

OLC PART 3

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Cc: Rice, K (Intelligence)
Subject: Discussion Drafts
Attachments: EAS07945(FISA Mod Packet 2 Ver 3).xml.pdf; HEN07G50_.xml.pdf; HEN07F61_.xml.pdf; HEN07D97_.xml.pdf; HEN07E61_.xml.pdf; HEN07G51_.xml.pdf

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I'm attaching the current discussion drafts on FISA modernization. The first one EAS07945 is what Senator Bond proposed to Senator Rockefeller about a week and half before recess. It is based on the DNI's original request. It drops the agent of a foreign power definition change and the mandatory transfer for review provisions. It makes a few changes to the streamlining provisions based on FISC legal advisor input, but otherwise uses almost all of the original text.

I'm attaching a bunch of drafts that Mike Davidson has circulated to Senate Judiciary counsel. One of them is based on the very last DNI proposal (the one that included prior judicial review). I'd appreciate it if DOJ, FBI, and NSA could review these and provide input in the next couple of weeks.

I'm particularly interested in arguments against court approval (either prior or post) related to targeting persons overseas.

Thanks.

73

110TH CONGRESS
1ST SESSION

S. _____

To amend the Foreign Intelligence Surveillance Act of 1978, to modernize the provisions of that Act.

IN THE SENATE OF THE UNITED STATES

Mr. BOND introduced the following bill; which was read twice and referred to the Committee on

A BILL

To amend the Foreign Intelligence Surveillance Act of 1978, to modernize the provisions of that Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Foreign Intelligence Surveillance Modernization Act of
6 2007”.

7 (b) **TABLE OF CONTENTS.**—The table of contents for
8 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Definitions.

Sec. 3. Attorney General authorization for acquisition of certain foreign intel-
ligence information.

Sec. 4. Liability defense.

- Sec. 5. Use of information.
- Sec. 6. Applications for court orders.
- Sec. 7. Issuance of an order.
- Sec. 8. Amendments for physical searches.
- Sec. 9. Amendments for emergency pen registers and trap and trace devices.
- Sec. 10. Weapons of mass destruction.
- Sec. 11. Designation of Judges.
- Sec. 12. Technical and conforming amendments.
- Sec. 13. Effective date.

1 **SEC. 2. DEFINITIONS.**

2 (a) **ELECTRONIC SURVEILLANCE.**—Subsection (f) of
3 section 101 of the Foreign Intelligence Surveillance Act
4 of 1978 (50 U.S.C. 1801) is amended to read as follows:

5 “(f) ‘Electronic surveillance’ means—

6 “(1) the installation or use of an electronic, me-
7 chanical, or other surveillance device for acquiring
8 information by intentionally directing surveillance at
9 a particular, known person who is reasonably be-
10 lieved to be located within the United States under
11 circumstances in which that person has a reasonable
12 expectation of privacy and a warrant would be re-
13 quired for law enforcement purposes; or

14 “(2) the intentional acquisition of the contents
15 of any communication under circumstances in which
16 a person has a reasonable expectation of privacy and
17 a warrant would be required for law enforcement
18 purposes, if both the sender and all intended recipi-
19 ents are reasonably believed to be located within the
20 United States.”.

1 (b) WIRE COMMUNICATION.—Such section is amend-
2 ed by striking subsection (l).

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

5 “(n) ‘Contents’, when used with respect to a commu-
6 nication, includes any information concerning the sub-
7 stance, purport, or meaning of that communication.”

8 **SEC. 3. ATTORNEY GENERAL AUTHORIZATION FOR ACQUI-**
9 **SITION OF CERTAIN FOREIGN INTELLIGENCE**
10 **INFORMATION.**

11 (a) **IN GENERAL.**—The Foreign Intelligence Surveil-
12 lance Act of 1978 (50 U.S.C. 1801 et seq.) is amended
13 by inserting the following after section 102:

14 **“AUTHORIZATION FOR ACQUISITION OF CERTAIN**
15 **FOREIGN INTELLIGENCE INFORMATION**

16 **“SEC. 102A. (a)** Notwithstanding any other provision
17 of law, the President, acting through the Attorney General
18 may, for periods of up to 1 year, authorize the acquisition
19 of foreign intelligence information concerning persons rea-
20 sonably believed to be outside the United States if the At-
21 torney General certifies in writing under oath that the At-
22 torney General has determined that—

23 “(1) the acquisition does not constitute elec-
24 tronic surveillance;

25 “(2) the acquisition involves obtaining the for-
26 eign intelligence information from or with the assist-

1 ance of a communications service provider, custo-
2 dian, or other person (including any officer, em-
3 ployee, agent, or other specified person of such serv-
4 ice provider, custodian, or other person) who has ac-
5 cess to communications, either as such communica-
6 tions are transmitted or while such communications
7 are stored, or equipment that is being or may be
8 used to transmit or store such communications;

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

11 “(4) the minimization procedures to be used
12 with respect to such acquisition activity meet the
13 definition of minimization procedures under section
14 101(h).

