

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

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4 S. 2248

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6 To amend the Foreign Intelligence Surveillance Act of
7 1978, to modernize and streamline the provisions of that
8 Act, and for other purposes.

9

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

12 Ordered to lie on the table and to be printed

13 AMENDMENT INTENDED TO BE PROPOSED BY _____

14 Viz:

15 Strike section 202 and insert the following:

16 **SEC. 202. SUBSTITUTION OF THE UNITED STATES**
17 **IN CERTAIN ACTIONS.**

18 (a) In General.—

19 (1) CERTIFICATION.—Notwithstanding any other provision of law, a Federal or
20 State court shall substitute the United States for an electronic communication service
21 provider with respect to any claim in a covered civil action as provided in this
22 subsection, if the Attorney General certifies to that court that—

23 (A) with respect to that claim, the assistance alleged to have been provided
24 by the electronic communication service provider was—

25 (i) provided in connection with an intelligence activity involving
26 communications that was—

27 (I) authorized by the President during the period beginning on
28 September 11, 2001, and ending on January 17, 2007; and

29 (II) designed to detect or prevent a terrorist attack, or activities in
30 preparation for a terrorist attack, against the United States; and

31 (ii) described in a written request or directive from the Attorney General
32 or the head of an element of the intelligence community (or the deputy of
33 such person) to the electronic communication service provider indicating
34 that the activity was—

1 (I) authorized by the President; and

2 (II) determined to be lawful; or

3 (B) the electronic communication service provider did not provide the
4 alleged assistance.

5 (2) SUBSTITUTION.—

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

8 (i) substitute the United States for the electronic communication service
9 provider as the defendant as to all claims designated by the Attorney
10 General in that certification; and

11 (ii) as to that electronic communication service provider—

12 (I) dismiss all claims designated by the Attorney General in that
13 certification; and

14 (II) enter a final judgment relating to those claims.

15 (B) CONTINUATION OF CERTAIN CLAIMS.—If a certification by the Attorney
16 General under paragraph (1) states that not all of the alleged assistance was
17 provided under a written request or directive described in paragraph (1)(A)(ii),
18 the electronic communication service provider shall remain as a defendant.

19 (3) PROCEDURES.—

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

22 (i) the claim shall be deemed to have been filed under section 1346(b)
23 of title 28, United States Code, except that sections 2401(b), 2675, and
24 2680(a) of title 28, United States Code, shall not apply; and

25 (ii) notwithstanding any other provision of law, the claim shall be
26 deemed timely filed against the United States if it was timely filed against
27 the electronic communication service provider.

28 (B) CONSTITUTIONAL AND STATUTORY CLAIMS.—Upon a substitution under
29 paragraph (2), for any claim under the Constitution of the United States or any
30 Federal statute—

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

33 (ii) with respect to any claim under a Federal statute that does not
34 provide a cause of action against the United States, the plaintiff shall be
35 permitted to amend such claim to substitute, as appropriate, a cause of
36 action under—

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

39 (II) section 2712 of title 18, United States Code, except that

1 paragraphs (1) and (2) of subsection (b) of that section and the
2 minimum amount of damages specified in subsection (a)(1) of that
3 section shall not apply; or

4 (III) section 110 of the Foreign Intelligence Surveillance Act of
5 1978 (50 U.S.C. 1810), except that subsection (b) of that section and
6 the minimum amount of damages specified in subsection (a) of that
7 section shall not apply;

8 (iii) notwithstanding any other provision of law, the statutes of
9 limitation applicable to the causes of action identified in clause (ii) shall
10 not apply to any amended claim under that clause, and any such cause of
11 action shall be deemed timely filed if any Federal statutory cause of action
12 against the electronic communication service provider was timely filed;

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

20 (C) DISCOVERY.—

21 (i) IN GENERAL— In a covered civil action in which the United States is
22 substituted as party-defendant under paragraph (2), any plaintiff may serve
23 third-party discovery requests to any electronic communications service
24 provider as to which all claims are dismissed.

25 (ii) BINDING THE GOVERNMENT—If a plaintiff in a covered civil
26 action serves Federal Rules of Civil Procedure Rule 30(b)(6) deposition notices
27 or Rule 36 requests for admission upon an electronic communications service
28 provider as to which all claims were dismissed, the electronic communications
29 service provider shall be deemed a party-defendant for purposes Rule 30(b)(6)
30 or Rule 36 and its answers and admissions shall be deemed binding upon the
31 government.

32 (b) Certifications.—

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

34 (A) a certification under subsection (a) may be provided and reviewed in
35 camera, ex parte, and under seal; and

36 (B) for any certification provided and reviewed as described in subparagraph
37 (A), the court shall not disclose or cause the disclosure of its contents.

38 (2) NONDELEGATION.—The authority and duties of the Attorney General under
39 this section shall be performed by the Attorney General or a designee in a position
40 not lower than the Deputy Attorney General.

41 (c) SOVEREIGN IMMUNITY.—This section, including any Federal statute cited in this

1 section that operates as a waiver of sovereign immunity, constitute the sole waiver of
2 sovereign immunity with respect to any covered civil action.

3 (d) Civil Actions in State Court.—For purposes of section 1441 of title 28, United
4 States Code, any covered civil action that is brought in a State court or administrative or
5 regulatory bodies shall be deemed to arise under the Constitution or laws of the United
6 States and shall be removable under that section.

7 (e) Rule of Construction.—Except as expressly provided in this section, nothing in this
8 section may be construed to limit any immunity, privilege, or defense under any other
9 provision of law, including any privilege, immunity, or defense that would otherwise
10 have been available to the United States absent its substitution as party-defendant or had
11 the United States been the named defendant.

12 (f) Effective Date and Application.—This section shall apply to any covered civil
13 action pending on or filed after the date of enactment of this Act.
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