

103^D CONGRESS
2^D SESSION

S. 1869

To amend the National Security Act of 1947 to improve counterintelligence measures through enhanced security for classified information, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 24 (legislative day, FEBRUARY 22), 1994

Mr. COHEN (for himself and Mr. BOREN) introduced the following bill; which was read twice and referred to the Select Committee on Intelligence

A BILL

To amend the National Security Act of 1947 to improve counterintelligence measures through enhanced security for classified information, and for other purposes.

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. SHORT TITLE.**

4 This Act may be cited as the “Counterintelligence
5 Improvements Act of 1994”.

1 **SEC. 2. AMENDMENT TO THE NATIONAL SECURITY ACT OF**
2 **1947.**

3 The National Security Act of 1947 (50 U.S.C. 401
4 et seq.) is amended by inserting at the end thereof the
5 following new title:

6 “TITLE VIII—ACCESS TO TOP SECRET
7 INFORMATION

8 “ELIGIBILITY FOR ACCESS TO TOP SECRET INFORMATION

9 “SEC. 801. (a) The President and Vice President,
10 Members of the Congress, Justices of the Supreme Court
11 and judges of other courts of the United States established
12 pursuant to Article III of the Constitution, shall, by virtue
13 of their elected or appointed positions, be entitled to access
14 to Top Secret information needed for the performance of
15 their governmental functions without regard to the other
16 provisions of this title.

17 “(b) Among employees of the United States Govern-
18 ment, access to Top Secret information shall be limited
19 to employees—

20 “(1) who have been granted access to such in-
21 formation pursuant to this title;

22 “(2) who are citizens of the United States who
23 require routine access to such information for the
24 performance of official governmental functions; and

25 “(3) who have been determined to be trust-
26 worthy based upon a background investigation and

1 appropriate reinvestigations and have otherwise sat-
2 isfied the requirements of section 802, below.

3 “(c) Access to Top Secret information by persons
4 other than those identified in subsections (a) and (b) shall
5 be permitted only in accordance with the regulations is-
6 sued by the President pursuant to section 802 below.

7 “IMPLEMENTING REGULATIONS

8 “Sec. 802. The President shall, within 180 days of
9 enactment of this title, issue regulations to implement this
10 title which shall be binding upon all departments, agen-
11 cies, and offices of the Executive branch. These regula-
12 tions shall, at a minimum provide that—

13 “(a) no employee of the United States Govern-
14 ment shall be given access to Top Secret information
15 owned, originated or possessed by United States,
16 after the effective date of this title, by any depart-
17 ment, agency, or entity of the United States Govern-
18 ment unless such person has been subject to an ap-
19 propriate background investigation and has—

20 “(1) provided consent to the investigative
21 agency responsible for conducting the security
22 investigation of such person, during the initial
23 background investigation and for such times as
24 access to such information is maintained, and
25 for 5 years thereafter, permitting access to—

1 “(A) financial records concerning the
2 subject pursuant to section 1104 of the
3 Right to Financial Privacy Act of 1978;

4 “(B) consumer reports concerning the
5 subject pursuant to section 1681b of the
6 Consumer Credit Protection Act; and

7 “(C) records maintained by commer-
8 cial entities within the United States per-
9 taining to any travel by the subject outside
10 the United States: *Provided, That—*

11 “(i) no information may be re-
12 quested by an authorized investigative
13 agency pursuant to this section for
14 any purpose other than making a se-
15 curity determination;

16 “(ii) where the person concerned
17 no longer has access to Top Secret in-
18 formation, no information may be re-
19 quested by an authorized investigative
20 agency pursuant to this section unless
21 such agency has reasonable grounds
22 to believe, based upon specific and
23 articulable facts available to it, that
24 such person may pose a threat to the
25 continued security of the information

1 to which he or she had previously had
2 access; and

3 “(iii) any information obtained
4 by an authorized investigative agency
5 pursuant to this section shall not be
6 disseminated to any other department,
7 agency, or entity for any purpose
8 other than for making a security de-
9 termination, or for foreign counter-
10 intelligence or law enforcement pur-
11 poses;

12 “(2) agreed, during the period of his or
13 her access, to report to the department, agency,
14 or entity granting such access in accordance
15 with applicable regulations, any travel to for-
16 eign countries which has not been authorized as
17 part of the subject’s official duties;

18 “(3) agreed to report to the Federal Bu-
19 reau of Investigation, or to appropriate inves-
20 tigative authorities of the department, agency,
21 or entity concerned, any unauthorized contacts
22 with persons known to be foreign nationals or
23 persons representing foreign nationals, where
24 an effort to acquire classified information is
25 made by the foreign national, or where such

1 contacts appear intended for this purpose. For
2 purposes of this subsection, the term ‘unauthor-
3 ized contacts’ does not include contacts made
4 within the context of an authorized diplomatic
5 relationship. Failure by the employee to comply
6 with any of the requirements of this subsection
7 shall constitute grounds for denial or termi-
8 nation of access to the Top Secret information
9 concerned.

10 “(b) all employees granted access to Top Secret
11 information pursuant to this subsection shall also be
12 subject to—

13 “(1) additional background investigations
14 by appropriate governmental authorities during
15 the period of access at no less frequent interval
16 than every 5 years, except that any failure to
17 satisfy this requirement that is not solely attrib-
18 utable to the subject of the investigation shall
19 not result in a loss or denial of access; and

20 “(2) investigation by appropriate govern-
21 mental authority at any time during the period
22 of access to ascertain whether such persons
23 continue to meet the requirements for access.

