

94TH CONGRESS
2D SESSION

S. 3197

IN THE SENATE OF THE UNITED STATES

MARCH 23, 1976

Mr. KENNEDY (for himself, Mr. NELSON, Mr. MATTHIAS, Mr. HUGH SCOTT, Mr. McCLELLAN, Mr. HRUSKA, Mr. BAYH, and Mr. ROBERT C. BYRD) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 *That this Act may be cited as the "Foreign Intelligence Sur-*
4 *veillance Act of 1976".*

5 SEC. 2. Title 18, United States Code, is amended by
6 adding a new chapter after chapter 119 as follows:

ii

MAY CONTAIN CONGRESSIONAL MATERIALS AFTER ALL OTHER REVIEWS
COMPLETED

1 "Chapter 120.—ELECTRONIC SURVEILLANCE WITH-
2 IN THE UNITED STATES FOR FOREIGN INTEL-
3 LIGENCE PURPOSES

4 "§ 2521. Definitions

5 "(a) Except as otherwise provided in this section the
6 definitions of section 2510 of this title shall apply to this
7 chapter.

8 "(b) As used in this chapter—

9 "(1) 'Agent of a foreign power' means—

10 "(i) a person who is not a permanent resident
11 alien or citizen of the United States and who is
12 an officer or employee of a foreign power; or

13 "(ii) a person who, pursuant to the direction
14 of a foreign power, is engaged in clandestine in-
15 telligence activities, sabotage, or terrorist activities,
16 or who conspires with, ^{knowingly} assists or ^{or} aids and abets such
17 a person in engaging in such activities.

18 "(2) 'Electronic surveillance' means—

19 "(i) the acquisition, by an electronic, mechan-
20 ical, or other ^{surveillance} device, of the contents of a wire
21 communication to or from a person in the United
22 States, without the consent of any party thereto,
23 where such acquisition occurs in the United States
24 while the communication is being transmitted by
25 wire;

"(ii) the acquisition, by an electronic, mechanical, or other ^{surveillance} device, of the contents of a radio ^{communication} transmission, without the consent of any party thereto, made with a reasonable expectation of privacy where both the ^{sender} point of origin and all intended recipients are located within the United States; or

"(iii) the installation of an electronic, mechanical, or other device in the United States to acquire information ^{other than from a communication} ~~not transmitted by wire or radio~~ under circumstances in which a person has a reasonable constitutionally protected right of privacy. ~~expectation of privacy.~~

"(3) 'Foreign intelligence information' means—

"(i) information ^{deemed necessary} relating to the ability of the United States to protect itself against actual or potential attack or other hostile acts of a foreign power or its agents;

"(ii) information, with respect to foreign powers or territories, which because of its importance is ^(a) deemed essential to the security or national ^(b) defense of the Nation or to the conduct of the foreign affairs of the United States;

"(iii) information ^{deemed necessary} relating to the ability of the United States to protect the national security against foreign intelligence activities.

"(4) 'Attorney General' means the Attorney Gen-

1 eral of the United States or in his absence

2 Attorney General.

3 " (5) 'Foreign power' includes foreign governments, factions of
4 foreign political foreign a foreign
5 factions, (parties, military forces, or agencies or in- government
6 enterprises controlled by
7 mentalities of such entities, or organizations composed of
8 such entities, whether or not recognized by the United
9 States, or foreign-based terrorist groups.

10 "§ 2522. Authorization for electronic surveillance for for-
11 eign intelligence purposes.

12 "Applications for a court order under this chapter are
13 authorized if the President has, by written authorization,
14 empowered the Attorney General to approve applications to
15 Federal judges having jurisdiction under section 2523 of
16 this chapter, and a judge to whom an application is made
17 may grant an order, in conformity with section 2525 of this
18 chapter, approving electronic surveillance of a foreign power
19 or an agent of a foreign power for the purpose of obtaining
20 foreign intelligence information.

