

1 Title: To establish procedures for the review of electronic surveillance programs.  
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4 Be it enacted by the Senate and House of Representatives of the United States of  
5 America in Congress assembled,

## 6 SECTION 1. SHORT TITLE.

7 This Act may be cited as the “National Security Surveillance Act of 2006”.

## 8 SEC. 2. FINDINGS.

9 Congress finds the following:

10 (1) After the terrorist attacks of September 11, 2001, President Bush authorized  
11 the National Security Agency to intercept communications between people inside  
12 the United States, including American citizens, and terrorism suspects overseas.

13 (2) One of the lessons learned from September 11, 2001, is that the enemies who  
14 seek to greatly harm and terrorize our Nation utilize technologies and techniques  
15 that defy conventional law enforcement practices.

16 (3) The Commander in Chief requires the ability and means to detect and track an  
17 enemy that can master and exploit modern technology.

18 (4) Although it is essential that the President have all necessary means to protect  
19 us against our enemies, it is equally essential that, in doing so, the President does not  
20 compromise the very civil liberties that the President seeks to safeguard. As Justice  
21 Hugo Black observed, “The President’s power, if any, to issue [an] order must stem  
22 either from an Act of Congress or from the Constitution itself.” *Youngstown Sheet  
23 & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (opinion by Black, J.).

24 (5) In 2004, Justice Sandra Day O’Connor explained in her plurality opinion for  
25 the Supreme Court in *Hamdi v. Rumsfeld*: “We have long since made clear that a  
26 state of war is not a blank check for the President when it comes to the rights of the  
27 Nation’s citizens. *Youngstown Sheet & Tube*, 343 U.S., at 587, 72 S.Ct. 863.  
28 Whatever power the United States Constitution envisions for the Executive in its  
29 exchanges with other nations or with enemy organizations in times of conflict, it  
30 most assuredly envisions a role for all three branches when individual liberties are at  
31 stake.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (citations omitted).

32 (6) Similarly, as Justice Jackson famously observed in his *Youngstown*  
33 concurrence: “When the President acts pursuant to an express or implied  
34 authorization of Congress, his authority is at its maximum, for it includes all that he  
35 possesses in his own right plus all that Congress can delegate.... When the President  
36 acts in absence of either a congressional grant or denial of authority, he can only rely  
37 upon his own independent powers, but there is a zone of twilight in which he and  
38 Congress may have concurrent authority, or in which its distribution is uncertain.  
39 Therefore, congressional inertia, indifference or quiescence may sometimes, at least  
40 as a practical matter, enable, if not invite, measures on independent presidential  
41 responsibility... When the President takes measures incompatible with the expressed

1 or implied will of Congress, his power is at its lowest ebb, for then he can rely only  
2 upon his own constitutional powers minus any constitutional powers of Congress  
3 over the matter. Courts can sustain exclusive Presidential control in such a case only  
4 by disabling the Congress from acting upon the subject.”. *Youngstown Sheet &*  
5 *Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

6 (7) The Constitution provides Congress with broad powers of oversight over  
7 national security and foreign policy, under article I, section 8 of the Constitution of  
8 the United States, which confers on Congress numerous powers, including the  
9 powers—

10 (A) “To declare War, grant Letters of Marque and Reprisal, and make Rules  
11 concerning Captures on Land and Water”;

12 (B) “To raise and support Armies”;

13 (C) “To provide and maintain a Navy”;

14 (D) “To make Rules for the Government and Regulation of the land and  
15 naval Forces”;

16 (E) “To provide for calling forth the Militia to execute the Laws of the  
17 Union, suppress Insurrections and repel Invasions”; and

18 (F) “To provide for organizing, arming, and disciplining the Militia, and for  
19 governing such Part of them as may be employed in the Service of the United  
20 States”.

21 (8) It is in our Nation’s best interest for Congress to use its oversight power to  
22 establish a system to ensure that electronic surveillance programs do not infringe on  
23 the constitutional rights of Americans, while at the same time making sure that the  
24 President has all the powers and means necessary to detect and track our enemies.