24 “(c) access to Top Secret information by cat-
25 egories of persons who do not meet the requirements

1 of subsections (A) and (B) of this section may be
2 permitted only where the President, or officials des-
3 ignated by the President for this purpose, determine
4 that such access is essential to protect or further the
5 national security interests of the United States.

6 “(d) a single office within the Executive branch
7 shall be designated to monitor the implementation
8 and operation of this title within the Executive
9 branch. This office shall submit an annual report to
10 the President and appropriate committees of the
11 Congress, describing the operation of this title and
12 recommending needed improvements. A copy of the
13 regulations implementing this title shall be provided
14 to the Select Committee on Intelligence of the Sen-
15 ate and the Permanent Select Committee on Intel-
16 ligence of the House of Representatives thirty days
17 prior to their effective date.

18 “WAIVERS FOR INDIVIDUAL CASES

19 “SEC. 803. In extraordinary circumstances, when es-
20 sential to protect or further the national security interests
21 of the United States, the President (or officials designated
22 by the President for this purpose) may waive the provi-
23 sions of this title, or the provisions of the regulations is-
24 sued pursuant to section 802, above, in individual cases
25 involving persons who are citizens of the United States
26 or are persons admitted into the United States for perma-

1 nent residence: *Provided*, That all such waivers shall be
2 made a matter of record and reported to the office des-
3 igned pursuant to section 802(D), above, and shall be
4 available for review by the Select Committee on Intel-
5 ligence of the Senate and the Permanent Select Committee
6 of the House of Representatives.

7 “DEFINITIONS

8 “SEC. 804. For purposes of this title—

9 “(a) the term ‘national security’ refers to the
10 national defense and foreign relations of the United
11 States;

12 “(b) the phrases ‘information classified in the
13 interest of national security’ or ‘classified informa-
14 tion’ means any information originated by or on be-
15 half of the United States Government, the unauthor-
16 ized disclosure of which would cause damage to the
17 national security, which has been marked and is con-
18 trolled pursuant to the Executive Order 12356 of
19 April 2, 1982, or successor orders, or the Atomic
20 Energy Act of 1954;

21 “(c) the term ‘Top Secret information’ means
22 information classified in the interests of national se-
23 curity, the unauthorized disclosure of which would
24 cause exceptionally grave damage to the national se-
25 curity;

1 “(d) the term ‘employee’ includes any person
2 who receives a salary or compensation of any kind
3 from the United States Government, is a contractor
4 of the United States Government, is an unpaid con-
5 sultant of the United States Government, or other-
6 wise acts for or on behalf of the United States Gov-
7 ernment, but does not include the President or Vice
8 President of the United States, Members of the Con-
9 gress of the United States, Justices of the Supreme
10 Court or judges of other federal courts established
11 pursuant to Article III of the Constitution; and

12 “(e) the term ‘authorized investigative agency’
13 means an agency authorized by law or regulation to
14 conduct investigations of persons who are proposed
15 for access to Top Secret information to ascertain
16 whether such persons satisfy the criteria for obtain-
17 ing and retaining access to such information.

18 “EFFECTIVE DATE

19 “SEC. 805. This title shall take effect 180 days after
20 the date of its enactment.”.

21 **SEC. 3. PROTECTION OF CRYPTOGRAPHIC INFORMATION.**

22 The National Security Act of 1947 (50 U.S.C. 401
23 et seq.), as amended by section 2, is further amended by
24 inserting at the end the following new title:

1 “TITLE IX—PROTECTION OF CRYPTOGRAPHIC
2 INFORMATION

3 “SEC. 901. (a) REQUIREMENTS FOR ACCESS TO
4 CRYPTOGRAPHIC INFORMATION.—(1) Any employee of a
5 department or agency within the Executive branch who
6 is granted access to classified cryptographic information
7 or routine, recurring access to any space in which classi-
8 fied cryptographic key is produced or processed, or is as-
9 signed responsibilities as a custodian of classified cryp-
10 tographic key, shall, as a condition of receiving such ac-
11 cess, or being assigned such responsibilities, and at a mini-
12 mum:

13 “(A) meet the requirements applicable to per-
14 sons having access to Top Secret information, as de-
15 fined in subsection 804(c) of this Act, [as added by
16 Section 2 of this Act]; and

17 “(B) be subject to periodic polygraph examina-
18 tions conducted by appropriate governmental au-
19 thorities, limited in scope to questions of a counter-
20 intelligence nature, during the period of access.

21 “(2) Failure to submit to an examination required
22 under paragraph (1) shall be grounds for removal from
23 access to cryptographic information or spaces.

24 “(3) No person shall be removed from access to cryp-
25 tographic information or spaces based solely upon the in-

1 terpretation of the results produced by a polygraph instru-
2 ment, measuring physiological resources, unless, after fur-
3 ther investigation, the head of the department or agency
4 concerned determines the risk to the national security in
5 permitting such access to be so potentially grave that ac-
6 cess must nonetheless be denied.