21 "§ 2523. Designation of judges authorized to grant orders
22 for electronic surveillance

23 "(a) The Chief Justice of the United States shall desig-
24 nate seven district court judges, each of whom shall have
25 jurisdiction to hear applications for and grant orders approv-
ing electronic surveillance anywhere within the United States
under the procedures set forth in this chapter.

⁵ one of whom shall be designated as the
presiding judge

1 “(b) The Chief Justice shall designate three judges from
2 the United States district courts or courts of appeals who
3 together shall comprise a special court of appeals which shall
4 have jurisdiction to hear an appeal^s by the United States from
5 the denial of any application made under this chapter. The
6 United States shall further have the right to appeal an
7 affirmance of denial by that court to the Supreme Court. All
8 appeals under this chapter shall be heard and determined as
9 expeditiously as possible.

10 “(c) Applications made and orders granted under this
11 chapter shall be sealed by the presiding judge and shall be
12 kept under security measures established by the Chief Jus-
13 tice in consultation with the Attorney General.

14 “§ 2524. Application for an order

15 “(a) Each application for an order approving electronic
16 surveillance under this chapter shall be made in writing upon
17 oath or affirmation to a judge having jurisdiction under sec-
18 tion 2523 of this chapter. Each application must be approved
19 by the Attorney General and shall include the following
20 information:

21 “(1) the identity of the officer making the appli-
22 cation;

23 “(2) the authority conferred on the applicant by
24 the President of the United States and the approval of
25 the Attorney General to make the application;

1 “(b) The Chief Justice shall designate three judges from
2 the United States district courts or courts of appeals who
3 together shall comprise a special court of appeals which shall
4 have jurisdiction to hear an appeal^s by the United States from
5 the denial of any application made under this chapter. The
6 United States shall further have the right to appeal an
7 affirmance of denial by that court to the Supreme Court. All
8 appeals under this chapter shall be heard and determined as
9 expeditiously as possible.

10 “(c) Applications made and orders granted under this
11 chapter shall be sealed by the presiding judge and shall be
12 kept under security measures established by the Chief Jus-
13 tice in consultation with the Attorney General.

14 “§ 2524. Application for an order

15 “(a) Each application for an order approving electronic
16 surveillance under this chapter shall be made in writing upon
17 oath or affirmation to a judge having jurisdiction under sec-
18 tion 2523 of this chapter. Each application must be approved
19 by the Attorney General and shall include the following
20 information:

21 “(1) the identity of the officer making the appli-
22 cation;

23 “(2) the authority conferred on the applicant by
24 the President of the United States and the approval of
25 the Attorney General to make the application;

2 son who is the subject of the electronic surveillance;
3 (4) a statement of the facts and circumstances
4 relied upon by the applicant to justify his belief that—

5 (i) the target of the electronic surveillance
6 is a foreign power or an agent of a foreign power;
7 and

8 (ii) the facilities or the place at which the
9 electronic surveillance is directed are being used, or
10 are about to be used, by a foreign power or an
11 agent of a foreign power;

12 (5) a statement of the procedures by which the
13 acquisition and retention of information relating to per-
14 manent resident aliens or citizens of the United States
15 that is not foreign intelligence information will be min-
16 imized;

17 (6) a description of the type of information sought

18 and a certification by the Assistant to the President for
19 National Security Affairs or an executive branch official
20 designated by the President from among those executive
21 officers employed in the area of national security or de-

that the purpose of the surveillance is to obtain foreign intelligence information and that such information
22 fense and appointed by the President by and with the
23 advice and consent of the Senate that ^{the} such ^{sought} information is
24 foreign intelligence information ~~that~~ cannot feasibly be
25 obtained by normal investigative techniques;

1 “(7) a statement of the means by which the surveil-
2 lance will be effected;

3 “(8) a statement of the facts concerning all previous
4 applications known to the Attorney General that have
5 been made to any judge under this chapter involving any
6 of the persons, facilities or places specified in the applica-
7 tion, and the action taken on each previous application;
8 and

9 “(9) a statement of the period of time for which the
10 electronic surveillance is required to be maintained. If
11 the nature of the intelligence gathering is such that the
12 approval of the use of electronic surveillance under this
13 chapter should not automatically terminate when the
14 described type of information has first been obtained, a
15 description of facts supporting the belief that additional
16 information of the same type will be obtained thereafter.

