

AMENDMENT NO. _____ Calendar No. _____

Purpose: To improve the amicus provisions and require the disclosure of relevant information.

IN THE SENATE OF THE UNITED STATES—116th Cong., 2d Sess.

H. R. 6172

To amend the Foreign Intelligence Surveillance Act of 1978 to prohibit the production of certain business records, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENTS intended to be proposed by _____

Viz:

1 In subsection (a)(2)(B) of section 602 of the Foreign
2 Intelligence Surveillance Act of 1978 (50 U.S.C. 1872),
3 as added by section 301(b)(3), insert after “section
4 103(i)” the following: “, a proceeding in the Foreign Intel-
5 ligence Court of Review resulting from the petition of an
6 amicus curiae under section 103(i)(7), or a proceeding in
7 which an amicus curiae could have been appointed pursu-
8 ant to section 103(i)(2)(A)”.

9 In section 302, strike subsections (a) and (b) and in-
10 sert the following:

11 (a) EXPANSION OF APPOINTMENT AUTHORITY.—

1 (1) IN GENERAL.—Section 103(i)(2) (50 U.S.C.
2 1803(i)(2)) is amended—

3 (A) by striking subparagraph (A) and in-
4 serting the following:

5 “(A) shall appoint one or more individuals
6 who have been designated under paragraph (1),
7 not less than one of whom possesses privacy
8 and civil liberties expertise, unless the court
9 finds that such a qualification is inappropriate,
10 to serve as amicus curiae to assist the court in
11 the consideration of any application or motion
12 for an order or review that, in the opinion of
13 the court—

14 “(i) presents a novel or significant in-
15 terpretation of the law, unless the court
16 issues a finding that such appointment is
17 not appropriate;

18 “(ii) presents significant concerns
19 with respect to the activities of a United
20 States person that are protected by the
21 first amendment to the Constitution of the
22 United States, unless the court issues a
23 finding that such appointment is not ap-
24 propriate;

1 “(iii) presents or involves a sensitive
2 investigative matter, unless the court
3 issues a finding that such appointment is
4 not appropriate;

5 “(iv) presents a request for approval
6 of a new program, a new technology, or a
7 new use of existing technology, unless the
8 court issues a finding that such appoint-
9 ment is not appropriate;

10 “(v) presents a request for reauthor-
11 ization of programmatic surveillance, un-
12 less the court issues a finding that such
13 appointment is not appropriate; or

14 “(vi) otherwise presents novel or sig-
15 nificant civil liberties issues, unless the
16 court issues a finding that such appoint-
17 ment is not appropriate; and”;

18 (B) in subparagraph (B), by striking “an
19 individual or organization” each place the term
20 appears and inserting “one or more individuals
21 or organizations”.

22 (2) DEFINITION OF SENSITIVE INVESTIGATIVE
23 MATTER.—Subsection (i) of section 103 (50 U.S.C.
24 1803) is amended by adding at the end the fol-
25 lowing:

1 “(12) DEFINITION.—In this subsection, the
2 term ‘sensitive investigative matter’ means—

3 “(A) an investigative matter involving the
4 activities of—

5 “(i) a domestic public official or polit-
6 ical candidate, or an individual serving on
7 the staff of such an official or candidate;

8 “(ii) a domestic religious or political
9 organization, or a known or suspected
10 United States person prominent in such an
11 organization; or

12 “(iii) the domestic news media; or

13 “(B) any other investigative matter involv-
14 ing a domestic entity or a known or suspected
15 United States person that, in the judgment of
16 the applicable court established under sub-
17 section (a) or (b), is as sensitive as an inves-
18 tigative matter described in subparagraph
19 (A).”.