15 “(b) A certification under subsection (a) is not re-
16 quired to identify the specific facilities, places, premises,
17 or property at which the acquisition of foreign intelligence
18 information will be directed.

19 “(c) The Attorney General shall immediately trans-
20 mit under seal to the court established under section
21 103(a) a copy of a certification made under subsection (a).
22 Such certification shall be maintained under security
23 measures established by the Chief Justice of the United
24 States and the Attorney General, in consultation with the
25 Director of National Intelligence, and shall remain sealed

1 unless the certification is necessary to determine the legal-
2 ity of the acquisition under section 102B.

3 “(d) An acquisition under this section may be con-
4 ducted only in accordance with the certification of the At-
5 torney General and the minimization procedures adopted
6 by the Attorney General. The Attorney General shall as-
7 sess compliance with such procedures.

8 “DIRECTIVES RELATING TO ELECTRONIC SURVEILLANCE
9 AND OTHER ACQUISITIONS OF FOREIGN INTEL-
10 LIGENCE INFORMATION

11 “SEC. 102B. (a) With respect to an authorization of
12 electronic surveillance under section 102 or an authoriza-
13 tion of an acquisition under section 102A, the Attorney
14 General may direct a person to—

15 “(1) immediately provide the Government with
16 all information, facilities, or assistance necessary to
17 accomplish the electronic surveillance or acquisition
18 of foreign intelligence information in such a manner
19 as will protect the secrecy of the electronic surveil-
20 lance or acquisition and produce a minimum of in-
21 terference with the services that such person is pro-
22 viding to the target; and

23 “(2) maintain under security procedures ap-
24 proved by the Attorney General and the Director of
25 National Intelligence any records concerning the

1 electronic surveillance or acquisition or the aid fur-
2 nished that such person wishes to maintain.

3 “(b) The Government shall compensate, at the pre-
4 vailing rate, a person for providing information, facilities,
5 or assistance under subsection (a).

6 “(c) In the case of a failure to comply with a directive
7 issued under subsection (a), the Attorney General may in-
8 voke the aid of the court established under section 103(a)
9 to compel compliance with the directive. The court shall
10 issue an order requiring the person to comply with the
11 directive if it finds that the directive was issued in accord-
12 ance with subsection (a) and is otherwise lawful. Failure
13 to obey an order of the court may be punished by the court
14 as contempt of court. Any process under this section may
15 be served in any judicial district in which the person may
16 be found.

17 “(d)(1)(A) A person receiving a directive issued
18 under subsection (a) may challenge the legality of that di-
19 rective by filing a petition with the pool established under
20 section 103(e)(1).

21 “(B) The presiding judge designated under section
22 103(b) shall assign a petition filed under subparagraph
23 (A) to 1 of the judges serving in the pool established by
24 section 103(e)(1). Not later than 24 hours after the as-
25 signment of such petition, the assigned judge shall conduct

1 an initial review of the directive. If the assigned judge de-
2 termines that the petition is frivolous, the assigned judge
3 shall immediately deny the petition and affirm the direc-
4 tive or any part of the directive that is the subject of the
5 petition. If the assigned judge determines the petition is
6 not frivolous, the assigned judge shall, within 72 hours
7 of the initial review of the directive, consider the petition
8 in accordance with the procedures established under sec-
9 tion 103(e)(2) and provide a written statement for the
10 record of the reasons for any determination under this
11 subsection.

12 “(2) A judge considering a petition under this sub-
13 section to modify or set aside a directive may grant such
14 petition only if the judge finds that such directive does
15 not meet the requirements of this section or is otherwise
16 unlawful. If the judge does not modify or set aside the
17 directive, the judge shall immediately affirm such direc-
18 tive, and order the recipient to comply with such directive.

19 “(3) Any directive not explicitly modified or set aside
20 under this subsection shall remain in full effect.