17 “(b) The Attorney General may require any other affi-
18 davit or certification from any other officer in connection with
19 the application.

20 “(c) ~~At the time of the hearing on the application,~~
21 ~~the applicant may furnish to the judge additional informa-~~
22 ~~tion in support of the application and the judge may require~~
23 the applicant to furnish such other information or evidence
24 as may be necessary to make the determinations required by
25 section 2525 of this title chapter.

1 "§ 2525. Issuance of an order

2 "(a) Upon an application made pursuant to section
3 2524 of this title, the judge shall enter an ex parte order
4 as requested or as modified approving the electronic sur-
5 veillance if he finds that—

6 "(1) the President has authorized the Attorney
7 General to approve applications for electronic surveil-
8 lance for foreign intelligence information;

9 "(2) the application has been approved by the
10 Attorney General;

11 "(3) on the basis of the facts submitted by the
12 applicant, there is probable cause to believe that:

13 "(i) the target of the electronic surveillance is
14 a foreign power or an agent of a foreign power; and

15 "(ii) the facilities or place at which the elec-
16 tronic surveillance is directed are being used, or
17 are about to be used, by a foreign power or an
18 agent of a foreign power;

19 "(4) minimization procedures to be followed are
20 reasonably designed to minimize the acquisition and
21 retention of information relating to permanent resident
22 aliens or citizens of the United States that is not foreign
23 intelligence information;

24 "(5) certification has been made pursuant to section
25 2524 (a) (6) that the information sought is foreign in-

2 by normal investigative techniques.

3 “(b) An order approving an electronic surveillance
4 under this section shall—

5 “(1) specify—

6 “(i) the identity or a characterization of the
7 person who is the subject of the electronic surveil-
8 lance;

9 “(ii) the nature and location of the facilities
10 or the place at which the electronic surveillance
11 will be directed;

12 “(iii) the type of information sought to be
13 acquired;

14 “(iv) the means by which the electronic sur-
15 veillance will be effected; and

16 “(v) the period of time during which the elec-
17 tronic surveillance is approved; and

18 “(2) direct—

19 “(i) that the minimization procedures be fol-
20 lowed;

21 “(ii) that, upon the request of the applicant,
22 a specified communication or other common car-
23 rier, landlord, custodian, contractor, or other speci-
24 fied person furnish the applicant forthwith any and
25 all information, facilities, ^{or} technical assistance, or

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

surveillance in such manner as will protect its secrecy and produce a minimum of interference with the services that such carrier, landlord, custodian, contractor, or other person is providing the target of electronic surveillance; and

"(iii) that the applicant compensate, at the prevailing rates, such carrier, landlord, custodian, or other person for furnishing such aid.

"(c) An order issued under this section may approve an electronic surveillance for the period necessary to achieve its purpose, or for ninety days, whichever is less. Extensions of an order issued under this chapter may be granted upon an application for an extension made in the same manner as required for an original application and after findings required by subsection (a) of this section. Each extension may be for the period necessary to achieve the purposes for which it is granted, or for ninety days, whichever is less.

