96TH CONGRESS
*1st Session*

SENATE

REPORT
No. 96-379

# IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

---

## REPORT

OF THE

## SELECT COMMITTEE ON INTELLIGENCE

## UNITED STATES SENATE

OCTOBER 25 (legislative day, OCTOBER 15), 1979.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

59-010 WASHINGTON : 1979

## SENATE SELECT COMMITTEE ON INTELLIGENCE

[Established by S. Res. 400, 94th Cong., 2d Sess.]

BIRCH BAYH, Indiana, *Chairman*
BARRY GOLDWATER, Arizona, *Vice Chairman*

ADLAI E. STEVENSON, Illinois
WALTER D. HUDDLESTON, Kentucky
JOSEPH R. BIDEN, Delaware
DANIEL P. MOYNIHAN, New York
DANIEL K. INOUYE, Hawaii
HENRY M. JACKSON, Washington
PATRICK J. LEAHY, Vermont
JAKE GARN, Utah
CHARLES McC. MATHIAS, JR., Maryland
JOHN H. CHAFEE, Rhode Island
RICHARD G. LUGAR, Indiana
MALCOLM WALLOP, Wyoming
DAVID DURENBERGER, Minnesota

ROBERT C. BYRD, West Virginia, *Ex Officio Member*
HOWARD H. BAKER, JR., Tennessee, *Ex Officio Member*

WILLIAM G. MILLER, *Staff Director*
EARL D. EISENHOWER, *Minority Staff Director*
AUDREY H. HATRY, *Chief Clerk*

# IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

## I. Introduction

The Foreign Intelligence Surveillance Act of 1978, 92 Stat. 1783, became law on October 25, 1978. Congressional oversight of electronic surveillance under the Act is provided by section 108, which states:

CONGRESSIONAL OVERSIGHT

> Sec. 108. (a) On a semiannual basis the Attorney General shall fully inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence concerning all electronic surveillance under this title. Nothing in this title shall be deemed to limit the authority and responsibility of the appropriate committees of each House of Congress to obtain such information as they may need to carry out their respective functions and duties.
>
> (b) On or before one year after the effective date of this Act and on the same day each year for four years thereafter, the Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence shall report respectively to the House of Representatives and the Senate, concerning the implementation of this Act. Said reports shall include but not be limited to an analysis and recommendations concerning whether this Act should be (1) amended, (2) replaced, or (3) permitted to continue in effect without amendment.

In addition, as part of the agreement in conference on the foregoing provision, the conferees stated their expectation that the annual reviews to be conducted by the respective intelligence committees would fully examine the issue of delineating in separate legislation the authority of each committee to notify any U.S. person who was a target of a surveillance that produced no foreign intelligence information. H. Rep. 95–1720, p. 33.

Congressional oversight is particularly important in monitoring the operation of this statute. By its very nature foreign intelligence surveillance must be conducted in secrecy. The Act reflects the need for such secrecy: judicial review is limited to a select panel and routine notice to the target is avoided. In addition, contrary to the premises which underlie the provisions of Title III of the Omnibus Crime Control Act of 1968, it is contemplated that few electronic surveillances conducted pursuant to this Act will result in criminal prosecution.

The semiannual report of the Attorney General is one source of information for the intelligence committees. The legislative history of the Act indicates that the requirement to report "fully" means that the committees must be given enough information to understand the activities, but does not mean that the Attorney General must set forth each and every detailed item of information relating to all electronic surveillances. For example, the committees would not ordinarily wish to know the identities of particular individuals.

To preserve the intelligence committees' right to seek further information, when necessary, section 108 makes clear that nothing in the Act shall be deemed to limit the authority and responsibility of those committees to obtain such additional information as they may need to carry out their respective functions and duties. In the case of the Senate Select Committee on Intelligence, that authority and responsibility are set forth in Senate Resolution 400, 94th Congress, 2d session.

This report is intended to fulfill the duty of the Senate Select Committee under the Act. It covers implementation of the Act during the period from the date of enactment, October 25, 1978, until the final dates covered by the first report of the Attorney General submitted on September 25, 1979. The Act did not take full effect until August 16, 1979, ninety days after the designation of the judges to serve on the two courts created under the Act. Section 301 of the Act provided for the transition as follows:

> SEC. 301. The provisions of this Act and the amendments made hereby shall become effective upon the date of enactment, except 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 this Act, if that surveillance is terminated or an order approving that surveillance is obtained under Title I of this Act within ninety days following the designation of the first judge pursuant to section 103 of this Act.

Prior to the designation of the judges on May 18, 1979, representatives of the Attorney General informed the Select Committee concerning steps being taken to implement the Act.