21 “(e) The Government or a person receiving a directive
22 reviewed under subsection (d) may file a petition with the
23 court of review established under section 103(b) for review
24 of the decision issued under subsection (d) not later than
25 7 days after the issuance of such decision. Such court of

1 review shall have jurisdiction to consider such petitions
2 and shall provide for the record a written statement of
3 the reasons for its decision. On petition for a writ of cer-
4 tiorari by the Government or any person receiving such
5 directive, the record shall be transmitted under seal to the
6 Supreme Court, which shall have jurisdiction to review
7 such decision.

8 “(f) Judicial proceedings under this section shall be
9 concluded as expeditiously as possible. The record of pro-
10 ceedings, including petitions filed, orders granted, and
11 statements of reasons for decision, shall be maintained
12 under security measures established by the Chief Justice
13 of the United States, in consultation with the Attorney
14 General and the Director of National Intelligence.

15 “(g) All petitions under this section shall be filed
16 under seal. In any proceedings under this section, the
17 court shall, upon request of the Government, review ex
18 parte and in camera any Government submission, or por-
19 tions of a submission, which may include classified infor-
20 mation.

21 “(h) No cause of action shall lie in any court against
22 any person for providing any information, facilities, or as-
23 sistance in accordance with a directive under this section.

24 “(i) A directive made or an order granted under this
25 section shall be retained for a period of not less than 10

1 years from the date on which such directive or such order
2 is made.

3 "USE OF INFORMATION ACQUIRED UNDER SECTION 102A

4 "SEC. 102C. (a) Information acquired from an acqui-
5 sition conducted under section 102A concerning any
6 United States person may be used and disclosed by Fed-
7 eral officers and employees without the consent of the
8 United States person only in accordance with the mini-
9 mization procedures required by section 102A. No other-
10 wise privileged communication obtained in accordance
11 with, or in violation of, the provisions of section 102A shall
12 lose its privileged character. No information from an ac-
13 quisition under section 102A may be used or disclosed by
14 Federal officers or employees except for lawful purposes.

15 "(b) Whenever the Government intends to enter into
16 evidence or otherwise use or disclose in any trial, hearing,
17 or other proceeding in or before any court, department,
18 officer, agency, regulatory body, or other authority of the
19 United States, against a person who was the target of,
20 or whose communications or activities were subject to, an
21 acquisition authorized under section 102A, any informa-
22 tion obtained or derived from such acquisition, the Gov-
23 ernment shall, prior to the trial, hearing, or other pro-
24 ceeding or at a reasonable time prior to an effort to dis-
25 close or so use that information or submit it in evidence,
26 notify such person and the court or other authority in

1 which the information is to be disclosed or used that the
2 Government intends to so disclose or so use such informa-
3 tion.

4 “(c) Whenever any State or political subdivision
5 thereof intends to enter into evidence or otherwise use or
6 disclose in any trial, hearing, or other proceeding in or
7 before any court, department, officer, agency, regulatory
8 body, or other authority of a State or a political subdivi-
9 sion thereof, against a person who was the target of, or
10 whose communications or activities were subject to, an ac-
11 quisition authorized under section 102A, any information
12 obtained or derived from such acquisition, the State or po-
13 litical subdivision thereof shall notify such person, the
14 court, or other authority in which the information is to
15 be disclosed or used, and the Attorney General that the
16 State or political subdivision thereof intends to so disclose
17 or so use such information.

18 “(d)(1) Any person against whom evidence obtained
19 or derived from an acquisition authorized under section
20 102A is to be, or has been, introduced or otherwise used
21 or disclosed in any trial, hearing, or other proceeding in
22 or before any court, department, officer, agency, regu-
23 latory body, or other authority of the United States, a
24 State, or a political subdivision thereof, may move to sup-

1 press the evidence obtained or derived from such acqui-
2 tion on the grounds that—

3 “(A) the information was unlawfully acquired;
4 or

5 “(B) the acquisition was not properly made in
6 conformity with an authorization under section
7 102A.

8 “(2) A person moving to suppress evidence under
9 paragraph (1) shall make such motion before the trial,
10 hearing, or other proceeding unless there was no oppor-
11 tunity to make such a motion or the person was not aware
12 of the grounds of the motion.