"(d) Notwithstanding any other provision of this chapter when the Attorney General reasonably determines that—

"(1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order au-

1 authorizing such surveillance can with due diligence be

2 obtained, and

3 "(2) the factual basis for issuance of an order under

4 this chapter to approve such surveillance exists,

5 he may authorize the emergency employment of electronic

6 surveillance if a judge designated pursuant to section 2523

7 of this title is informed by the Attorney General or his designee

8 at the time of such authorization that the decision has

9 been made to employ emergency electronic surveillance

10 and if an application in accordance with this chapter is made

11 to that judge as soon as practicable, but not more than

12 twenty-four hours after the Attorney General authorizes

13 such acquisition. In the absence of a judicial order approving

14 such electronic surveillance, the surveillance shall terminate

15 when the information sought is obtained, when the application

16 for the order is denied, or after the expiration

17 of twenty-four hours from the time of authorization by the

18 Attorney General, whichever is earliest. [As provided in

19 section 2523, a denial of the application may be appealed by

20 the Attorney General.

21 "(e) A judge denying an order under this section or

22 a panel affirming such denial under section 2523 (b) shall

23 state the reasons therefor.

In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated without an order having been issued, no information obtained or derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing or other proceeding or before any court, grand jury, department, office, agency, regulatory body, legislative committee or authority of the United States, a state, or a political subdivision thereof.

1 "§ 2526. Use of information

2 "(a) Information acquired from an electronic surveil-
3 lance conducted pursuant to this chapter may be used and

4 disclosed by Federal officers and employees only for the
5 set forth in section 2521(b) (3) of this chapter

6 purposes designated under this chapter/or for the enforce-

7 ment of the criminal law. | No otherwise privileged communication obtained
in accordance with, or in violation of, the
provisions of this chapter shall lose its
privileged character.

8 "(b) The minimization procedures required under this

9 chapter shall not preclude the retention and disclosure of

10 information which is not
11 nonforeign intelligence information acquired incidentally

12 which is evidence of a crime.

13 No information obtained or derived from an electronic surveillance

14 "(c) When information acquired from or the product

15 shall be received in evidence or otherwise used and disclosed in any

16 of an electronic surveillance conducted pursuant to this chap-

17 trial, hearing, or other proceeding in a federal or state court unless,

18 ter is received in evidence in any trial, proceeding, or other

19 prior to an effort to disclose the information or submit it in evidence

20 hearing in any Federal or State court, the provisions of sec-

21 tion 2518 (9) of chapter 119 shall not apply. No otherwise

22 court of the source of the information and the court, in camera and ex

23 privileged communication obtained in accordance with, or

24 parte, determines that the surveillance was authorized and conducted

25 in violation of, the provisions of this chapter shall lose its

in a manner that did not violate any right afforded the person by the

privileged character.

Constitution and statutes of the United States.

20 "(d) If an emergency employment of electronic surveil-

21 lance is authorized under section 2525 (d) and a subsequent

22 order approving the surveillance is not obtained, the judge

23 shall cause to be served on any United States citizen or

24 permanent resident alien named in the application and on

25 such other United States citizen or permanent resident alien

subject to electronic surveillance as the judge may determine

1 in his discretion it is in the interest of justice to serve, notice

2 of—

3 “(1) the fact of the application;

4 “(2) the period of the surveillance; and

5 “(3) the fact that during the period information

6 was or was not obtained.

7 On an ex parte showing of good cause to the judge the

8 serving of the notice required by this subsection may be

9 postponed or suspended for a period not to exceed ninety

10 days. Thereafter, on a further ex parte showing of good

11 cause, the court shall forgo ordering the serving of the

12 notice required under this subsection.

13 “§ 2527. Report of electronic surveillance

14 “In April of each year, the Attorney General shall

15 report to the Administrative Office of the United States

16 Courts and shall transmit to the Congress with respect to the

17 preceding calendar year—

18 “(1) the number of applications made for orders

19 and extensions of orders approving electronic surveil-

20 lance and the number of such orders and extensions

21 granted, modified, and denied;

22 “(2) the periods of time for which applications

23 granted authorized electronic surveillances and the actual

24 duration of such electronic surveillances;

1 ... "(3) the number of such surveillances in place
2 at any time during the preceding year; and

3 "(4) the number of such surveillances terminated
4 during the preceding year.