The Attorney General advised the Committee on June 15, 1979, of his intent to fulfill his statutory duty to keep the Select Committee fully informed concerning electronic surveillance under the Act by providing the Committee with both a semi-annual written report and such further information as might be necessary to satisfy his obligation to keep the Committee informed. He also explained that the initial report would be accelerated and provided to the Committee following the initial 90-day transition period after designation of the judges. On June 27, 1979, the Acting Attorney General reported to the Committee the minimization procedures for electronic surveillances conducted under certification of the Attorney General, rather than court order, pursuant to the provisions of section 102(a) of the Act.

On September 25, 1979, the Attorney General submitted separate reports for each agency that conducted electronic surveillance pursuant to the Act. Each report consisted of a detailed statistical report on the various categories of targets of electronic surveillance that were requested and authorized under the Act during the reporting period.

The statistical information was supplemented, where appropriate, by narrative explanations including an explanation of any significant statistical variations in each section between the reporting period and the previous six-month period. The report was also supplemented by meetings between designated staff personnel of the Select Committee and representatives of the Attorney General and the agencies that conducted the surveillances. Additional specific information concerning the surveillances was provided to the Committee at these meetings in response to the Committee's questions. Information reported under these procedures pertained only to activities authorized under the Foreign Intelligence Surveillance Act.

In addition to the congressional oversight provisions of the Act, the Attorney General is required to transmit in April of each year to the Administrative Office of the United States Courts and to Congress a report setting forth with respect to the preceding calendar year (a) the total number of applications made for orders and extensions of orders approving electronic surveillance under the Act; and (b) the total number of such orders and extensions either granted, modified, or denied. The legislative history indicates that such statistics are to be made public. To protect the security of properly classified information, no additional quantitative indication of the extent to which electronic surveillance under this Act has been used is being made public by the Select Committee on Intelligence in this report.

## II. Analysis and Recommendations

Although certain topics have been identified by the Select Committee during its exercise of oversight responsibilities as described above, the Select Committee has concluded that the brief experience since all procedures of the Act became applicable does not provide sufficient grounds for consideration at this time of amending or replacing the Foreign Intelligence Surveillance Act of 1979. Therefore, the Select Committee recommends that the Act should be permitted to continue in effect without amendment.

The Select Committee intends to conduct a continuing analysis of the Act and its implementation, based upon the information it has already obtained and additional information that may be requested by the Committee or submitted by the Attorney General and the agencies concerned. Moreover, the Committee is interested in receiving any information or expression of views from members of the Senate or from the public concerning the Act. If the Select Committee concludes prior to the date on which its next report to the Senate is required by the statute that the Act should be amended or replaced, or that other information should be reported to the Senate, the Committee will submit an earlier report for that purpose.

The Select Committee continues to hold the view set forth in its annual report to the Senate under Senate Resolution 400 that, "by providing a workable legal procedure for court orders as required by the Fourth Amendment the act aids the foreign intelligence and counterintelligence capabilities of the United States. It allows electronic surveillance to be conducted in circumstances where, because of uncertainty about the legal requirements, the Government may other-

wise have been reluctant to use this technique for detecting dangerous clandestine intelligence and terrorist activities by foreign powers in this country. At the same time it provides safeguards that have not existed before."

## III. Implementation of the Act

Implementation of the Foreign Intelligence Surveillance Act required certain measures to be taken by the Chief Justice of the United States and by the President. The Chief Justice had to designate publicly the federal judges to serve on courts established by the Act and to promulgate security measures for those courts. In addition, the President had to grant express authorization to the Attorney General to approve applications for electronic surveillance under the Act. If those applications were to include certifications by officials other than the Assistant to the President for National Security Affairs, the President had to designate those officials. The Chief Justice and the President completed these actions in May, 1979. During the ninety-day period after designation of the judges, all electronic surveillance covered by the Act and conducted for foreign intelligence purposes was approved under the procedures of the Act either by court order or by certification of the Attorney General under section 102(a) of the Act for a narrow category of surveillance solely directed at certain categories of foreign powers.

The actions taken by the Chief Justice and by the President to implement the Act may be summarized as follows:

*Designation of judges under the act*

The Act requires the Chief Justice of the United States to publicly designate seven district court judges from seven of the United States judicial circuits who constitute the court which has jurisdiction to hear applications for and grant orders approving electronic surveillance under the procedures of the Act. The Chief Justice is also required to publicly designate three judges, one of whom is publicly designated as the presiding judge, from the United States district courts or courts of appeals who together comprise a court of review which has jurisdiction to review the denial of any application made under the Act. Each judge designated under the Act serves for a maximum of seven years and is not eligible for redesignation, except that the terms of the judges first designated are staggered so that one term expires every year or, in the case of the court of review, every two or three years.