13 “(e) Whenever a court or other authority is notified
14 pursuant to subsection (b) or (c) of this section, or when-
15 ever a motion is made pursuant to subsection (d) of this
16 section, or whenever any motion or request is made pursu-
17 ant to any other statute or rule of the United States or
18 any State by a person who was the target of, or whose
19 communications or activities were subject to, an acquisi-
20 tion authorized pursuant to section 102A before any court
21 or other authority of the United States or any State—

22 “(1) to discover or obtain applications or orders
23 or other materials relating to an acquisition author-
24 ized pursuant to section 102A; or

1 “(2) to discover, obtain, or suppress evidence or
2 information obtained or derived from an acquisition
3 authorized pursuant to section 102A,
4 the United States district court or, where the motion
5 is made before another authority, the United States
6 district court in the same district as the authority,
7 shall, notwithstanding any other law, if the Attorney
8 General files an affidavit under oath that disclosure
9 or an adversary hearing would harm the national se-
10 curity of the United States, review in camera and ex
11 parte the application, order, and such other mate-
12 rials relating to the acquisition as may be necessary
13 to determine whether such acquisition was lawfully
14 authorized and conducted. In making this deter-
15 mination, the court may disclose to the person who
16 was the target of, or whose communications or ac-
17 tivities were subject to, an acquisition authorized
18 pursuant to section 102A, under appropriate secu-
19 rity procedures and protective orders, portions of the
20 application, order, or other materials relating to the
21 acquisition only where such disclosure is necessary
22 to make an accurate determination of the legality of
23 the acquisition.

24 “(f) If the United States district court, under sub-
25 section (e), determines that an acquisition authorized

1 under section 102A was not lawfully authorized or con-
2 ducted, it shall, in accordance with the requirements of
3 law, suppress the evidence which was unlawfully obtained
4 or derived from the acquisition or otherwise grant the mo-
5 tion of the person who was the target of, or whose commu-
6 nications or activities were subject to, an acquisition au-
7 thorized under section 102A. If the court determines that
8 such acquisition was lawfully authorized and conducted,
9 it shall deny the motion of the person who was the target
10 of, or whose communications or activities were subject to,
11 an acquisition authorized under section 102A except to the
12 extent that due process requires discovery or disclosure.

13 “(g) Orders granting motions or requests under sub-
14 section (f), decisions under this section that an acquisition
15 was not lawfully authorized or conducted, and orders of
16 the United States district court requiring review or grant-
17 ing disclosure of applications, orders, or other materials
18 relating to an acquisition shall be final orders and binding
19 upon all courts of the United States and the several
20 States, except a United States court of appeals and the
21 Supreme Court of the United States.

22 “(h)(1) Federal officers who acquire foreign intel-
23 ligence information under section 102A may consult with
24 Federal law enforcement officers or law enforcement per-
25 sonnel of a State or political subdivision of a State (includ-

1 ing the chief executive officer of that State or political sub-
2 division who has the authority to appoint or direct the
3 chief law enforcement officer of that State or political sub-
4 division) to coordinate efforts to investigate or protect
5 against—

6 “(A) actual or potential attack or other grave
7 hostile acts of a foreign power or an agent of a for-
8 eign power;

9 “(B) sabotage, international terrorism, or the
10 international proliferation of weapons of mass de-
11 struction by a foreign power or an agent of a foreign
12 power; or

13 “(C) clandestine intelligence activities by an in-
14 telligence service or network of a foreign power or by
15 an agent of a foreign power.

16 “(2) Coordination authorized under paragraph (1)
17 shall not preclude the certification required by section
18 102A.

19 “(i) Nothing in this section shall prevent the United
20 States from seeking protective orders or asserting privi-
21 leges ordinarily available to the United States to protect
22 against the disclosure of classified information.”

23 (b) TABLE OF CONTENTS.—The table of contents in
24 the first section of the Foreign Intelligence Surveillance

1 Act of 1978 (50 U.S.C. 1801 et seq.) is amended by in-
2 serting after the item relating to section 102 the following:

“102A. Authorization for acquisition of certain foreign intelligence information.

“102B. Directives relating to electronic surveillance and other acquisitions of
foreign intelligence information.

“102C. Use of information acquired under section 102A.”

3 **SEC. 4. LIABILITY DEFENSE.**

4 (a) **IN GENERAL.**—Notwithstanding any other provi-
5 sion of law, and in addition to the immunities, privileges,
6 and defenses provided by any other source of law, no ac-
7 tion shall lie or be maintained in any court, and no pen-
8 alty, sanction, or other form of remedy or relief shall be
9 imposed by any court or any other body, against any per-
10 son for the alleged provision to an element of the intel-
11 ligence community of any information (including records
12 or other information pertaining to a customer), facilities,
13 or any other form of assistance, during the period begin-
14 ning on September 11, 2001, and ending on the effective
15 date of this Act, in connection with any alleged classified
16 communications intelligence activity that the Attorney
17 General or a designee of the Attorney General certifies,
18 in a manner consistent with the protection of state secrets,
19 is, was, would be, or would have been intended to protect
20 the United States from a terrorist attack. This section
21 shall apply to all actions, claims, or proceedings pending
22 on or after the effective date of this Act.