20 (b) AUTHORITY TO SEEK REVIEW.—Subsection (i) of
21 section 103 (50 U.S.C. 1803), as amended by subsection
22 (a) of this section, is amended—

23 (1) in paragraph (4)—

24 (A) in the paragraph heading, by inserting
25 “; AUTHORITY” after “DUTIES”;

1 (B) by redesignating subparagraphs (A),
2 (B), and (C) as clauses (i), (ii), and (iii), re-
3 spectively, and adjusting the margins accord-
4 ingly;

5 (C) in the matter preceding clause (i), as
6 so designated, by striking “the amicus curiae
7 shall” and inserting the following: “the amicus
8 curiae—

9 “(A) shall”;

10 (D) in subparagraph (A)(i), as so des-
11 ignated, by inserting before the semicolon at the
12 end the following: “, including legal arguments
13 regarding any privacy or civil liberties interest
14 of any United States person that would be sig-
15 nificantly impacted by the application or mo-
16 tion”; and

17 (E) by striking the period at the end and
18 inserting the following: “; and

19 “(B) may seek leave to raise any novel or
20 significant privacy or civil liberties issue rel-
21 evant to the application or motion or other
22 issue directly impacting the legality of the pro-
23 posed electronic surveillance with the court, re-
24 gardless of whether the court has requested as-
25 sistance on that issue.”;

1 (2) by redesignating paragraphs (7) through
2 (12) as paragraphs (8) through (13), respectively;
3 and

4 (3) by inserting after paragraph (6) the fol-
5 lowing:

6 “(7) AUTHORITY TO SEEK REVIEW OF DECI-
7 SIONS.—

8 “(A) FISA COURT DECISIONS.—Following
9 issuance of an order under this Act by the For-
10 eign Intelligence Surveillance Court, an amicus
11 curiae appointed under paragraph (2) may peti-
12 tion the Foreign Intelligence Surveillance Court
13 to certify for review to the Foreign Intelligence
14 Surveillance Court of Review a question of law
15 pursuant to subsection (j). If the court denies
16 such petition, the court shall provide for the
17 record a written statement of the reasons for
18 such denial. Upon certification of any question
19 of law pursuant to this subparagraph, the
20 Court of Review shall appoint the amicus curiae
21 to assist the Court of Review in its consider-
22 ation of the certified question, unless the Court
23 of Review issues a finding that such appoint-
24 ment is not appropriate.

1 “(B) FISA COURT OF REVIEW DECI-
2 SIONS.—An amicus curiae appointed under
3 paragraph (2) may petition the Foreign Intel-
4 ligence Surveillance Court of Review to certify
5 for review to the Supreme Court of the United
6 States any question of law pursuant to section
7 1254(2) of title 28, United States Code.

8 “(C) DECLASSIFICATION OF REFER-
9 RALS.—For purposes of section 602, a petition
10 filed under subparagraph (A) or (B) of this
11 paragraph and all of its content shall be consid-
12 ered a decision, order, or opinion issued by the
13 Foreign Intelligence Surveillance Court or the
14 Foreign Intelligence Surveillance Court of Re-
15 view described in paragraph (2) of section
16 602(a).”.

17 In section 302(c), redesignate paragraph (2) as para-
18 graph (3).

19 In section 302(c), strike paragraph (1) and insert the
20 following:

21 (1) APPLICATION AND MATERIALS.—Subpara-
22 graph (A) of section 103(i)(6) (50 U.S.C.
23 1803(i)(6)) is amended to read as follows:

24 “(A) IN GENERAL.—

1 “(i) RIGHT OF AMICUS.—If a court
2 established under subsection (a) or (b) ap-
3 points an amicus curiae under paragraph
4 (2), the amicus curiae—

5 “(I) shall have access to, to the
6 extent such information is available to
7 the Government—

8 “(aa) the application, certifi-
9 cation, petition, motion, and
10 other information and supporting
11 materials, including any informa-
12 tion described in section 901,
13 submitted to the Foreign Intel-
14 ligence Surveillance Court in con-
15 nection with the matter in which
16 the amicus curiae has been ap-
17 pointed, including access to any
18 relevant legal precedent (includ-
19 ing any such precedent that is
20 cited by the Government, includ-
21 ing in such an application);

22 “(bb) an unredacted copy of
23 each relevant decision made by
24 the Foreign Intelligence Surveil-
25 lance Court or the Foreign Intel-

1 intelligence Surveillance Court of Re-
2 view in which the court decides a
3 question of law, without regard
4 to whether the decision is classi-
5 fied; and

6 “(cc) any other information
7 or materials that the court deter-
8 mines are relevant to the duties
9 of the amicus curiae; and

10 “(II) may make a submission to
11 the court requesting access to any
12 other particular materials or informa-
13 tion (or category of materials or infor-
14 mation) that the amicus curiae be-
15 lieves to be relevant to the duties of
16 the amicus curiae.