7 “(b) DEFINITIONS.—For purposes of this section—

8 “(1) the term ‘classified cryptographic informa-
9 tion’ means any information classified by the United
10 States Government pursuant to law or Executive
11 order concerning the details of (A) the nature, prep-
12 aration, or use of any code, cipher, or cryptographic
13 system of the United States; or (B) the design, con-
14 struction, use, maintenance, or repair of any cryp-
15 tographic equipment: *Provided, however,* That the
16 term does not include information concerning the
17 use of cryptographic systems or equipment required
18 for personal or office use;

19 “(2) the phrase ‘custodian of classified cryp-
20 tographic key’ means positions that require access to
21 classified cryptographic key beyond that required to
22 use or operate cryptographic equipment for personal
23 or office use, future editions of classified cryp-
24 tographic key, or classified cryptographic key used
25 for multiple devices;

1 “(3) the term ‘classified cryptographic key’
2 means any information (usually a sequence of ran-
3 dom binary digits), in any form, classified by the
4 United States Government pursuant to law or Exec-
5 utive order that is used to set up and periodically
6 change the operations performed by any cryp-
7 tographic equipment;

8 “(4) the term ‘cryptographic equipment’ means
9 any device, apparatus or appliance used, or pre-
10 pared, or planned for use by the United States for
11 the purpose of authenticating communications or
12 disguising or concealing the contents, significance,
13 or meanings of communications;

14 “(5) the term ‘employee’ includes any person
15 who receives a salary or compensation of any kind
16 from a department or agency of the Executive
17 branch, or is a contractor or unpaid consultant of
18 such department or agency;

19 “(6) the term ‘head of a department or agency’
20 refers to the highest official who exercises super-
21 visory control over the employee concerned, and does
22 not include any intermediate supervisory officials
23 who may otherwise qualify as heads of agencies
24 within departments; and

1 of 1947 (as added by section 2 of this Act), may authorize
2 nonrevokable disclosure of all financial records maintained
3 by financial institutions for the period of the customer's
4 access to such information and for up to 5 years after
5 access to such information has been terminated, by the
6 investigative agency responsible for the conduct of such
7 investigation, for an authorized security purpose.

8 “(2) Such authority shall be contained in a signed
9 and dated statement of the customer which identifies the
10 financial records which are authorized to be disclosed.
11 Such statement may also authorize the disclosure of finan-
12 cial records of accounts opened during the period covered
13 by the consent agreement which are not identifiable at the
14 time such consent is provided. A copy of such statement
15 shall be provided by the investigative agency concerned to
16 the financial institution from which disclosure is sought,
17 together with the certification required pursuant to section
18 1103(b) (12 U.S.C. 3403(b)).

19 “(3) The rights of the customer established by sub-
20 section (c), above, shall pertain to any disclosures made
21 pursuant to this subsection.

22 “(4) On an annual basis, the office designated by
23 President pursuant to section 802(D) of the National Se-
24 curity Act of 1947 (as added by section 2 of this Act),
25 shall fully inform the Permanent Select Committee on In-

1 telligence of the House of Representatives and the Select
2 Committee on Intelligence of the Senate concerning the
3 number of requests for financial records made pursuant
4 to this section.”.

5 **SEC. 5. NEW CRIMINAL OFFENSE FOR THE POSSESSION OF**
6 **ESPIONAGE DEVICES.**

7 (a) IN GENERAL.—Chapter 37 of title 18, United
8 States Code, is amended by inserting at the end thereof
9 the following new section:

10 “POSSESSION OF ESPIONAGE DEVICES

11 “SEC. 799a. Whoever knowingly maintains possession
12 of any electronic, mechanical, or other device or equipment
13 the design and capability of which renders it primarily
14 useful for the purpose of surreptitiously collecting or com-
15 municating information, with the intent of utilizing such
16 device or equipment to undertake actions which would vio-
17 late section 793, 794, 794a (as added by section 6 of this
18 Act), or 798 of this title, or section 783(b) of title 50,
19 United States Code, shall be fined not more than \$10,000
20 or imprisoned not more than 5 years, or both.”.

21 (b) AMENDMENTS TO TABLE OF SECTIONS.—The
22 table of sections for chapter 37 of title 18, United States
23 Code, is amended by adding at the end thereof the follow-
24 ing new item:

“799a. Possession of espionage devices.”.

1 **SEC. 6. NEW OFFENSE FOR SALE OR TRANSFER TO FOR-**
2 **EIGN GOVERNMENTS DOCUMENTS AND**
3 **OTHER MATERIALS DESIGNATED AS TOP SE-**
4 **CRET.**

5 (a) IN GENERAL.—Chapter 37 of title 18, United
6 States Code, is amended by inserting after section 794 the
7 following new section:

8 “SALE OR TRANSFER OF DOCUMENTS OR MATERIALS
9 MARKED AS ‘TOP SECRET’

10 “SEC. 794a. (a)(1) No person shall knowingly sell or
11 otherwise transfer for any valuable consideration to any
12 person whom he knows or has reason to believe to be an
13 agent or representative of a foreign government—

14 “(A) any document, writing, code book, sketch,
15 photograph, map, model, instrument, equipment,
16 electronic storage media, or other material, or por-
17 tion thereof, knowing that it is marked or otherwise
18 designated in any manner, pursuant to applicable
19 law and Executive order, as ‘Top Secret’, or

20 “(B) any such document, writing, code book,
21 sketch, photograph, map, model, instrument, equip-
22 ment, electronic storage media, or other material, or
23 portion thereof, which has had such marking or des-
24 ignation removed without authority and the person
25 making the sale or transfer is aware of such re-
26 moval.

1 “(2) Paragraph (1) shall not be deemed to be violated
2 by a person who makes such transfer pursuant to applica-
3 ble law or executive branch authority.

4 “(b) In any prosecution under this section, whether
5 or not the information or material in question has been
6 properly marked or designated as ‘TOP SECRET’ pursu-
7 ant to applicable law or Executive order shall not be an
8 element of the offense: *Provided, however,* That it shall
9 be a defense to any prosecution under this section that
10 the information or document in question has been offi-
11 cially released to the public by an authorized representa-
12 tive of the United States prior to the sale or transfer in
13 question.

14 “(c) Violation of this section shall be punishable by
15 imprisonment for a maximum of 15 years.”.