25 (9) While Attorney General Alberto Gonzales explained that the executive branch  
26 reviews the electronic surveillance program of the National Security Agency every  
27 45 days to ensure that the program is not overly broad, it is the belief of Congress  
28 that approval and supervision of electronic surveillance programs should be  
29 conducted outside of the executive branch, by the Article III court established under  
30 section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803). It  
31 is also the belief of Congress that it is appropriate for an Article III court to pass  
32 upon the constitutionality of electronic surveillance programs that may implicate the  
33 rights of Americans.

34 (10) The Foreign Intelligence Surveillance Court is the proper court to approve  
35 and supervise classified electronic surveillance programs because it is adept at  
36 maintaining the secrecy with which it was charged and it possesses the requisite  
37 expertise and discretion for adjudicating sensitive issues of national security.

38 (11) In 1975, then-Attorney General Edward Levi, a strong defender of executive  
39 authority, testified that in times of conflict, the President needs the power to conduct  
40 long-range electronic surveillance and that a foreign intelligence surveillance court  
41 should be empowered to issue special warrants in these circumstances.

1 (12) This Act clarifies and definitively establishes that the Foreign Intelligence  
2 Surveillance Court has the authority to review electronic surveillance programs and  
3 pass upon their constitutionality. Such authority is consistent with well-established,  
4 longstanding practices.

5 (13) The Foreign Intelligence Surveillance Court already has broad authority to  
6 approve surveillance of members of international conspiracies in addition to  
7 granting warrants for surveillance of a particular individual under sections 104, 105,  
8 and 402 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804, 1805,  
9 1842).

10 (14) Prosecutors have significant flexibility in investigating domestic conspiracy  
11 cases. Courts have held that broad warrants comply with the Fourth Amendment  
12 when they relate to complex, far reaching, and multi-faceted criminal enterprises  
13 like drug conspiracies and money laundering rings. The courts recognize that  
14 applications for search warrants must be judged in a common sense and realistic  
15 fashion, and they permit broad warrant language where, due to the nature and  
16 circumstances of the investigation and the criminal organization, more precise  
17 descriptions are not feasible.

18 (15) Federal agents investigating international terrorism by foreign enemies are  
19 entitled to tools at least as broad as those used by federal agents investigating  
20 domestic crimes by U.S. citizens. The Supreme Court, in the Keith Case,  
21 recognized that the standards and procedures used to fight ordinary crime may not  
22 be applicable to cases involving national security. The Court recognized that  
23 national “security surveillance may involve different policy and practical  
24 considerations from the surveillance of ordinary crime” and that courts should be  
25 more flexible in issuing warrants in national security cases. *United States v. United*  
26 *States District Court for the Eastern District of Michigan*, 407 US 297, 322 (1972).

27 (16) By authorizing the Foreign Intelligence Surveillance Court to review the  
28 electronic surveillance program, Congress preserves the ability of the Commander in  
29 Chief to use the necessary means to guard our national security, while also  
30 protecting the civil liberties and constitutional rights that we cherish.

### 31 SEC. 3. DEFINITIONS.

32 The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is  
33 amended—

34 (1) by redesignating title VII as title VIII;

35 (2) by redesignating section 701 as section 801; and

36 (3) by inserting after title VI the following:

#### 37 “TITLE VII—ELECTRONIC SURVEILLANCE

#### 38 “SEC. 701. DEFINITIONS.

39 “As used in this title—

1 “(1) the terms ‘agent of a foreign power’, ‘Attorney General’, ‘foreign  
2 intelligence information’, ‘foreign power’, ‘international terrorism’, ‘minimization  
3 procedures’, ‘person’, ‘United States’, and ‘United States person’ have the same  
4 meaning as in section 101;

5 “(2) the term ‘Foreign Intelligence Surveillance Court’ means the court  
6 established under section 103(a);

7 “(3) the term ‘electronic communication’ means any transfer of signs, signals,  
8 writing, images, sounds, data, or intelligence of any nature transmitted in whole or  
9 in part by a wire, radio, electromagnetic, photoelectronic or photooptical system,  
10 cable, or other like connection furnished or operated by any person engaged as a  
11 common carrier in providing or operating such facilities for the transmission of  
12 communications;

13 “(4) the term ‘electronic surveillance’ means the acquisition by an electronic,  
14 mechanical, or other surveillance device of the substance of any electronic  
15 communication sent by, received by, or intended to be received by a person who is  
16 in the United States, where there is a reasonable possibility that the surveillance will  
17 intercept communication in which a participant in the communication has a  
18 reasonable expectation of privacy.

