

AMENDMENT NO.

Calendar No.

Purpose: To provide for the substitution of the United States
in certain actions.

IN THE SENATE OF THE UNITED STATES—110th Cong., 1st Sess.

S. 2248

To amend the Foreign Intelligence Surveillance Act of 1978,
to modernize and streamline the provisions of that Act,
and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. SPECTER

Viz:

- 1 Strike section 202 and insert the following:
- 2 **SEC. 202. SUBSTITUTION OF THE UNITED STATES IN CER-**
- 3 **TAIN ACTIONS.**
- 4 (a) IN GENERAL.—
- 5 (1) CERTIFICATION.—Notwithstanding any
- 6 other provision of law, a Federal or State court shall
- 7 substitute the United States for an electronic com-
- 8 munication service provider with respect to any
- 9 claim in a covered civil action as provided in this

1 subsection, if the Attorney General certifies to that
2 court that—

3 (A) with respect to that claim, the assist-
4 ance alleged to have been provided by the elec-
5 tronic communication service provider was—

6 (i) provided in connection with an in-
7 telligence activity involving communica-
8 tions that was—

9 (I) authorized by the President
10 during the period beginning on Sep-
11 tember 11, 2001, and ending on Jan-
12 uary 17, 2007; and

13 (II) designed to detect or prevent
14 a terrorist attack, or activities in
15 preparation for a terrorist attack,
16 against the United States; and

17 (ii) described in a written request or
18 directive from the Attorney General or the
19 head of an element of the intelligence com-
20 munity (or the deputy of such person) to
21 the electronic communication service pro-
22 vider indicating that the activity was—

23 (I) authorized by the President;

24 and

25 (II) determined to be lawful; or

1 (B) the electronic communication service
2 provider did not provide the alleged assistance.

3 (2) SUBSTITUTION.—

4 (A) IN GENERAL.—Except as provided in
5 subparagraph (B), upon receiving a certification
6 under paragraph (1), a Federal or State court
7 shall—

8 (i) substitute the United States for
9 the electronic communication service pro-
10 vider as the defendant as to all claims des-
11 ignated by the Attorney General in that
12 certification; and

13 (ii) as to that electronic communica-
14 tion service provider—

15 (I) dismiss all claims designated
16 by the Attorney General in that cer-
17 tification; and

18 (II) enter a final judgment relat-
19 ing to those claims.

20 (B) CONTINUATION OF CERTAIN
21 CLAIMS.—If a certification by the Attorney
22 General under paragraph (1) states that not all
23 of the alleged assistance was provided under a
24 written request or directive described in para-

1 graph (1)(A)(ii), the electronic communication
2 service provider shall remain as a defendant.

3 (3) PROCEDURES.—

4 (A) TORT CLAIMS.—Upon a substitution
5 under paragraph (2), for any tort claim—

6 (i) the claim shall be deemed to have
7 been filed under section 1346(b) of title
8 28, United States Code, except that sec-
9 tions 2401(b), 2675, and 2680(a) of title
10 28, United States Code, shall not apply;
11 and

12 (ii) notwithstanding any other provi-
13 sion of law, the claim shall be deemed
14 timely filed against the United States if it
15 was timely filed against the electronic com-
16 munication service provider.

17 (B) CONSTITUTIONAL AND STATUTORY
18 CLAIMS.—Upon a substitution under paragraph
19 (2), for any claim under the Constitution of the
20 United States or any Federal statute—

21 (i) the claim shall be deemed to have
22 been filed against the United States under
23 section 1331 of title 28, United States
24 Code;

1 (ii) with respect to any claim under a
2 Federal statute that does not provide a
3 cause of action against the United States,
4 the plaintiff shall be permitted to amend
5 such claim to substitute, as appropriate, a
6 cause of action under—

7 (I) section 704 of title 5, United
8 States Code (commonly known as the
9 Administrative Procedure Act);

10 (II) section 2712 of title 18,
11 United States Code, except that para-
12 graphs (1) and (2) of subsection (b)
13 of that section and the minimum
14 amount of damages specified in sub-
15 section (a)(1) of that section shall not
16 apply; or

