

AMENDMENT NO.

Calendar No.

Purpose: To provide a statement of the exclusive means by which electronic surveillance and interception of certain communications may be conducted, and for other purposes.

IN THE SENATE OF THE UNITED STATES—110th Cong., 2d 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 Mrs. FEINSTEIN

Viz:

1 Strike section 102, and insert the following:

2 **SEC. 102. STATEMENT OF EXCLUSIVE MEANS BY WHICH**
3 **ELECTRONIC SURVEILLANCE AND INTERCEP-**
4 **TION OF CERTAIN COMMUNICATIONS MAY BE**
5 **CONDUCTED.**

6 (a) STATEMENT OF EXCLUSIVE MEANS.—Title I of
7 the Foreign Intelligence Surveillance Act of 1978 (50

1 U.S.C. 1801 et seq.) is amended by adding at the end
2 the following new section:

3 “STATEMENT OF EXCLUSIVE MEANS BY WHICH ELEC-
4 TRONIC SURVEILLANCE AND INTERCEPTION OF CER-
5 TAIN COMMUNICATIONS MAY BE CONDUCTED

6 “SEC. 112. (a) Except as provided in subsection (b),
7 the procedures of chapters 119, 121 and 206 of title 18,
8 United States Code, and this Act shall be the exclusive
9 means by which electronic surveillance (as defined in sec-
10 tion 101(f), regardless of the limitation of section 701)
11 and the interception of domestic wire, oral, or electronic
12 communications may be conducted.

13 “(b) Only an express statutory authorization for elec-
14 tronic surveillance or the interception of domestic wire,
15 oral, or electronic communications, other than as an
16 amendment to this Act or chapters 119, 121, or 206 of
17 title 18, United States Code, shall constitute an additional
18 exclusive means for the purpose of subsection (a).”.

19 (b) OFFENSE.—Section 109(a) of the Foreign Intel-
20 ligence Surveillance Act of 1978 (50 U.S.C. 1809(a)) is
21 amended by striking “authorized by statute” each place
22 it appears in such section and inserting “authorized by
23 this Act, chapter 119, 121, or 206 of title 18, United
24 States Code, or any express statutory authorization that
25 is an additional exclusive means for conducting electronic
26 surveillance under section 112.”.

1 (c) AUTHORIZATION FOLLOWING ATTACK OR DEC-
2 LARATION OF WAR.—The Foreign Intelligence Surveil-
3 lance Act of 1978 (50 U.S.C. 1801 et seq.) is amended
4 by—

5 (1) striking section 111 and inserting the fol-
6 lowing:

7 “AUTHORIZATION FOLLOWING ATTACK OR DECLARATION
8 OF WAR

9 “SEC. 111. (a) Notwithstanding any other law, the
10 President, through the Attorney General, may authorize
11 electronic surveillance or a physical search of stored elec-
12 tronic communications or stored electronic data that is in
13 the custody of an electronic communication service pro-
14 vider without a court order to acquire foreign intelligence
15 information, if such electronic surveillance or physical
16 search of stored electronic communications or stored elec-
17 tronic data that is in the custody of an electronic commu-
18 nication service provider is reasonably related to the appli-
19 cable circumstance described in paragraph (1), (2), or (3),
20 for a period of not more than 45 days after the date of—

21 “(1) a national emergency created by an attack
22 by a foreign power or agent of a foreign power on
23 the United States, its territories or possessions, or
24 the Armed Forces, if the President determines there
25 is a threat of an additional such attack;

1 “(2) an authorization for the use of military
2 force under the War Powers Resolution (50 U.S.C.
3 1541 et seq.); or

4 “(3) a declaration of war by the Congress.

5 “(b) If the President determines to exercise the au-
6 thority under subsection (a), the President, through the
7 Attorney General, shall, not later than 5 days after mak-
8 ing that determination, submit to the Foreign Intelligence
9 Surveillance Court and Congress a classified written noti-
10 fication that the use of such authority has been initiated.