19 “(5) the term ‘electronic surveillance program’ means a program to engage in  
20 electronic surveillance—

21 “(A) to gather foreign intelligence information or to protect against  
22 international terrorism or clandestine intelligence activities by obtaining the  
23 substance of or information regarding electronic communications sent by,  
24 received by, or intended to be received by a foreign power, an agent or agents  
25 of a foreign power, or a person or persons who have had communication with a  
26 foreign power or agent of a foreign power;

27 “(B) where it is not feasible to name every person and location to be  
28 subjected to electronic surveillance; and

29 “(C) where effective gathering of foreign intelligence information requires  
30 an extended period of electronic surveillance.

31 “(6) the term ‘intercept’ means the acquisition of the substance of any electronic  
32 communication by a person through the use of any electronic, mechanical, or other  
33 device; and

34 “(7) the term ‘substance’ means any information concerning the words, purport,  
35 or meaning of a communication, and does not include information identifying the sender,  
36 origin, or recipient of the communication or the date or time of its transmission.”.

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38 **SEC. 4. FOREIGN INTELLIGENCE SURVEILLANCE**  
39 **COURT JURISDICTION TO REVIEW ELECTRONIC**  
40 **SURVEILLANCE PROGRAMS.**

1 Title VII of the Foreign Intelligence Surveillance Act of 1978, as amended by section  
2 3, is amended by adding at the end the following:

3 “SEC. 702. FOREIGN INTELLIGENCE  
4 SURVEILLANCE COURT JURISDICTION TO REVIEW  
5 ELECTRONIC SURVEILLANCE PROGRAMS.

6 “(a) In General.—The Foreign Intelligence Surveillance Court shall have jurisdiction  
7 to issue an order under this title, lasting not longer than 45 days, that authorizes an  
8 electronic surveillance program to obtain foreign intelligence information or to protect  
9 against international terrorism or clandestine intelligence activities.

10 “(b) Reauthorization.—In order to continue an electronic surveillance program after  
11 the period described in subsection (a), the Attorney General shall submit a new  
12 application under section 703. There shall be no limit on the number of times the  
13 Attorney General may seek approval of an electronic surveillance program.

14 “(c) Modifications in event application is denied.—In the event that the Foreign  
15 Intelligence Surveillance Court refuses to approve an application under subsection (a),  
16 the court shall state its reasons in a written opinion. The Attorney General shall be  
17 permitted to submit a new application under section 703 for the electronic surveillance  
18 program, reflecting modifications to address the concerns set forth in the written opinion  
19 of the Foreign Intelligence Surveillance Court. There shall be no limit on the number of  
20 times the Attorney General may seek approval of an electronic surveillance program.

21 “(d) Communications Subject to this Act. —

22 “(1) The provisions of this Act requiring authorization by the Foreign  
23 Intelligence Surveillance Court apply only to interception of the substance of  
24 electronic communications sent by, received by, or intended to be received by a  
25 person who is in the United States, where there is a reasonable possibility that a  
26 participant in the communication has a reasonable expectation of privacy.

27 “(2) The provisions of this Act requiring authorization by the Foreign  
28 Intelligence Surveillance Court do not apply to information identifying the sender,  
29 origin, or recipient of the electronic communication or the date or time of its  
30 transmission that is obtained without review of the substance of the electronic  
31 communication.

32 “(e) Programs Subject to this Act.—

33 “(1) IN GENERAL.— All electronic surveillance programs to obtain foreign  
34 intelligence information or to protect against international terrorism or clandestine  
35 intelligence activities must be submitted for judicial authorization to the Foreign  
36 Intelligence Surveillance Court.