17 (III) section 110 of the Foreign
18 Intelligence Surveillance Act of 1978
19 (50 U.S.C. 1810), except that sub-
20 section (b) of that section and the
21 minimum amount of damages speci-
22 fied in subsection (a) of that section
23 shall not apply;

24 (iii) notwithstanding any other provi-
25 sion of law, the statutes of limitation appli-

1 cable to the causes of action identified in
2 clause (ii) shall not apply to any amended
3 claim under that clause, and any such
4 cause of action shall be deemed timely filed
5 if any Federal statutory cause of action
6 against the electronic communication serv-
7 ice provider was timely filed; and

8 (iv) notwithstanding any other provi-
9 sions of law, for any amended claim under
10 clause (ii) the United States shall be
11 deemed a proper defendant under any stat-
12 utes described in that clause, and any
13 plaintiff that had standing to proceed
14 against the original defendant shall be
15 deemed an aggrieved party for purposes of
16 proceeding under section 2712 of title 18
17 or section 110 of the Foreign Intelligence
18 Surveillance Act of 1978 (50 U.S.C.
19 1810).

20 (C) DISCOVERY.—

21 (i) IN GENERAL.—In a covered civil
22 action in which the United States is sub-
23 stituted as party-defendant under para-
24 graph (2), any plaintiff may serve third-
25 party discovery requests to any electronic

1 communications service provider as to
2 which all claims are dismissed.

3 (ii) BINDING THE GOVERNMENT.—If
4 a plaintiff in a covered civil action serves
5 deposition notices under rule 30(b)(6) of
6 the Federal Rules of Civil Procedure or re-
7 quests under rule 36 of the Federal Rules
8 of Civil Procedure for admission upon an
9 electronic communications service provider
10 as to which all claims were dismissed, the
11 electronic communications service provider
12 shall be deemed a party-defendant for pur-
13 poses rule 30(b)(6) or rule 36 and its an-
14 swers and admissions shall be deemed
15 binding upon the Government.

16 (b) CERTIFICATIONS.—

17 (1) IN GENERAL.—For purposes of substitution
18 proceedings under this section—

19 (A) a certification under subsection (a)
20 may be provided and reviewed in camera, ex
21 parte, and under seal; and

22 (B) for any certification provided and re-
23 viewed as described in subparagraph (A), the
24 court shall not disclose or cause the disclosure
25 of its contents.

1 (2) NONDELEGATION.—The authority and du-
2 ties of the Attorney General under this section shall
3 be performed by the Attorney General or a designee
4 in a position not lower than the Deputy Attorney
5 General.

6 (c) LIMITATIONS.—

7 (1) SOVEREIGN IMMUNITY.—This section, in-
8 cluding any Federal statute cited in this section that
9 operates as a waiver of sovereign immunity, con-
10 stitute the sole waiver of sovereign immunity with
11 respect to any covered civil action.

12 (2) DAMAGES.—In any covered civil action in
13 which the United States is substituted under sub-
14 section (a), the total amount of damages that may
15 be awarded for the sum total of all plaintiffs shall
16 not exceed \$25,000,000.

17 (d) CIVIL ACTIONS IN STATE COURT.—For purposes
18 of section 1441 of title 28, United States Code, any cov-
19 ered civil action that is brought in a State court or admin-
20 istrative or regulatory bodies shall be deemed to arise
21 under the Constitution or laws of the United States and
22 shall be removable under that section.

23 (e) RULE OF CONSTRUCTION.—Except as expressly
24 provided in this section, nothing in this section may be
25 construed to limit any immunity, privilege, or defense

1 under any other provision of law, including any privilege,
2 immunity, or defense that would otherwise have been
3 available to the United States absent its substitution as
4 party-defendant or had the United States been the named
5 defendant.

6 (f) EFFECTIVE DATE AND APPLICATION.—This sec-
7 tion shall apply to any covered civil action pending on or
8 filed after the date of enactment of this Act.