11 “(c) The President, through the Attorney General,
12 may authorize 1 extension of any electronic surveillance
13 or physical search of stored electronic communications or
14 stored electronic data that is in the custody of an elec-
15 tronic communication service provider authorized under
16 paragraph (2) or (3) of subsection (a) for a period of not
17 more than 45 days.

18 “(d) Not later than 30 days after the end of the pe-
19 riod for which electronic surveillance or a physical search
20 of stored electronic communications or stored electronic
21 data that is in the custody of an electronic communication
22 service provider is authorized under subsection (a) or ex-
23 tended under subsection (c), the President, through the
24 Attorney General, shall submit to the Foreign Intelligence
25 Surveillance Court and the congressional intelligence com-

1 mittees a written report describing the exercise of such
2 authority during such period.

3 “(e) In this section—

4 “(1) the term ‘congressional intelligence com-
5 mittees’ means the Select Committee on Intelligence
6 of the Senate and the Permanent Select Committee
7 on Intelligence of the House of Representatives;

8 “(2) the term ‘electronic communication service
9 provider’ has the meaning given that term in section
10 801; and

11 “(3) the term ‘Foreign Intelligence Surveillance
12 Court’ means the court established under section
13 103(a).”; and

14 (2) striking section 404 and inserting the fol-
15 lowing:

16 “AUTHORIZATION FOLLOWING ATTACK OR DECLARATION
17 OF WAR

18 “SEC. 404. (a) Notwithstanding any other law, the
19 President, through the Attorney General, may authorize
20 the use of a pen register or trap and trace device without
21 a court order to acquire foreign intelligence information,
22 if such use of a pen register or trap and trace device is
23 reasonably related to the applicable circumstance de-
24 scribed in paragraph (1), (2), or (3), for a period of not
25 more than 45 days after the date of—

1 “(1) a national emergency created by an attack
2 by a foreign power or agent of a foreign power on
3 the United States, its territories or possessions, or
4 the Armed Forces, if the President determines there
5 is a threat of an additional such attack;

6 “(2) an authorization for the use of military
7 force under the War Powers Resolution (50 U.S.C.
8 1541 et seq.); or

9 “(3) a declaration of war by the Congress.

10 “(b) If the President determines to exercise the au-
11 thority under subsection (a), the President, through the
12 Attorney General, shall, not later than 5 days after mak-
13 ing that determination, submit to the Foreign Intelligence
14 Surveillance Court and Congress a classified written noti-
15 fication that the use of such authority has been initiated.

16 “(c) The President, through the Attorney General,
17 may authorize 1 extension of the use of a pen register
18 or trap and trace device authorized under paragraph (2)
19 or (3) of subsection (a) for a period of not more than 45
20 days.

21 “(d) Not later than 30 days after the end of the pe-
22 riod for which the use of a pen register or trap and trace
23 device is authorized under subsection (a) or extended
24 under subsection (c), the President, through the Attorney
25 General, shall submit to the Foreign Intelligence Surveil-

1 lance Court and the congressional intelligence committees
2 a written report describing the exercise of such authority
3 during such period.

4 “(e) In this section—

5 “(1) the term ‘congressional intelligence com-
6 mittees’ means the Select Committee on Intelligence
7 of the Senate and the Permanent Select Committee
8 on Intelligence of the House of Representatives; and

9 “(2) the term ‘Foreign Intelligence Surveillance
10 Court’ means the court established under section
11 103(a).”.

12 (d) CONFORMING AMENDMENTS.—

13 (1) IN GENERAL.—Section 2511(2) of title 18,
14 United States Code, is amended—

15 (A) in paragraph (a), by adding at the end
16 the following:

17 “(iii) If a certification under subparagraph (ii)(B) for
18 assistance to obtain foreign intelligence information is
19 based on statutory authority, the certification shall iden-
20 tify the specific statutory provision, and shall certify that
21 the statutory requirements have been met.”; and

22 (B) in paragraph (f), by striking “, as de-
23 fined in section 101 of such Act,” and inserting

24 “(as defined in section 101(f) of such Act re-

1 gardless of the limitation of section 701 of such
2 Act)”.