On May 18, 1979, the Chief Justice publicly announced the appointment of seven United States District Court Judges as members of the Foreign Intelligence Surveillance Court. Those judges were:

Albert V. Bryan, Jr., Judge, United States District Court, Eastern District of Virginia, to serve a Term of seven years.

Frederick B. Lacy, Judge, United States District Court, District of New Jersey, to serve a Term of six years.

Lawrence Warren Pierce, Judge, United States District Court, Southern District of New York, to serve a Term of five years.

Frank J. McGarr, Judge, United States District Court, Northern District of Illinois, to serve a Term of four years.

George L. Hart, Jr., Senior Judge, United States District Court, District of Columbia, to serve a Term of three years.

James H. Meredith, Chief Judge, United States District Court, Eastern District of Missouri, to serve a Term of two years.

Thomas Jamison MacBride, Senior Judge, United States District Court, Eastern District of California, to serve a Term of one year.

The Chief Justice also publicly announced the designation of three United States Circuit Judges empowered to review denials of surveillance authorization applications as members of the Foreign Intelligence Surveillance Court of Review. These judges were:

A. Leon Higginbothan, Jr., Circuit Judge, United States Court of Appeals for the Third Circuit, to serve a Term of seven years.

James E. Barrett, Circuit Judge, United States Court of Appeals for the Tenth Circuit, to serve a Term of five years.

George Edward MacKinnon, Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, to serve a Term of three years.

The Chief Justice designated Senior United States District Judge Hart, whose chambers are in Washington, D.C., as Presiding Judge of the Foreign Intelligence Surveillance Court; and Circuit Judge MacKinnon, whose chambers are in Washington, D.C., as Presiding Judge of the Foreign Intelligence Court of Review.

*Court security measures*

The Act provides that the record of proceedings under the Act, including applications made and orders granted, are to be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence. The legislative history indicates that the security measures are to include such document, physical, personnel, or communications security measures as are necessary to protect information concerning proceedings under the Act from unauthorized disclosure. Such measures may also include the use of secure premises provided by the executive branch to hear an application and the employment of executive branch personnel to provide clerical and administrative assistance.

On the same date as his announcement of the designation of judges, the Chief Justice publicly released the security procedures under which both courts would operate as required by the Act. Under these procedures, the same facilities, supporting personnel and security procedures are used by both courts, subject to such exceptions as may be authorized by the Chief Justice. The quarters and facilities of the courts are provided by the Attorney General, subject to the approval of the Chief Justice, and are constructed and maintained in accordance with applicable construction standards pertaining to sensitive compartmented information set out by the United States Intelligence Board in 1973 or successor directives.

Before designation, the judges are subject to updated FBI background investigations conducted under standards established by the Director of Central Intelligence in 1976, or successor directives as concurred in by the Attorney General, insofar as they may be deemed

applicable to the court. If a question of suitability is raised after initial appointment, the matter is to be referred to the Chief Justice who may in his discretion consult the Attorney General and the Director of Central Intelligence regarding the security significance of the matter before taking such action as he deems appropriate.

The Director of the Administrative Office of the United States Courts designates one employee, to be appointed by the courts, to serve as Clerk of Court and to perform other support functions. Provision is also made for a substitute, if the Clerk is absent. If the court determines that legal assistance is necessary, it may appoint a legal officer to assist the courts in the performance of their duties. In any specific case the courts may refer to the legal officer such parts of the application and supporting documents as they deem necessary for the legal officer to provide assistance. The court may also request the Administrative Office of the United States Courts to provide a court reporter.

These personnel undergo appropriate FBI background investigations under standards established by the Director of Central Intelligence in 1976, or successor directives as concurred in by the Attorney General. They may not have access to classified information unless they have received a security clearance determined appropriate by the courts in consultation with the Attorney General and the Director of Central Intelligence. Court personnel having access to court records must sign appropriate security agreements. If a question concerning their security clearance is raised after appointment, the matter is referred to the courts which may consult the Attorney General and the Director of Central Intelligence regarding its security significance before taking such action as they deem appropriate.

The courts designate an experienced security officer from among candidates submitted by the Attorney General and the Director of Central Intelligence. The security office may be an Executive branch employee, and alternate security officers may be designated. The security officer serves at the pleasure of the courts and is not subject to removal by the Executive branch without the concurrence of the courts. The security officer (and alternates) may perform other duties in the Executive branch, so long as such duties do not conflict with the officer's responsibilities to the court. Additional personnel may be provided by the Department of Justice to perform incidental security and administrative functions for the court if appropriate security clearances are obtained.