16 (b) AMENDMENTS TO TABLE OF SECTIONS.—The
17 table of sections for chapter 37 of title 18, United States
18 Code, is amended by inserting after the item relating to
19 section 794 the following new item:

“794a. Sale or transfer of documents or materials marked as ‘Top Secret’.”

20 **SEC. 7. LESSER CRIMINAL OFFENSE FOR THE REMOVAL OF**
21 **TOP SECRET DOCUMENTS BY GOVERNMENT**
22 **EMPLOYEES AND CONTRACTORS.**

23 (a) IN GENERAL.—Chapter 93 of title 18, United
24 States Code, is amended by inserting at the end thereof
25 the following new section:

1 “(a) section 793, 794, 794a (as added by sec-
2 tion 6 of this Act), 798, 798a (as added by section
3 5 of this Act), or subsection 1030(a)(1) of this title;

4 “(b) section 601 of the National Security Act of
5 1947 as added by the Intelligence Identities Protec-
6 tion Act of 1982 (50 U.S.C. 421); or

7 “(c) subsections 4(b) or 4(c) of the Subversive
8 Activities Control Act of 1950 (U.S.C. 783(b) or
9 783(c));

10 begun or committed upon the high seas or elsewhere out
11 of the jurisdiction of any particular state or district, may
12 be prosecuted in the District of Columbia, or in the East-
13 ern District of Virginia, or in any other district authorized
14 by law.”.

15 (b) The chapter analysis for chapter 211 of title 18
16 of the United States Code is amended by striking out

“[3239. Repealed.]”

17 and inserting in lieu thereof:

“3239. Jurisdiction for espionage and related offenses.”

18 **SEC. 9. EXPANSION OF EXISTING STATUTE REGARDING**
19 **FORFEITURE OF COLLATERAL PROFITS OF**
20 **CRIME TO ADDITIONAL ESPIONAGE OF-**
21 **FENSES.**

22 Section 3681 of title 18, United States Code, is
23 amended—

1 (1) in subsection (a), by striking out “section
2 794 of this title” and inserting in lieu thereof “sec-
3 tions 793, 794, 794a (as added by section 6 of this
4 Act), 798, and 799a (as added by section 5 of this
5 Act) of this title and section 783 of title 50, United
6 States Code”; and

7 (2) by adding at the end thereof the following
8 new subsection:

9 “(e) For purposes of this section, convictions pursu-
10 ant to military courts-martial for offenses comparable to
11 violations of sections 793, 794, 794a (as added by section
12 6 of this Act), 798, and 799a (as added by section 5 of
13 this Act) of this title, or a violation of section 783 of title
14 50, or convictions by foreign courts for offenses which, if
15 perpetrated within the United States, would constitute of-
16 fenses under sections 793, 794, 794a (as added by section
17 6 of this Act), 798, and 799a (as added by section 5 of
18 this Act) of this title, or a violation of section 783 of title
19 50 shall be considered as convictions for which actions
20 may be ordered pursuant to this section.”.

1 **SEC. 10. DENIAL OF ANNUITIES OR RETIRED PAY TO PER-**
2 **SONS CONVICTED OF ESPIONAGE IN FOR-**
3 **EIGN COURTS INVOLVING UNITED STATES IN-**
4 **FORMATION.**

5 Section 8312 of title 5, United States Code, is
6 amended by adding at the end thereof the following new
7 subsection:

8 “(d) For purposes of subsections (b)(1) and (c)(1),
9 an offense within the meaning of such subsections is es-
10 tablished if the Attorney General certifies to the agency
11 employing or formerly employing the person concerned—

12 “(i) that an individual subject to this chapter
13 has been convicted by an impartial court of appro-
14 priate jurisdiction within a foreign country in cir-
15 cumstances in which the conduct violates the provi-
16 sions of law enumerated in subsections (b)(1) and
17 (c)(1), or would violate such provisions, had such
18 conduct taken place within the United States, and
19 that such conviction is not being appealed or that
20 final action has been taken on such appeal;

21 “(2) that such conviction was obtained in ac-
22 cordance with procedures that provided the defend-
23 ant due process rights comparable to such rights
24 provided by the United States Constitution, and
25 such conviction was based upon evidence which

1 would have been admissible in the courts of the
2 United States; and

3 “(3) that such conviction occurred after the
4 date of enactment of this subsection:

5 *Provided*, That any certification made pursuant to this
6 paragraph shall be subject to review by the United States
7 Court of Claims based upon the application of the individ-
8 ual concerned, or his or her attorney, alleging that any
9 of the conditions set forth in subsections (1), (2), (3),
10 herein, as certified by the Attorney General, have not been
11 satisfied in his or her particular circumstances. Should the
12 court determine that any of these conditions has not been
13 satisfied in such case, the court shall order any annuity
14 or retirement benefit to which the person concerned is en-
15 titled to be restored and shall order that any payments
16 which may have been previously denied or withheld to be
17 paid by the department or agency concerned.

18 **SEC. 11. AUTHORIZING THE FBI TO OBTAIN CONSUMER RE-**
19 **PORTS ON PERSONS BELIEVED TO BE**
20 **AGENTS OF FOREIGN POWERS.**

21 Section 608 of the Consumer Credit Protection Act
22 (15 U.S.C. 1681f) is amended—

23 (1) by inserting “(a)” before “Notwithstand-
24 ing”; and

1 (2) by inserting at the end thereof the following
2 new subsections:

3 “(b) Notwithstanding the provisions of section 604,
4 a consumer reporting agency shall, upon request, furnish
5 a consumer report to the Federal Bureau of Investigation,
6 if the Director of the Federal Bureau of Investigation, or
7 the Director’s designee, certifies in writing to the
8 consumer reporting agency that such records are sought
9 in connection with an authorized foreign counterintel-
10 ligence investigation and that there are specific and
11 articulable facts giving reason to believe that the person
12 to whom the requested consumer report relates is an agent
13 of a foreign power, as defined in section 101 of the For-
14 eign Intelligence Surveillance Act of 1978 (50 U.S.C.
15 1801).