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

6 (c) DEFINITIONS.—In this section:

7 (1) INTELLIGENCE COMMUNITY.—The term
8 “intelligence community” has the meaning given the
9 term in section 3(4) of the National Security Act of
10 1947 (50 U.S.C. 401a(4)).

11 (2) PERSON.—The term “person” has the
12 meaning given the term in section 2510(6) of title
13 18, United States Code.

14 **SEC. 5. USE OF INFORMATION.**

15 Section 106 of the Foreign Intelligence Surveillance
16 Act of 1978 (50 U.S.C. 1806) is amended—

17 (1) in subsection (i)—

18 (A) by striking “radio communication” and
19 inserting “communication”; and

20 (B) by striking “contents indicates” and
21 inserting “contents contain significant foreign
22 intelligence information or indicate”; and

23 (2) by adding at the end the following:

24 “(l) Nothing in this section shall prevent the United
25 States from seeking protective orders or asserting privi-

1 leges ordinarily available to the United States to protect
2 against the disclosure of classified information.”

3 **SEC. 6. APPLICATIONS FOR COURT ORDERS.**

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

6 (1) in subsection (a)—

7 (A) by striking paragraphs (2) and (11);

8 (B) by redesignating paragraphs (3)
9 through (10) as paragraphs (2) through (9); re-
10 spectively;

11 (C) in paragraph (5), as redesignated by
12 subparagraph (B) of this paragraph, by striking
13 “detailed”;

14 (D) in paragraph (6), as redesignated by
15 subparagraph (B) of this paragraph, in the
16 matter preceding subparagraph (A)—

17 (i) by striking “Affairs or” and insert-
18 ing “Affairs,”; and

19 (ii) by striking “Senate—” and insert-
20 ing “Senate, or the Deputy Director of the
21 Federal Bureau of Investigation, if des-
22 ignated by the President as a certifying of-
23 ficial—”;

1 (E) in paragraph (7), as redesignated by
2 subparagraph (B) of this paragraph, by striking
3 “statement of” and inserting “listing of”;

4 (F) in paragraph (8), as redesignated by
5 subparagraph (B) of this paragraph, by adding
6 “and” at the end; and

7 (G) in paragraph (9), as redesignated by
8 subparagraph (B) of this paragraph, by striking
9 “; and’” and inserting a period;

10 (2) by striking subsection (b);

11 (3) by redesignating subsections (c) through (e)

12 as subsections (b) through (d), respectively; and

13 (4) in paragraph (1)(A) of subsection (d), as re-
14 designated by paragraph (3) of this subsection, by
15 striking “or the Director of National Intelligence”
16 and inserting “the Director of National Intelligence,
17 or the Director of the Central Intelligence Agency”.

18 **SEC. 7. ISSUANCE OF AN ORDER.**

19 Section 105 of the Foreign Intelligence Surveillance
20 Act of 1978 (50 U.S.C. 1805) is amended—

21 (1) in subsection (a)—

22 (A) by striking paragraph (1); and

23 (B) by redesignating paragraphs (2)
24 through (5) as paragraphs (1) through (4), re-
25 spectively;

1 (2) in subsection (c)(1)—

2 (A) in subparagraph (D), by adding “and”
3 at the end;

4 (B) in subparagraph (E), by striking “;
5 and” and inserting a period; and

6 (C) by striking subparagraph (F);

7 (3) by striking subsection (d);

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

10 (5) in subsection (d), as redesignated by para-
11 graph (4) of this section—

12 (A) in paragraph (1), by striking “120
13 days” and inserting “1 year”; and

14 (B) by amending paragraph (2) to read as
15 follows:

16 “(2) Extensions of an order issued under this title
17 may be granted on the same basis as an original order
18 upon an application for an extension and new findings
19 made in the same manner as required for an original order
20 and may be for a period not to exceed 1 year.”;

21 (6) by amending subsection (e), as redesignated
22 by paragraph (4) of this section, to read as follows:

23 “(e)(1) Notwithstanding any other provision of this
24 title, the Attorney General may authorize the emergency