3 (2) TABLE OF CONTENTS.—The table of con-
4 tents in the first section of the Foreign Intelligence
5 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.)
6 is amended by—

7 (A) striking the item relating to section
8 111 and inserting the following:

“Sec. 111. Authorization following attack or declaration of war.

“Sec. 112. Statement of exclusive means by which electronic surveillance and
interception of certain communications may be conducted.”;
and

9 (B) striking the item relating to section
10 404 and inserting the following:

“Sec. 404. Authorization following attack or declaration of war.”.

AMENDMENT NO.

Calendar No.

Purpose: To expedite the review of challenges to directives under the Foreign Intelligence Surveillance Act of 1978.

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. ROCKEFELLER
(for himself and Mr. BOND)

Viz:

1 On page 13, strike lines 3 through 13, and insert the

2 following:

3 “(C) STANDARDS FOR REVIEW.—A judge

4 considering a petition to modify or set aside a

5 directive may grant such petition only if the

6 judge finds that the directive does not meet the

7 requirements of this section, or is otherwise un-

8 lawful.

1 “(D) PROCEDURES FOR INITIAL RE-
2 VIEW.—A judge shall conduct an initial review
3 not later than 5 days after being assigned a pe-
4 tition described in subparagraph (C). If the
5 judge determines that the petition consists of
6 claims, defenses, or other legal contentions that
7 are not warranted by existing law or by a non-
8 frivolous argument for extending, modifying, or
9 reversing existing law or for establishing new
10 law, the judge shall immediately deny the peti-
11 tion and affirm the directive or any part of the
12 directive that is the subject of the petition and
13 order the recipient to comply with the directive
14 or any part of it. Upon making such a deter-
15 mination or promptly thereafter, the judge shall
16 provide a written statement for the record of
17 the reasons for a determination under this sub-
18 paragraph.

19 “(E) PROCEDURES FOR PLENARY RE-
20 VIEW.—If a judge determines that a petition
21 described in subparagraph (C) requires plenary
22 review, the judge shall affirm, modify, or set
23 aside the directive that is the subject of that pe-
24 tition not later than 30 days after being as-
25 signed the petition, unless the judge, by order

1 for reasons stated, extends that time as nec-
2 essary to comport with the due process clause
3 of the fifth amendment to the Constitution of
4 the United States. Unless the judge sets aside
5 the directive, the judge shall immediately affirm
6 or affirm with modifications the directive, and
7 order the recipient to comply with the directive
8 in its entirety or as modified. The judge shall
9 provide a written statement for the records of
10 the reasons for a determination under this sub-
11 paragraph.

12 On page 13, line 14, strike “(D)” and insert “(F)”.

13 On page 13, line 17, strike “(E)” and insert “(G)”.

14 On page 14, strike lines 10 through 19, and insert
15 the following:

16 “(C) STANDARDS FOR REVIEW.—A judge
17 considering a petition filed under subparagraph
18 (A) shall issue an order requiring the electronic
19 communication service provider to comply with
20 the directive or any part of it, as issued or as
21 modified, if the judge finds that the directive

1 meets the requirements of this section, and is
2 otherwise lawful.

3 “(D) PROCEDURES FOR REVIEW.—The
4 judge shall render a determination not later
5 than 30 days after being assigned a petition
6 filed under subparagraph (A), unless the judge,
7 by order for reasons stated, extends that time
8 if necessary to comport with the due process
9 clause of the fifth amendment to the Constitu-
10 tion of the United States. The judge shall pro-
11 vide a written statement for the record of the
12 reasons for a determination under this para-
13 graph.

14 On page 14, line 20, strike “(D)” and insert “(E)”.

15 On page 14, line 24, strike “(E)” and insert “(F)”.