16 “(c) Notwithstanding the provisions of section 604,
17 a consumer reporting agency shall furnish identifying in-
18 formation respecting any consumer, limited to name, ad-
19 dress, former addresses, places of employment, or former
20 places of employment, to a representative of the Federal
21 Bureau of Investigation when presented with a written re-
22 quest signed signed by the Director of the Federal Bureau
23 of Investigation, or the Director’s designee, stating that
24 the information is necessary to the conduct of an author-
25 ized foreign counterintelligence investigation.

1 “(d) No consumer reporting agency, or officer, em-
2 ployee, or agent of such institution shall disclose to any
3 person that the Federal Bureau of Investigation has
4 sought or obtained a consumer report or identifying infor-
5 mation respecting any consumer under this section.

6 “(e) On an annual basis the Director of the Federal
7 Bureau of Investigation shall fully inform the Permanent
8 Select Committee on Intelligence of the House of Rep-
9 resentatives and the Select Committee on Intelligence of
10 the Senate concerning all requests made under subsections
11 (b) and (c).”.

12 **SEC. 12. TO PROVIDE FOR REWARDS FOR INFORMATION**
13 **CONCERNING ESPIONAGE.**

14 (a) IN GENERAL.—Chapter 204 of title 18, United
15 States Code, is amended—

16 (1) by inserting at the end of the chapter head-
17 ing “**AND ESPIONAGE**”;

18 (2) in section 3071, by inserting “(a)” imme-
19 diately before “With respect to”;

20 (3) in section 3071, adding at the end thereof
21 the following new subsection:

22 “(b) With respect to acts of espionage involving or
23 directed at United States information classified in the in-
24 terest of national security, the Attorney General may re-
25 ward any individual who furnishes information—

1 “(1) leading to the arrest or conviction, in any
2 country, of any individual or individuals for commis-
3 sion of an act of espionage against the United
4 States;

5 “(2) leading to the arrest or conviction, in any
6 country, of any individual or individuals for conspir-
7 ing or attempting to commit an act of espionage
8 against the United States; or

9 “(3) leading to the prevention or frustration of
10 an act of espionage against the United States.”.

11 (b) AMOUNT OF REWARDS.—Section 3072 of title 18,
12 United States Code, is amended by striking out
13 “\$500,000” and inserting in lieu thereof “\$1,000,000”.

14 (c) DEFINITIONS.—Section 3077 of title 18, United
15 States Code, is amended by inserting at the end thereof
16 the following new paragraphs:

17 “(8) ‘act of espionage’ means an activity that is
18 a violation of sections 794, 794a (as added by sec-
19 tion 6 of this Act), 798, or 799a (as added by sec-
20 tion 5 of this Act) of this title or section 783 of title
21 50, United States Code.

22 “(9) ‘United States information classified in the
23 interests of national security’ means information
24 originated, owned, or possessed by the United States
25 Government concerning the national defense and for-

1 eign relations of the United States that has been de-
2 termined pursuant to law or Executive order to re-
3 quire protection against unauthorized disclosure and
4 that has been so designated.”.

5 **SEC. 13. TO PROVIDE A COURT ORDER PROCESS FOR PHYS-**
6 **ICAL SEARCHES UNDERTAKEN FOR FOREIGN**
7 **INTELLIGENCE PURPOSES.**

8 The Foreign Intelligence Surveillance Act of 1978 is
9 amended by inserting at the end thereof the following new
10 title:

11 “TITLE IV—PHYSICAL SEARCHES WITHIN THE
12 UNITED STATES FOR FOREIGN INTEL-
13 LIGENCE PURPOSES

14 “AUTHORIZATION OF PHYSICAL SEARCHES FOR FOREIGN
15 INTELLIGENCE PURPOSES

16 “SEC. 401(a). Applications for a court order under
17 this title are authorized if the President has, in writing,
18 empowered the Attorney General to approve applications
19 to the Foreign Intelligence Surveillance Court, and a judge
20 of that court to whom application is made may, notwith-
21 standing any other law, grant an order, in conformity with
22 section 403, approving a physical search in the United
23 States, for the purpose of collecting foreign intelligence in-
24 formation of—

1 “(1) the property, information or material of a
2 foreign power as defined in section 101(a)(1), (2),
3 and (3) of this Act, or

4 “(2) the premises, property, information or ma-
5 terial of an agent of a foreign power or a foreign
6 power as defined in section 101(a)(4), (5), and (6)
7 of this Act.

8 “(b) The Foreign Intelligence Surveillance Court
9 shall have jurisdiction to hear applications for and grant
10 orders approving a physical search for the purpose of ob-
11 taining foreign intelligence information anywhere within
12 the United States under the procedures set forth in this
13 title, except that no judge shall hear the same application
14 which has been denied previously by another judge. If any
15 judge denies an application for an order authorizing a
16 physical search under this title, such judge shall provide
17 immediately for the record a written statement of each
18 reason for his decision and, on motion of the United
19 States, the record shall be transmitted, under seal, to the
20 Court of Review.

21 “(c) The Court of Review shall have jurisdiction to
22 review the denial of any application made under this title.
23 If such court determines that the application was properly
24 denied, the Court shall immediately provide for the record
25 a written statement of each reason for its decision and,

1 on petition of the United States for a writ of certiorari,
2 the record shall be transmitted under seal to the Supreme
3 Court, which shall have jurisdiction to review such deci-
4 sion.