37 “(2) EXISTING PROGRAMS.— Not later than 45 days after the date of enactment of  
38 this title, the Attorney General shall submit an application under section 703 for  
39 approval of the electronic surveillance program sometimes referred to as the  
40 ‘Terrorist Surveillance Program’ and discussed by the Attorney General before the  
41 Committee on the Judiciary of the United States Senate on February 6, 2006. Not

1 later than 120 days after the date of enactment of this title, the Attorney General  
2 shall submit applications under Foreign Intelligence Surveillance Act (18 U.S.C.  
3 1801 et. seq.) for approval of any other electronic surveillance programs in existence  
4 on the date of enactment of this title that have not been submitted to the Foreign  
5 Intelligence Surveillance Court.

## 6 SEC. 5. APPLICATIONS FOR APPROVAL OF 7 ELECTRONIC SURVEILLANCE PROGRAMS.

8 Title VII of the Foreign Intelligence Surveillance Act of 1978, as amended by section  
9 4, is amended by adding at the end the following:

### 10 “SEC. 703. APPLICATIONS FOR APPROVAL OF 11 ELECTRONIC SURVEILLANCE PROGRAMS.

12 “(a) In General.—Each application for approval of an electronic surveillance program  
13 under this title shall—

14 “(1) be made by the Attorney General;

15 “(2) include [a statement of] the authority conferred on the Attorney General by  
16 the President of the United States;

17 “(3) include a statement setting forth the legal basis for the conclusion by the  
18 Attorney General that the electronic surveillance program is consistent with the  
19 requirements of the Constitution of the United States;

20 “(4) certify that the information sought cannot reasonably be obtained by  
21 conventional investigative techniques or through an application under section 104 of  
22 the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804);

23 “(5) include the name, if known, identity, or description of the foreign power or  
24 agent of a foreign power the electronic surveillance program seeks to monitor or  
25 detect;

26 “(6) include a statement of the means and operational procedures by which the  
27 surveillance will be executed and effected;

28 “(7) include a statement of the facts and circumstances relied upon by the  
29 Attorney General to justify the belief that at least one of the participants in the  
30 communications to be intercepted by the electronic surveillance program will be the  
31 foreign power or agent of a foreign power specified in subsection 5, or a person who  
32 has had communication with the foreign power or agent of a foreign power specified  
33 in subsection 5;

34 “(8) include a statement of the proposed minimization procedures;

35 “(9) include a detailed description of the nature of the information sought and the  
36 type of communication to be intercepted by the electronic surveillance program;

37 “(10) include an estimate of the number of communications to be intercepted by  
38 the electronic surveillance program during the requested authorization period;

1 “(11) specify the date that the electronic surveillance program that is the subject  
2 of the application was initiated, if it was initiated before submission of the  
3 application;

4 “(12) certify that any continuous surveillance of a person in the United States  
5 under this title shall cease after 90 days, unless the government has obtained judicial  
6 authorization for continued surveillance of the person in the United States under  
7 section 104 of the Foreign Intelligence Surveillance Act (18 U.S.C. 1804) or another  
8 federal statute;

9 “(13) include a statement of the facts concerning all previous applications that  
10 have been made to the Foreign Intelligence Surveillance Court under this title  
11 involving the electronic surveillance program in the application, including the  
12 minimization procedures and the means and operational procedures proposed, and  
13 the Foreign Intelligence Surveillance Court’s decision on each previous application;  
14 and

15 “(14) include a statement of the facts concerning the implementation of the  
16 electronic surveillance program described in the application, including, for any  
17 period of operation of the program authorized at least 45 days prior to the date of  
18 submission of the application—

19 “(A) the minimization procedures implemented;

20 “(B) the means and operational procedures by which the surveillance was  
21 executed and effected;

22 “(C) the number of communications intercepted by the electronic  
23 surveillance program;

24 “(D) the identity, if known, or a description of the United States persons  
25 whose communications sent or received in the United States were intercepted  
26 by the electronic surveillance program;

27 “(E) a description of the foreign intelligence information obtained through  
28 the electronic surveillance program.

29 “(b) Additional Information.—The Foreign Intelligence Surveillance Court may  
30 require the Attorney General to furnish such other information as may be necessary to  
31 make a determination under section 704.”.

