

111TH CONGRESS
1ST SESSION

S. 876

To provide for the substitution of the United States in certain civil actions relating to electronic service providers and FISA.

IN THE SENATE OF THE UNITED STATES

APRIL 23, 2009

Mr. SPECTER (for himself and Mr. WHITEHOUSE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for the substitution of the United States in certain civil actions relating to electronic service providers and FISA.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. AMENDMENT TO FISA.**

4 Title III of the Foreign Intelligence Surveillance Act
5 of 1978 Amendments Act of 2008 (Public Law 110–261)
6 is amended by inserting at the end the following:

7 **“SEC. 302. SUBSTITUTION OF THE UNITED STATES IN CER-**
8 **TAIN ACTIONS.**

9 **“(a) IN GENERAL.—**

1 “(1) CERTIFICATION.—Notwithstanding any
2 other provision of law, a Federal or State court shall
3 substitute the United States for an electronic com-
4 munication service provider with respect to any
5 claim in a covered civil action as provided in this
6 subsection, if the Attorney General certifies to that
7 court that—

8 “(A) with respect to that claim, the assist-
9 ance alleged to have been provided by the elec-
10 tronic communication service provider was—

11 “(i) provided in connection with an in-
12 telligence activity involving communica-
13 tions that was—

14 “(I) authorized by the President
15 during the period beginning on Sep-
16 tember 11, 2001, and ending on Jan-
17 uary 17, 2007; and

18 “(II) designed to detect or pre-
19 vent a terrorist attack, or activities in
20 preparation for a terrorist attack,
21 against the United States; and

22 “(ii) described in a written request or
23 directive from the Attorney General or the
24 head of an element of the intelligence com-
25 munity (or the deputy of such person) to

1 the electronic communication service pro-
2 vider indicating that the activity was—

3 “(I) authorized by the President;

4 and

5 “(II) determined to be lawful; or

6 “(B) the electronic communication service
7 provider did not provide the alleged assistance.

8 “(2) SUBSTITUTION.—

9 “(A) IN GENERAL.—Except as provided in
10 subparagraph (B), and subject to subparagraph
11 (C), upon receiving a certification under para-
12 graph (1), a Federal or State court shall—

13 “(i) substitute the United States for
14 the electronic communication service pro-
15 vider as the defendant as to all claims des-
16 ignated by the Attorney General in that
17 certification, consistent with the proce-
18 dures under rule 25(c) of the Federal
19 Rules of Civil Procedure, as if the United
20 States were a party to whom the interest
21 of the electronic communication service
22 provider in the litigation had been trans-
23 ferred; and

24 “(ii) as to that electronic communica-
25 tion service provider—

1 “(I) dismiss all claims designated
2 by the Attorney General in that cer-
3 tification; and

4 “(II) enter a final judgment re-
5 lating to those claims.

6 “(B) CONTINUATION OF CERTAIN
7 CLAIMS.—If a certification by the Attorney
8 General under paragraph (1) states that not all
9 of the alleged assistance was provided under a
10 written request or directive described in para-
11 graph (1)(A)(ii), the electronic communication
12 service provider shall remain as a defendant.

13 “(C) DETERMINATION.—

14 “(i) IN GENERAL.—Substitution
15 under subparagraph (A) shall proceed only
16 after a determination by the Foreign Intel-
17 ligence Surveillance Court that—

18 “(I) the written request or direc-
19 tive from the Attorney General or the
20 head of an element of the intelligence
21 community (or the deputy of such
22 person) to the electronic communica-
23 tion service provider under paragraph
24 (1)(A)(ii) complied with section

1 2511(2)(a)(ii)(B) of title 18, United
2 States Code;

3 “(II) the assistance alleged to
4 have been provided was undertaken by
5 the electronic communication service
6 provider acting in good faith and pur-
7 suant to an objectively reasonable be-
8 lief that compliance with the written
9 request or directive under paragraph
10 (1)(A)(ii) was permitted by law; or

11 “(III) the electronic communica-
12 tion service provider did not provide
13 the alleged assistance.

14 “(ii) CERTIFICATION.—If the Attor-
15 ney General submits a certification under
16 paragraph (1), the court to which that cer-
17 tification is submitted shall—

18 “(I) immediately certify the ques-
19 tions described in clause (i) to the
20 Foreign Intelligence Surveillance
21 Court; and

22 “(II) stay further proceedings in
23 the relevant litigation, pending the de-
24 termination of the Foreign Intel-
25 ligence Surveillance Court.

1 “(iii) PARTICIPATION OF PARTIES.—

2 In reviewing a certification and making a
 3 determination under clause (i), the Foreign
 4 Intelligence Surveillance Court shall permit
 5 any plaintiff and any defendant in the ap-
 6 plicable covered civil action to appear be-
 7 fore the Foreign Intelligence Surveillance
 8 Court pursuant to section 103 of the For-
 9 eign Intelligence Surveillance Act of 1978
 10 (50 U.S.C. 1803).