5 “(d) Judicial proceedings under this title shall be con-
6 cluded as expeditiously as possible. The record of proceed-
7 ings under this title, including applications made and or-
8 ders granted, shall be maintained under security measures
9 established by the Chief Justice of the United States in
10 consultation with the Attorney General and the Director
11 of Central Intelligence.

12 “APPLICATION FOR AN ORDER

13 “SEC. 402(a). Each application for an order approv-
14 ing a physical search under this title shall be made by
15 a Federal officer in writing upon oath or affirmation to
16 a judge of the Foreign Intelligence Surveillance Court.
17 Each application shall require the approval of the Attor-
18 ney General based upon the Attorney General’s finding
19 that it satisfied the criteria and requirements for such ap-
20 plication as set forth in this title. It shall include—

21 “(1) the identity, if known, or a description of
22 the target of the search;

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

1 “(3) the identity of the Federal officer making
2 the application and a detailed description of the
3 premises or property to be searched and of the infor-
4 mation, material, or property to be seized, repro-
5 duced, or altered;

6 “(4) a statement of the facts and circumstances
7 relied upon by the applicant to justify the appli-
8 cant’s belief that—

9 “(A) the target of the physical search is a
10 foreign power or an agent of a foreign power;

11 “(B) the premises or property to be
12 searched contains foreign intelligence informa-
13 tion;

14 “(C) the premises or property to be
15 searched is owned, used, possessed by, or is in
16 transit to or from a foreign power or an agent
17 of a foreign power;

18 “(5) a statement of the proposed minimization
19 procedures;

20 “(6) a statement of the manner in which the
21 physical search is to be conducted;

22 “(7) a statement of the facts concerning all pre-
23 vious applications that have been made to any judge
24 under this title involving any of the persons, prem-

1 ises, or property specified in the application, and the
2 action taken on each previous applications;

3 “(8) a statement of the facts concerning any
4 search described in section 406(b), below, which in-
5 volves any of the persons, premises, or property
6 specified in the application; and

7 “(9) a statement that the purpose of the phys-
8 ical search is to obtain foreign intelligence informa-
9 tion.

10 “(b) The judge may require the applicant to furnish
11 such other information as may be necessary to make the
12 determinations required by section 403.

13 “ISSUANCE OF AN ORDER

14 “SEC. 403. (a) Upon an application made pursuant
15 to section 402, the judge shall enter an ex parte order
16 as requested or as modified approving the physical search
17 if the judge finds that—

18 “(1) the President has authorized the Attorney
19 General to approve applications for physical searches
20 for foreign intelligence purposes;

21 “(2) the application has been made by a Fed-
22 eral officer and approved by the Attorney General;

23 “(3) on the basis of the facts submitted by the
24 applicant there is probable cause to believe that—

25 “(A) the target of the physical search is a
26 foreign power or an agent of a foreign power:

1 *Provided*, That no United States person may be
2 considered an agent of a foreign power solely
3 upon the basis of activities protected by the
4 first amendment to the Constitution of the
5 United States;

6 “(B) the premises or property to be
7 searched are owned, used, possessed by, or is in
8 transit to or from an agent of a foreign power
9 or a foreign power; and

10 “(C) physical search of such premises or
11 property can reasonably be expected to yield
12 foreign intelligence information which cannot
13 reasonably be obtained by normal investigative
14 means; and

15 “(4) the proposed minimization procedures
16 meet the definition of minimization contained in this
17 title; and

18 “(5) the application which has been filed con-
19 tains all statements required by section 402.

20 “(b) An order approving a physical search under this
21 section shall—

22 “(1) specify—

23 “(A) the Federal officer or officers author-
24 ized to conduct the physical search and the

1 identity, if known, or a description of the target
2 of the physical search;

3 “(B) the premises or property to be
4 searched and the information, material, or
5 property to be seized, altered, or reproduced;

6 “(C) the type of foreign intelligence infor-
7 mation sought to be acquired; and

8 “(D) a statement of the manner in which
9 the physical search is to be conducted and,
10 whenever more than one physical search is au-
11 thorized under the order, the authorized scope
12 of each search and what minimization proce-
13 dures shall apply to the information acquired by
14 each search;

15 “(2) direct—

16 “(A) that the minimization procedures be
17 followed;

18 “(B) that, upon the request of the appli-
19 cant, a specified landlord, custodian, or other
20 specified person furnish the applicant forthwith
21 all information, facilities, or assistance nec-
22 essary to accomplish the physical search in such
23 a manner as will protect its secrecy and
24 produce a minimum of interference with the ac-
25 tivities of the landlord, custodian, or other per-

1 son; and that such landlord, custodian or other
2 person maintain under security procedures ap-
3 proved by the Attorney General and the Direc-
4 tor of Central Intelligence any records concern-
5 ing the search or the aid furnished that such
6 person wishes to retain;

7 “(C) that the physical search be under-
8 taken within 30 days of the date of the order,
9 or, if the physical search is of the property, in-
10 formation or material of a foreign power as de-
11 fined in section 101(a)(1), (2), or (3) of this
12 Act, that such search be undertaken within one
13 year of the order; and

14 “(D) that the federal officer conducting
15 the physical search promptly report to the court
16 the circumstances and results of the physical
17 search.

18 “(c) At any time after a physical search has been
19 carried out, the judge to whom the return has been made
20 may assess compliance with the minimization procedures
21 by reviewing the circumstances under which information
22 concerning United States persons was acquired, retained,
23 or disseminated.