## 32 SEC. 6. APPROVAL OF ELECTRONIC 33 SURVEILLANCE PROGRAMS.

34 Title VII of the Foreign Intelligence Surveillance Act of 1978, as amended by section  
35 5, is amended by adding at the end the following:

### 36 “SEC. 704. APPROVAL OF ELECTRONIC 37 SURVEILLANCE PROGRAMS.

38 “(a) Necessary Findings.—Upon receipt of an application under section 703, the  
39 Foreign Intelligence Surveillance Court shall enter an ex parte order as requested, or as

1 modified, approving the electronic surveillance program if it finds that—

2 “(1) the President has authorized the Attorney General to make the application for  
3 electronic surveillance for foreign intelligence information;

4 “(2) approval of the electronic surveillance program in the application is  
5 consistent with the duty of the Foreign Intelligence Surveillance Court to uphold the  
6 Constitution of the United States;

7 “(3) there is probable cause to believe that the electronic surveillance program  
8 will intercept communications of the foreign power or agent of a foreign power  
9 specified in the application, or a person who has had communication with the  
10 foreign power or agent of a foreign power specified in the application;

11 “(4) the proposed minimization procedures meet the definition of minimization  
12 procedures under section 101(h);

13 “(5) the application contains all statements and certifications required by section  
14 703; and

15 “(6) an evaluation of the implementation of the electronic surveillance program,  
16 as described in subsection (b), supports approval of the application.

17 “(b) Evaluation of the Implementation of the Electronic Surveillance Program.—In  
18 determining whether the implementation of the electronic surveillance program supports  
19 approval of the application for purposes of subsection (a)(6), the Foreign Intelligence  
20 Surveillance Court shall consider the performance of the electronic surveillance program  
21 for at least three previously authorized periods, to the extent such information is  
22 available, and shall—

23 “(1) evaluate whether the electronic surveillance program has been implemented  
24 in accordance with the proposal by the Federal Government by comparing—

25 “(A) the minimization procedures proposed with the minimization  
26 procedures implemented;

27 “(B) the nature of the information sought with the nature of the information  
28 obtained; and

29 “(C) the means and operational procedures proposed with the means and  
30 operational procedures implemented;

31 “(2) consider the number of communications intercepted by the electronic  
32 surveillance program and the length of time the electronic surveillance program has  
33 been in existence; and

34 “(3) consider the benefits of the electronic surveillance program, as reflected by  
35 the foreign intelligence information obtained.

## 36 SEC. 7. CONGRESSIONAL OVERSIGHT.

37 Title VII of the Foreign Intelligence Surveillance Act of 1978, as amended by section  
38 6, is amended by adding at the end the following:

### 39 “SEC. 705. CONGRESSIONAL OVERSIGHT.

1 “(a) In General.—Not less often than every 45 days, the Attorney General shall submit  
2 to the chairman and the ranking member of the Select Committee on Intelligence of the  
3 Senate and the chairman and the ranking member of the Permanent Select Committee on  
4 Intelligence of the House of Representatives, a written report on the activities during the  
5 previous authorized period under any electronic surveillance program authorized under  
6 this title.

7 “(b) Contents.—Each report described in subsection (a) shall provide, with respect to  
8 the previous authorized period—

9 “(1) the number of communications intercepted by the electronic surveillance  
10 program

11 “(2) a description of the means and operational procedures by which the  
12 surveillance was executed and effected;

13 “(3) a description of the minimization procedures implemented; and

14 “(4) a description of the foreign intelligence information obtained through the  
15 electronic surveillance program.

16 “(c) Rule of Construction.—Nothing in this title shall be deemed to limit the authority  
17 or responsibility of any committee of either House of Congress to obtain such  
18 information as such committee may need to carry out its respective functions and  
19 duties.”.

## 20 SEC. 8. CONFORMING AMENDMENT.

21 The table of contents for the Foreign Intelligence Surveillance Act of 1978 is amended  
22 by striking the items related to title VII and section 701 and inserting the following:

### 23 “TITLE VII—ELECTRONIC SURVEILLANCE

24 “Sec.701.Definitions.

25 “Sec.702.Foreign Intelligence Surveillance Court jurisdiction to review electronic  
26 surveillance programs.

27 “Sec.703.Applications for approval of electronic surveillance programs.

28 “Sec.704.Approval of electronic surveillance programs.

29 “Sec.705.Congressional oversight.

### 30 “TITLE VIII—EFFECTIVE DATE

31 “Sec.801.Effective date.”.

32