11 “(iv) DECLARATIONS.—If the Attor-
 12 ney General files a declaration under sec-
 13 tion 1746 of title 28, United States Code,
 14 that disclosure of a determination made
 15 pursuant to clause (i) would harm the na-
 16 tional security of the United States, the
 17 Foreign Intelligence Surveillance Court
 18 shall limit any public disclosure concerning
 19 such determination, including any public
 20 order following such an ex parte review, to
 21 a statement that the conditions of clause
 22 (i) have or have not been met, without dis-
 23 closing the basis for the determination.

24 “(D) SPECIAL RULE.—Notwithstanding
 25 any other provision of this Act—

“(i) in any matter in which the Foreign Intelligence Surveillance Court denies dismissal on grounds that the statutory defenses provided in title VIII of the Foreign Intelligence Surveillance Act of 1978 are unconstitutional, the Attorney General shall be substituted pursuant to this paragraph; and

“(ii) if a claim is dismissed pursuant to title VIII of the Foreign Intelligence Surveillance Act of 1978 prior to date of enactment of this section, the claim against the United States shall be tolled for the period during which the claim was pending and may be refilled against the United States pursuant to rule 60(b) of the Federal Rules of Civil Procedure after the date of enactment of this section.

“(3) PROCEDURES.—

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

“(i) the claim shall be deemed to have been filed under section 1346(b) of title 28, United States Code, except that sections 2401(b), 2675, and 2680(a) of title

28, United States Code, shall not apply;
and

“(ii) the claim shall be deemed timely
filed against the United States if it was
timely filed against the electronic commu-
nication service provider.

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

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

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

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

“(II) section 2712 of title 18,
United States Code; or

1 “(III) section 110 of the Foreign
2 Intelligence Surveillance Act of 1978
3 (50 U.S.C. 1810);

4 “(iii) the statutes of limitation appli-
5 cable to the causes of action identified in
6 clause (ii) shall apply to any amended
7 claim under that clause subject to the toll-
8 ing requirements of paragraph (2)(D)(ii),
9 and any such cause of action shall be
10 deemed timely filed if any Federal statu-
11 tory cause of action against the electronic
12 communication service provider was timely
13 filed; and

14 “(iv) for any amended claim under
15 clause (ii) the United States shall be
16 deemed a proper defendant under any stat-
17 utes described in that clause, and any
18 plaintiff that had standing to proceed
19 against the original defendant shall be
20 deemed an aggrieved party for purposes of
21 proceeding under section 2712 of title 18,
22 United States Code, or section 110 of the
23 Foreign Intelligence Surveillance Act of
24 1978 (50 U.S.C. 1810).

25 “(C) DISCOVERY.—

1 “(i) IN GENERAL.—In a covered civil
2 action in which the United States is sub-
3 stituted as party-defendant under para-
4 graph (2), any plaintiff may serve third-
5 party discovery requests to any electronic
6 communications service provider as to
7 which all claims are dismissed.

8 “(ii) BINDING THE GOVERNMENT.—If
9 a plaintiff in a covered civil action serves
10 deposition notices under rule 30(b)(6) of
11 the Federal Rules of Civil Procedure or re-
12 quests for admission under rule 36 of the
13 Federal Rules of Civil Procedure upon an
14 electronic communications service provider
15 as to which all claims were dismissed, the
16 electronic communications service provider
17 shall be deemed a party-defendant for pur-
18 poses rule 30(b)(6) or rule 36 and its an-
19 swers and admissions shall be deemed
20 binding upon the Government.

21 “(b) CERTIFICATIONS.—

22 “(1) IN GENERAL.—For purposes of substi-
23 tution proceedings under this section—

1 “(A) a certification under subsection (a)
2 may be provided and reviewed in camera, ex
3 parte, and under seal; and

4 “(B) for any certification provided and re-
5 viewed as described in subparagraph (A), the
6 court shall not disclose or cause the disclosure
7 of its contents.

8 “(2) NONDELEGATION.—The authority and du-
9 ties of the Attorney General under this section shall
10 be performed by the Attorney General or a designee
11 in a position not lower than the Deputy Attorney
12 General.

13 “(c) SOVEREIGN IMMUNITY.—This section, including
14 any Federal statute cited in this section that operates as
15 a waiver of sovereign immunity, constitute the sole waiver
16 of sovereign immunity with respect to any covered civil
17 action.

18 “(d) CIVIL ACTIONS IN STATE COURT.—For pur-
19 poses of section 1441 of title 28, United States Code, any
20 covered civil action that is brought in a State court or
21 administrative or regulatory bodies shall be deemed to
22 arise under the Constitution or laws of the United States
23 and shall be removable under that section.

24 “(e) RULE OF CONSTRUCTION.—Except as expressly
25 provided in this section, nothing in this section may be

1 construed to limit any immunity, privilege, or defense
2 under any other provision of law, including any privilege,
3 immunity, or defense that would otherwise have been
4 available to the United States absent its substitution as
5 party-defendant or had the United States been the named
6 defendant.

7 “(f) EFFECTIVE DATE AND APPLICATION.—This sec-
8 tion shall apply to any covered civil action pending on or
9 filed after the date of enactment of this section.”.

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