1 “(d) Application made and orders granted under this
2 title shall be retained for a period of at least ten years
3 from the date of the application.

4 “(e) Not more than 60 days after a physical search
5 of the residence of a United States person authorized by
6 this title, or such a search in the circumstances described
7 in section 406(b), has been conducted, the Attorney Gen-
8 eral shall provide the United States person with an inven-
9 tory which shall include—

10 “(1) existence or not of a court order authoriz-
11 ing the physical search and the date of the order;

12 “(2) the date of the physical search and an
13 identification of the premises or property searched;
14 and

15 “(3) a list of any information, material, or
16 property seized, altered, or reproduced.

17 “(f) On an ex parte showing of good cause by the
18 Attorney General to a judge of the Foreign Intelligence
19 Surveillance Court the provision of the inventory required
20 by subsection (e) may be postponed for a period not to
21 exceed 90 days. At the end of such period the provision
22 of the inventory may, upon a similar showing, be post-
23 poned indefinitely. The denial of a request for such post-
24 ponements may be reviewed as provided in section 401.

1 “USE OF INFORMATION

2 “SEC. 404. (a) Information acquired from a physical
3 search conducted pursuant to this title concerning any
4 United States person may be used and disclosed by Fed-
5 eral officers and employees without the consent of the
6 United States person only in accordance with the mini-
7 mization procedures required by this title. No information
8 acquired from a physical search pursuant to this title may
9 be used or disclosed by Federal officers or employees ex-
10 cept for lawful purposes.

11 “(b) No information acquired pursuant to this title
12 shall be disclosed for law enforcement purposes unless
13 such disclosure is accompanied by a statement that such
14 information, or any information derived therefrom, may
15 only be used in a criminal proceeding with the advance
16 authorization of the Attorney General.

17 “(c) Whenever the United States intends to enter into
18 evidence or otherwise use or disclose in any trial, hearing,
19 or other proceeding in or before any court, department,
20 officer, agency, regulatory body, or other authority of the
21 United States, against an aggrieved person, any informa-
22 tion obtained or derived from a physical search of the
23 premises or property of that aggrieved person pursuant
24 to the authority of this title, the United States shall, prior
25 to the trial, hearing, or the other proceeding or at a rea-

1 sonable time prior to an effort to so disclose or so use
2 that information or submit it in evidence, notify the ag-
3 grieved person and the court or other authority in which
4 the information is to be disclosed or used that the United
5 States intends to so disclose or so use such information.

6 “(d) Whenever any State or political subdivision
7 thereof intends to enter into evidence or otherwise use of
8 disclose in any trial, hearing, or other proceeding in or
9 before any court, department, officer, agency, regulatory
10 body, or other authority of a State or a political subdivi-
11 sion thereof against an aggrieved person any information
12 obtained or derived from a physical search of the premises
13 or property of that aggrieved person pursuant to the au-
14 thority of this title, the State or political subdivision there-
15 of shall notify the aggrieved person, the court or other
16 authority in which the information is to be disclosed or
17 used, and the Attorney General that the State or political
18 subdivision thereof intends to so disclose or so use such
19 information.

20 “(e) Any person against whom evidence obtained or
21 derived from a physical search to which he is an aggrieved
22 person is to be, or has been, introduced or otherwise used
23 or disclosed in any trial, hearing, or other proceeding in
24 or before any court, department, officer, agency, regu-
25 latory body, or other authority of the United States, a

1 State, or a political subdivision thereof, may move to sup-
2 press the evidence obtained or derived from such search
3 on the grounds that—

4 “(1) the information was unlawfully acquired;
5 or

6 “(2) the physical search was not made in con-
7 formity with an order of authorization or approval.

8 Such a motion shall be made before the trial, hearing, or
9 other proceeding unless there was no opportunity to make
10 such a motion or the person was not aware of the grounds
11 of the motion.

12 “(f) Whenever a court of other authority is notified
13 pursuant to subsection (c) or (d), or whenever a motion
14 is made pursuant to subsection (e), or whenever any mo-
15 tion or request is made by an aggrieved person pursuant
16 to any other statute or rule of the United States or any
17 State before any court or other authority of the United
18 States or any State to discover or obtain applications or
19 orders or other materials relating to a physical search au-
20 thorized by this title or to discover, obtain, or suppress
21 evidence or information obtained or derived from a phys-
22 ical search authorized by this title, the United States dis-
23 trict court or, where the motion is made before another
24 authority, the United States district court in the same dis-
25 trict as the authority shall, notwithstanding any other law,

1 if the Attorney General files an affidavit under oath that
2 disclosure or an adversary hearing would harm the na-
3 tional security of the United States, review in camera and
4 ex parte the application, order, and such other materials
5 relating to the physical search as may be necessary to de-
6 termine whether the physical search of the aggrieved per-
7 son was lawfully authorized and conducted. In making this
8 determination, the court may disclose to the aggrieved per-
9 son, under appropriate security procedures and protective
10 orders, portions of the application, order, or other mate-
11 rials relating to the physical search only where such disclo-
12 sure is necessary to make an accurate determination of
13 the legality of the physical search.

14 “(g) If the United States district court pursuant to
15 subsection (f) determines that the physical search was not
16 lawfully authorized or conducted, it shall, in accordance
17 with the requirements of law, suppress the evidence which
18 was unlawfully obtained or derived from the physical
19 search of the aggrieved person or otherwise grant the mo-
20 tion of the aggrieved person. If the court determines that
21 the physical search was lawfully authorized or conducted,
22 it shall deny the motion of the aggrieved person except
23 to the extent that due process requires discovery or disclo-
24 sure.

