **issuance of an order pursuant to subsection (i)(3) prior to the initiation of an**
28 **acquisition implementation of the authorization, the Attorney General and the**
29 **Director of National Intelligence may authorize the acquisition and shall submit to**
30 **the Foreign Intelligence Surveillance Court a certification, including the**
31 **determination under this subsection, as soon as possible but in no event more**
32 **than 7 days after such determination is made.**

33 “(2) **REQUIREMENTS.**—A certification made under this subsection shall—

34 “(A) attest that—

35 “(i) there are reasonable procedures in place **that have been approved or**
36 **submitted for approval to the Foreign Intelligence Surveillance Court**, for
37 determining that the acquisition authorized under subsection (a)—

38 “(I) is targeted at persons reasonably believed to be located outside the
39 United States ~~and such procedures have been submitted to the Foreign~~
40 **Intelligence Surveillance Court; and**

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1 “(II) does not result in the intentional acquisition of any communication as
2 to which the sender and all intended recipients are known at the time of the
3 acquisition to be located in the United States, ~~and such procedures have been~~
4 ~~submitted to the Foreign Intelligence Surveillance Court;~~

5 “(ii) guidelines have been adopted in accordance with subsection (f) to ensure
6 compliance with the limitations in subsection (b) and to ensure that applications
7 are filed under section 104 or section 303, if required by this Act;

8 “(iii) the minimization procedures to be used with respect to such acquisition—

9 “(I) meet the definition of minimization procedures under section 101(h)
10 or section 301(4) ~~in accordance with subsection (e), as appropriate;~~ and

11 “(II) have been **approved by, or submitted to for approval by,** the
12 Foreign Intelligence Surveillance Court;

13 “(iv) the procedures and guidelines referred to in clauses (i), (ii), and (iii) are
14 consistent with the requirements of the fourth amendment to the Constitution of
15 the United States;

16 “(v) a significant purpose of the acquisition is to obtain foreign intelligence
17 information;

18 “(vi) the acquisition involves obtaining the foreign intelligence information
19 from or with the assistance of an electronic communication service provider; and

20 “(vii) the acquisition complies with the limitations in subsection (b); and

21 “(B) be supported, as appropriate, by the affidavit of any appropriate official in the
22 area of national security who is—

23 “(i) appointed by the President, by and with the consent of the Senate; or

24 “(ii) the head of an element of the intelligence community; and

25 “(C) include—

26 “(i) an effective date for the authorization that is between 30 and 60 days from
27 the submission of the written certification to the court; or

28 “(ii) if the acquisition has begun or ~~will begin in the effective date is less than~~
29 30 days from the submission of the written certification to the court—

30 “(I) the date the acquisition began or the effective date for the acquisition;

31 “(II) a description of why ~~implementation was~~ **initiation of the**
32 **acquisition is** required in less than 30 days from the submission of the
33 written certification to the court; and

34 “(III) if the acquisition is authorized under paragraph (1)(B), ~~the basis for~~
35 ~~the determination that an emergency situation exists, immediate action by the~~
36 **government is required;** (ii), **a description of why there should be**
37 **immediate implementation of the authorization** and time does not permit
38 the completion of judicial review prior to the initiation of the acquisition.
39 **issuance of an order pursuant to subsection (i)(3) prior to the**

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implementation of the authorization.

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2 ~~“(3)“(3) CHANGE IN EFFECTIVE DATE.—The Attorney General and the Director of~~
3 ~~National Intelligence may advance or delay the effective date described in paragraph~~
4 ~~(2)(C) by amending the certification pursuant to subsection (i)(C) to include the~~
5 ~~applicable requirements of paragraph (2)(C).~~

6 ~~“(4) LIMITATION.—A certification made under this subsection is not required to identify~~
7 ~~the specific facilities, places, premises, or property at which the acquisition authorized~~
8 ~~under subsection (a) will be directed or conducted.~~

9 ~~“(4) Submission to the court.—The“(5) MAINTENANCE OF CERTIFICATION.—The~~
10 ~~Attorney General shall transmit maintain a copy of a certification made under this~~
11 ~~subsection, and any supporting affidavit, under seal to the Foreign Intelligence Surveillance~~
12 ~~Court before the initiation of an acquisition under this section, except in accordance with~~
13 ~~paragraph (1)(B). The Attorney General shall maintain such certification under security~~
14 ~~measures adopted by the Chief Justice of the United States and the Attorney General, in~~
15 ~~consultation with the Director of National Intelligence.~~

16 ~~“(5) Review.—A“(6) REVIEW.—The certification submitted pursuant to required by~~
17 ~~this subsection shall be subject to judicial review pursuant to subsection (i).~~

18 ~~“(h) Directives and Judicial Review of Directives.—~~

19 ~~“(1) AUTHORITY.— PURSUANT TO AN ORDER ISSUED IN ACCORDANCE WITH SUBSECTION-~~
20 ~~(1)(3) OR A DETERMINATION UNDER SUBSECTION (C)(1)(B) AUTHORITY.—With respect to~~
21 ~~an acquisition authorized under subsection (a), the Attorney General and the Director of~~
22 ~~National Intelligence may direct, in writing, an electronic communication service provider~~
23 ~~to—~~

24 ~~“(A) immediately provide the Government with all information, facilities, or~~
25 ~~assistance necessary to accomplish the acquisition authorized in accordance with this~~
26 ~~section in a manner that will protect the secrecy of the acquisition and produce a~~
27 ~~minimum of interference with the services that such electronic communication service~~
28 ~~provider is providing to the target of the acquisition; and~~

29 ~~“(B) maintain under security procedures approved by the Attorney General and the~~
30 ~~Director of National Intelligence any records concerning the acquisition or the aid~~
31 ~~furnished that such electronic communication service provider wishes to maintain.~~

32 ~~“(2) COMPENSATION.—The Government shall compensate, at the prevailing rate, an~~
33 ~~electronic communication service provider for providing information, facilities, or~~
34 ~~assistance pursuant to paragraph (1).~~

35 ~~“(3) RELEASE FROM LIABILITY.— NOTWITHSTANDING ANY OTHER PROVISION OF LAW, NO~~
36 ~~LIABILITY.—No cause of action shall lie in any court against any electronic communication~~
37 ~~service provider for providing any information, facilities, or assistance in accordance with a~~
38 ~~directive issued pursuant to paragraph (1).~~

39 ~~“(4) CHALLENGING OF DIRECTIVES.—~~

40 ~~“(A) AUTHORITY TO CHALLENGE.—An electronic communication service provider~~
41 ~~receiving a directive issued pursuant to paragraph (1) may challenge the directive by~~

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