17 “(ii) SUPPORTING DOCUMENTATION
18 REGARDING ACCURACY.—The Foreign In-
19 telligence Surveillance Court, upon the mo-
20 tion of an amicus curiae appointed under
21 paragraph (2) or upon its own motion,
22 may require the Government to make
23 available the supporting documentation de-
24 scribed in section 902.”

1 (2) CLARIFICATION OF ACCESS TO CERTAIN IN-
2 FORMATION.—Such section is further amended—

3 (A) in subparagraph (B), by striking
4 “may” and inserting “shall”; and

5 (B) by striking subparagraph (C) and in-
6 serting the following:

7 “(C) CLASSIFIED INFORMATION.—An ami-
8 cus curiae designated or appointed by the court
9 shall have access to, to the extent such informa-
10 tion is available to the Government, unredacted
11 copies of each opinion, order, transcript, plead-
12 ing, or other document of the Foreign Intel-
13 ligence Surveillance Court and the Foreign In-
14 telligence Surveillance Court of Review, includ-
15 ing, if the individual is eligible for access to
16 classified information, any classified documents,
17 information, and other materials or pro-
18 ceedings.”.

19 Redesignate section 207 as section 208.

20 Insert after section 206 the following:

21 **SEC. 207. DISCLOSURE OF RELEVANT INFORMATION; CER-**
22 **TIFICATION REGARDING ACCURACY PROCE-**
23 **DURES.**

24 (a) DISCLOSURE OF RELEVANT INFORMATION.—

1 (1) IN GENERAL.—The Foreign Intelligence
2 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.)
3 is amended by adding at the end the following:

4 **“TITLE IX—DISCLOSURE OF**
5 **RELEVANT INFORMATION**

6 **“SEC. 901. DISCLOSURE OF RELEVANT INFORMATION.**

7 “The Attorney General or any other Federal officer
8 making an application for a court order under this Act
9 shall provide the court with—

10 “(1) all information in the possession of the
11 Government that is material to determining whether
12 the application satisfies the applicable requirements
13 under this Act, including any exculpatory informa-
14 tion; and

15 “(2) all information in the possession of the
16 Government that might reasonably—

17 “(A) call into question the accuracy of the
18 application or the reasonableness of any assess-
19 ment in the application conducted by the de-
20 partment or agency on whose behalf the appli-
21 cation is made; or

22 “(B) otherwise raise doubts with respect to
23 the findings that are required to be made under
24 the applicable provision of this Act in order for
25 the court order to be issued.”.

1 (2) TECHNICAL AMENDMENT.—The table of
2 contents of the Foreign Intelligence Surveillance Act
3 of 1978 is amended by adding at the end the fol-
4 lowing:

“TITLE IX—DISCLOSURE OF RELEVANT INFORMATION

“Sec. 901. Disclosure of relevant information.”.

5 (b) CERTIFICATION REGARDING ACCURACY PROCE-
6 DURES.—

7 (1) IN GENERAL.—Title IX of the Foreign In-
8 telligence Surveillance Act of 1978, as added by sub-
9 section (a), is amended by adding at the end the fol-
10 lowing:

11 **“SEC. 902. CERTIFICATION REGARDING ACCURACY PROCE-
12 DURES.**

13 “(a) DEFINITION.—In this section, the term ‘accu-
14 racy procedures’ means specific procedures, adopted by
15 the Attorney General, to ensure that an application for
16 a court order under this Act, including any application for
17 renewal of an existing order, is accurate and complete, in-
18 cluding procedures that ensure, at a minimum, that—

19 “(1) the application reflects all information that
20 might reasonably call into question the accuracy of
21 the information or the reasonableness of any assess-
22 ment in the application, or otherwise raises doubts
23 about the requested findings;

1 “(2) the application reflects all material infor-
2 mation that might reasonably call into question the
3 reliability and reporting of any information from a
4 confidential human source that is used in the appli-
5 cation;

6 “(3) a complete file documenting each factual
7 assertion in an application is maintained;