1 to those committees a report setting forth with respect to
2 the preceding calendar year—

3 “(1) the total number of applications made for
4 orders approving physical searches under this title;
5 and

6 “(2) the total number of such orders either
7 granted, modified, or denied.

8 “(b) Whenever a search is conducted without a court
9 order to obtain foreign intelligence information which is
10 not a physical search as defined in this title solely because
11 the existence of exigent circumstances would not require
12 a warrant for law enforcement purposes, a full report of
13 such search, including a description of the exigent cir-
14 cumstances, shall be maintained by the Attorney General.
15 Each such report shall be transmitted to the Foreign In-
16 telligence Surveillance Court promptly after the search is
17 conducted.

18 “AUTHORITY FOR INTELLIGENCE SEARCHES

19 “SEC. 406. (a) The procedures contained in this title
20 shall be the exclusive means by which a physical search,
21 as defined in this title, may be conducted in the United
22 States for foreign intelligence purposes, and an order is-
23 sued under this title authorizing a physical search shall
24 constitute a search warrant authorized by law for purposes
25 of any other law.

1 search not authorized by statute, for the purpose of
2 obtaining intelligence information.

3 “(b) DEFENSE.—It is a defense to a prosecution
4 under subsection (a) that the defendant was a law enforce-
5 ment or investigative officer engaged in the course of his
6 official duties and the physical search was authorized by
7 and conducted pursuant to a search warrant or court
8 order of a court of competent jurisdiction.

9 “(c) PENALTY.—An offense described in this section
10 is punishable by a fine of not more than \$10,000 or im-
11 prisonment for not more than five years, or both.

12 “(d) JURISDICTION.—There is Federal jurisdiction
13 over an offense under this section if the person committing
14 the offense was an officer or employee of the United States
15 at the time the offense was committed.

16 “CIVIL LIABILITY

17 “SEC. 408. CIVIL ACTION.—An aggrieved person,
18 other than a foreign power or an agent of a foreign power,
19 as defined in section 101 (a) or (b)(1)(A), respectively,
20 of this Act, whose premises, property, information, or ma-
21 terial has been subjected to a physical search within the
22 United States or about whom information obtained by
23 such a physical search has been disclosed or used in viola-
24 tion of section 407 shall have a cause of action against
25 any person who committed such violation and shall be en-
26 titled to recover—

1 “(a) actual damages;

2 “(b) punitive damages; and

3 “(c) reasonable attorney’s fees and other inves-
4 tigative and litigation costs reasonably incurred.

5 “DEFINITIONS

6 “SEC. 409. As used in this title:

7 “(a) The terms ‘foreign power,’ ‘agent of a for-
8 eign power,’ ‘international terrorism,’ ‘sabotage,’
9 ‘foreign intelligence information,’ ‘Attorney General,’
10 ‘United States person,’ ‘United States,’ ‘person,’
11 and ‘State’ shall have the same meaning as in Sec-
12 tion 101 of this Act.

13 “(b) ‘Physical search’ means any physical intru-
14 sion into premises or property (including examina-
15 tion of the interior of property by technical means)
16 or any seizure, reproduction or alteration of infor-
17 mation, material or property, under circumstances in
18 which a person has a reasonable expectation of pri-
19 vacy and a warrant would be required for law en-
20 forcement purposes, but does not include ‘electronic
21 surveillance’ as defined in subsection 101(f) of this
22 Act.

23 “(c) ‘Minimization procedures’ with respect to
24 physical search, means—

25 “(1) specific procedures, which shall be
26 adopted by the Attorney General, that are rea-

1 sonably designed in light of the purposes and
2 technique of the particular physical search, to
3 minimize the acquisition and retention, and pro-
4 hibit the dissemination, of non-publicly available
5 information concerning unconsenting United
6 States persons consistent with the need of the
7 United States persons consistent with the need
8 of the United States to obtain, produce, and
9 disseminate foreign intelligence information;

10 “(2) procedures that require that non-pub-
11 licly available information, which is not foreign
12 intelligence information, as defined in sub-
13 section 101(e)(1) of this Act, shall not be dis-
14 seminated in a manner that identifies any
15 United States person, without such person’s
16 consent, unless such person’s identity is nec-
17 essary to understand such foreign intelligence
18 information or assess its importance; and

19 “(3) notwithstanding paragraphs (1) and
20 (2), procedures that allow for the retention and
21 dissemination of information that is evidence of
22 a crime which has been, is being, or is about to
23 be committed and that is to be retained or dis-
24 seminated for law enforcement purposes.

1 “(d) ‘Aggrieved person’ means a person whose
2 premises, property, information, or material is the
3 target of physical search or any other person whose
4 premises, property, information, or material was
5 subject to physical search.

6 “(e) ‘Foreign Intelligence Surveillance Court’
7 means the court established by section 103(a) of this
8 Act.

9 “(f) ‘Court of Review’ means the court estab-
10 lished by section 103(b) of this Act.

11 “EFFECTIVE DATE

12 “SEC. 410. The provisions of this title shall become
13 effective 90 days after the date of enactment of this title,
14 except that any physical search approved by the Attorney
15 General to gather foreign intelligence information shall
16 not be deemed unlawful for failure to follow the procedures
17 of this title, if that search is conducted within 180 days
18 following the date of enactment of this title pursuant to
19 regulations issued by the Attorney General, which are in
20 the possession of the Select Committee on Intelligence of
21 the Senate and the Permanent Select Committee on Intel-
22 ligence of the House of Representatives prior to the date
23 of enactment.”.

○

S 1869 IS1S—2

S 1869 IS1S—3

S 1869 IS1S—4