5 "§ 2528. Presidential power

6 ~~"Nothing contained in this chapter shall limit the con-~~
7 ~~stitutional power of the President to order electronic surveil-~~
8 ~~lance for the reasons stated in section 2511 (3) of title 18,~~
9 ~~United States Code, if the facts and circumstances giving~~
10 ~~rise to such order are beyond the scope of this chapter."~~

11 Nothing contained in chapter 119, section 605 of the
12 Communications Act of 1934, or this chapter shall be deemed
13 to affect the exercise of any Constitutional power the President
14 may have to acquire foreign intelligence information if:

15 (a) such acquisition does not come within the
16 definition of electronic surveillance in paragraph (2)
17 of subsection (b) of section 2521 of this chapter; or

18 (b) the facts and circumstances giving rise to the
19 acquisition are so unprecedented and potentially harmful
20 to the nation that they cannot be reasonably said to
21 have been within the contemplation of Congress in
22 enacting this chapter or chapter 119; provided that in
23 such an event, the President shall, within a reasonable
24 time thereafter, transmit to the Committees on the
25 Judiciary of the Senate and House of Representatives,

under a written injunction of secrecy if necessary, a statement setting forth the nature of such facts and circumstances.

Foreign intelligence information acquired by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such acquisition was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Sec. 3. The provisions of this Act and the amendment made hereby shall become effective upon enactment; provided that, any electronic surveillance approved by the Attorney General to gather foreign intelligence information shall not be deemed unlawful for failure to follow the procedures of chapter 120, title 18, United States Code, if that surveillance is terminated or an order approving that surveillance is obtained under this chapter within sixty days following the designation of the first judges pursuant to section 2523 of chapter 120, title 18, United States Code.

Conforming Amendments to Title III

Sec. 4. Chapter 119 of title 18, United States Code, is amended as follows:

(a) Section 2511(1) is amended by inserting the words "or chapter 120" after the word "chapter."

(b) Section 2511(2) (a) (ii) is amended by inserting the words "or chapter 120" after both appearances of the word "chapter;" and by adding at the end of the section the following provision:

provided, however, that before the information, facilities or technical assistance may be provided, the investigative or law enforcement officer shall furnish to the officer, employee or agency of the carrier either --

(1) a statement signed by the authorizing judge certifying that a court order directing such assistance has been issued, or

(2) in the case of an emergency surveillance as provided for in section 2518(7) of this chapter or section 2525(d) of chapter 120, or a surveillance conducted under the provisions of section 2528(b) of chapter 120, a sworn statement by the investigative or law enforcement officer certifying that the applicable statutory requirements have been met,

and setting forth the period of time for which the surveillance is authorized and describing the facilities from which the communication is to be intercepted. Any violation of this subsection by a communication common carrier or an officer, employee or agency thereof, shall render

the carrier liable for the civil damages provided for in section 2520.

(c) Section 2511(3) is repealed.

(d) Section 2514 is amended by inserting the words "or chapter 120" after both appearances of the word "chapter."

(e) Section 2515 is amended by adding at the end of the section the words "or chapter 120."

(f) Section 2518(1) is amended by inserting "under this chapter" after the word "communication."

(g) Section 2518(4) is amended by inserting the words "under this chapter" after both appearances of the words "wire or oral communication."

(h) Section 2518(9) is amended by striking the word "intercepted" and inserting the words "intercepted pursuant to this chapter" after the word "communication."

(i) Section 2518(10) is amended by striking the word "intercepted" and inserting the words "intercepted pursuant to this chapter" after the first appearance of the word "communication."

(j) Section 2519(3) is amended by inserting the words "pursuant to this chapter" after the words "wire or oral communications" and after the words "granted or denied."

(k) Section 2520 is amended by

(1) inserting the words, "other than an agent of a foreign power as defined in section 2521(b)(1)(i) of Chapter 120" after the word "person."

(2) inserting the words "or chapter 120" after the word "chapter".