8 “(4) the applicant coordinates with the appro-
9 priate elements of the intelligence community (as de-
10 fined in section 3 of the National Security Act of
11 1947 (50 U.S.C. 3003)), concerning any prior or ex-
12 isting relationship with the target of any surveil-
13 lance, search, or other means of investigation, and
14 discloses any such relationship in the application;

15 “(5) before any application targeting a United
16 States person is made, the applicant Federal officer
17 shall document that the officer has collected and re-
18 viewed for accuracy and completeness supporting
19 documentation for each factual assertion in the ap-
20 plication; and

21 “(6) the applicant Federal agency establish
22 compliance and auditing mechanisms on an annual
23 basis to assess the efficacy of the accuracy proce-
24 dures that have been adopted and report such find-
25 ings to the Attorney General.

1 “(b) STATEMENT AND CERTIFICATION OF ACCURACY
2 PROCEDURES.—Any Federal officer making an applica-
3 tion for a court order under this Act shall include with
4 the application—

5 “(1) a description of the accuracy procedures
6 employed by the officer or the officer’s designee; and

7 “(2) a certification that the officer or the offi-
8 cer’s designee has collected and reviewed for accu-
9 racy and completeness—

10 “(A) supporting documentation for each
11 factual assertion contained in the application;

12 “(B) all information that might reasonably
13 call into question the accuracy of the informa-
14 tion or the reasonableness of any assessment in
15 the application, or otherwise raises doubts
16 about the requested findings; and

17 “(C) all material information that might
18 reasonably call into question the reliability and
19 reporting of any information from any confiden-
20 tial human source that is used in the applica-
21 tion.

22 “(c) NECESSARY FINDING FOR COURT ORDERS.—A
23 judge may not enter an order under this Act unless the
24 judge finds, in addition to any other findings required
25 under this Act, that the accuracy procedures described in

1 the application for the order, as required under subsection
2 (b)(1), are actually accuracy procedures as defined in this
3 section.”.

4 (2) TECHNICAL AMENDMENT.—The table of
5 contents of the Foreign Intelligence Surveillance Act
6 of 1978, as amended by subsection (a), is amended
7 by inserting after the item relating to section 901
8 the following:

“Sec. 902. Certification regarding accuracy procedures.”.

9 In section 208, as so redesignated, strike “section
10 501 of the Foreign Intelligence Surveillance Act of 1978
11 (50 U.S.C. 1861)” and insert “the Foreign Intelligence
12 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) (if ap-
13 plicable)”.

14 At the end, add the following:

15 **SEC. 409. ANNUAL REPORTING ON ACCURACY AND COM-**
16 **PLETENESS OF APPLICATIONS.**

17 Section 603 (50 U.S.C. 1873) is amended—

18 (1) by redesignating subsection (e) as sub-
19 section (f); and

20 (2) by inserting after subsection (d) the fol-
21 lowing:

22 “(e) ANNUAL REPORT BY DOJ INSPECTOR GENERAL
23 ON ACCURACY AND COMPLETENESS OF APPLICATIONS.—

1 “(1) DEFINITION OF APPROPRIATE COMMIT-
2 TEES OF CONGRESS.—In this subsection, the term
3 ‘appropriate committees of Congress’ means—

4 “(A) the Committee on the Judiciary and
5 the Select Committee on Intelligence of the
6 Senate; and

7 “(B) the Committee on the Judiciary and
8 the Permanent Select Committee on Intelligence
9 of the House of Representatives.

10 “(2) REPORT.—In April of each year, the In-
11 specter General of the Department of Justice shall
12 submit to the appropriate committees of Congress
13 and make public, subject to a declassification review,
14 a report setting forth, with respect to the preceding
15 calendar year, the following:

16 “(A) A summary of all accuracy or com-
17 pleteness reviews of applications submitted to
18 the Foreign Intelligence Surveillance Court by
19 the Federal Bureau of Investigation.

20 “(B) The total number of applications re-
21 viewed for accuracy or completeness.

22 “(C) The total number of material errors
23 or omissions identified during such reviews.

24 “(D) The total number of nonmaterial er-
25 rors or omissions identified during such reviews.

1 “(E) The total number of instances in
2 which facts contained in an application were
3 not supported by documentation that existed in
4 the applicable file being reviewed at the time of
5 the accuracy review.”.