The security officer is responsible to the court for document, physical, personnel, and communications security. Under court supervision, the security officer is to take reasonable measures to fulfill these responsibilites and arrange for an annual security audit of court quarters and facilities and report to the courts.

The Clerk of the Court, with the advice and concurrence of the security officer, establishes and maintains a control and accountability system for all records of proceedings before the courts, and any other documents the courts may designate. The Clerk, in consultation with the security officer, ensures that all court records are marked with appropriate security classifications in accordance with Executive Order 12065 and its successors, and procedures established by the courts.

The courts are to ensure that all their records, including notes, draft opinions and related materials, are maintained according to applicable security standards established by the Director of Central Intelligence in 1978, or successor directives as concurred in by the Attorney General. Court records are not to be removed from court premises except in accordance with the Act. Court personnel may have access to court records only as authorized by the courts and only to the extent necessary to perform an official function. Reports and exhibits submitted in support of applications to the court may be returned by the court to the applicant on a trust receipt basis.

For surveillances under the Act approved by certification of the Attorney General, rather than by court order, the Act requires the Attorney General to immediately transmit under seal to the Foreign Intelligence Surveillance Court a copy of his certification. Such certification must be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of Central Intelligence, and must remain sealed unless an application for a court order is made with respect to the surveillance or the certification is necessary to determine the legality of the surveillance in subsequent litigation.

The security measures established by the Chief Justice and concurred in by the Attorney General require that such certifications be numbered in sequence by the Clerk of the Court, who maintains a record of all certifications received by designated number and date of receipt. Certifications are filed under seal in separate storage compartments. They are only accessible jointly to a representative designated by the courts and a representative of the Executive branch designated by the Attorney General. They may be unsealed only in accordance with the provisions of the Act.

Finally, both the members of the courts and all court personnel are to be briefed on security matters appropriate to the functions of the courts by designees of the Attorney General and the Director of Central Intelligence.

*Executive Order 12139*

The President issued Executive Order 12139 on May 23, 1979, pursuant to the authority vested in him by sections 102 and 104 of the Act, in order to provide as set forth in the Act for the authorization of electronic surveillance for foreign intelligence purposes.

Pursuant to section 102(a)(1) of the Act, the order authorizes the Attorney General to approved electronic surveillance without a court order, but only if the Attorney General makes the certifications required by that section. (Section 102(a)(1) requires the Attorney General to certify in writing under oath that the electronic surveillance is directed solely at—(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among specified types of foreign powers; or (ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of the specified type of foreign power. The Attorney General must also certify that there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; and that the proposed minimization procedures meet the definition of such procedures under the Act.)

Pursuant to section 102(a) of the Act, the order authorizes the Attorney General to approve applications to the Foreign Intelligence Surveillance Court to obtain orders for electronic surveillance for the purpose of obtaining foreign intelligence information.

Section 104(a)(7) of the Act requires that such applications contain a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate. Such official or officials must certify that he or she deems the information sought to be foreign intelligence information, that the purpose of the surveillance is to obtain foreign intelligence information, and that such information cannot reasonably be obtained by normal investigative techniques. The certification must also designate the type of foreign intelligence information sought. Except for specified types of foreign powers, it must include a statement of the basis for the certification that the information sought is that type of foreign intelligence information and that such information cannot reasonably be acquired by normal investigative techniques. The court reviews this certification only if the target is a United States person.

Pursuant to the foregoing provision, the President designated in Executive Order 12139 the following officials, each of whom is employed in the area of national security or defense, to make the certifications required by section 104(a)(7) of the Act in support of applications to conduct electronic surveillance:

(a) Secretary of State.
(b) Secretary of Defense.
(c) Director of Central Intelligence.
(d) Director of the Federal Bureau of Investigation.
(e) Deputy Secretary of State.
(f) Deputy Secretary of Defense.
(g) Deputy Director of Central Intelligence.

The order also provides that none of the above officials, nor anyone officially acting in that capacity, may exercise the authority to make such certifications, unless that official has been appointed by the President with the advice and consent of the Senate.

Finally, Executive Order 12139 made two modifications in Executive Order 12036, January 26, 1978, governing United States intelligence activities. The provision of the earlier order on electronic surveillance is revised to add the following: "Any electronic surveillance, as defined in the Foreign intelligence Surveillance Act of 1978, shall be conducted in accordance with that Act as well as this Order." In addition, the provision of the prior order on television cameras and other monitoring is modified to add the following: "Any monitoring which constitutes electronic surveillance as defined in the Foreign Intelligence Surveillance Act of 1978 shall be conducted in accordance with that Act as well as this Order."

O