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11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**
 13 **SAN FRANCISCO DIVISION**

14 IN RE NATIONAL SECURITY AGENCY)
 15 TELECOMMUNICATIONS RECORDS)
 16 LITIGATION)

No. M:06-cv-01791-VRW
DEFENDANTS' NOTICE OF
STATUTORY AMENDMENTS TO THE
FOREIGN INTELLIGENCE
SURVEILLANCE ACT

17 _____)
 18 This Document Relates Only To:)
 19 *Center for Constitutional Rights v. Bush,*)
 (Case No. 07-1115))

Judge: Hon. Vaughn R. Walker
 Date: August 9, 2007
 Time: 2 p.m.
 Courtroom: 6, 17th Floor

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 28 **Defendants' Notice of FISA Amendments**
Center for Constitutional Rights v. Bush (07-CV-1115-VRW)
 M:06-CV-1791-VRW

1 **DEFENDANTS' NOTICE OF STATUTORY AMENDMENTS TO THE FOREIGN**
2 **INTELLIGENCE SURVEILLANCE ACT**

3 Defendants hereby give notice of the attached statute, signed into law by the President on
4 August 5, 2007. *See* S. 1927, 110th Cong., 153 Cong. Rec. H9952-05 (enacted) (attached as
5 Exhibit A). The statute, entitled the Protect America Act of 2007, amends the Foreign
6 Intelligence Surveillance Act ("FISA") in a manner that bears directly on this case.

7 First, the statute amends FISA by clarifying that "[n]othing in the definition of electronic
8 surveillance under [50 U.S.C. § 1801(f)] shall be construed to encompass surveillance directed at
9 a person reasonably believed to be located outside of the United States." *Id.* § 2 (adding § 105A
10 to FISA).

11 Second, the statute sets forth new procedures for authorizing acquisitions of foreign
12 intelligence information concerning persons reasonably believed to be outside the United States.
13 *See id.* (adding § 105B to FISA). In relevant part, the Director of National Intelligence ("DNI")
14 and Attorney General may authorize such acquisitions for periods of up to one year if they
15 determine, *inter alia*, that there are reasonable procedures in place for determining that the
16 acquisition concerns persons reasonably believed to be outside the United States; the acquisition
17 does not constitute electronic surveillance as defined by FISA; a significant purpose of the
18 acquisition is to obtain foreign intelligence information; and the minimization procedures to be
19 used with respect to such acquisition activity meet the definition of minimization procedures
20 under 50 U.S.C. § 1801(h). *Id.* The determination of the DNI and Attorney General may be
21 made orally if immediate action is required, but shall be reduced to a sworn written certification
22 within 72 hours and transmitted to the Foreign Intelligence Surveillance Court ("FISC") "as soon
23 as practicable." *Id.* The DNI and Attorney General are also authorized under the statute to
24 direct a person to provide information, facilities, and assistance necessary to accomplish the
25 acquisition and in such a manner as to preserve secrecy. *See id.* The Government may request
26 the FISC to enforce the directive, which the FISC shall do if the directive was issued in
27 accordance with the directive provision and is otherwise lawful, and the person may challenge

1 the legality of the directive with a FISC judge pursuant to certain procedures. *See id.*

2 Third, the statute provides for judicial review by the FISC of the procedures by which the
3 Government determines that acquisitions conducted pursuant to section 105B do not constitute
4 electronic surveillance. *See id.* § 3 (adding § 105C to FISA). Within 120 days of enactment, and
5 annually thereafter, the Attorney General is required to submit those procedures to the FISC, and
6 within 180 days of enactment the FISC is required to assess the Government's determination that
7 the procedures are reasonably designed to ensure that the acquisitions do not constitute
8 electronic surveillance. *Id.* If the FISC concludes that the Government's determination is
9 clearly erroneous, it shall direct the Government to submit new procedures within 30 days or
10 cease any implicated acquisitions; otherwise, it shall approve the continued use of such
11 procedures. *Id.* The Government may appeal any adverse order to the Foreign Intelligence
12 Surveillance Court of Review and, ultimately, the Supreme Court, and any affected acquisitions
13 may continue during the pendency of the appeal. *See id.*

14 Fourth, the statute provides for congressional oversight by requiring the Attorney General
15 on a semi-annual basis to inform the Senate Select Committee on Intelligence, the House
16 Permanent Select Committee on Intelligence, the Senate Judiciary Committee, and the House
17 Judiciary Committee of the number of certifications and directives issued, as well as any
18 incidents of non-compliance. *See id.* § 4. The DNI and Attorney General are also required to
19 assess compliance with minimization procedures and report such assessments to the Senate
20 Select Committee on Intelligence and the House Permanent Select Committee on Intelligence.
21 *See id.* § 2 (§ 105B(d)).

22 Finally, the statute expires 180 days after the date of enactment, although authorizations
23 for the acquisition of foreign intelligence information pursuant to the statute shall remain in
24 effect until their expiration, and the Government has the option during the 180 days to continue
25 to seek the FISC's authorization or reauthorization of surveillance under the provisions of FISA
26 as they existed on the day before enactment of these amendments. *See id.* § 6.

1 * * *

2 This action should be dismissed for all of the reasons that we have previously explained,
3 regardless of the foregoing FISA amendments. Because the basis for Plaintiffs' claims is their
4 alleged communications with individuals located outside of the United States suspected of links
5 to al Qaeda or other terrorist groups, however, the FISA amendments provide an additional basis
6 for dismissal. *See* Compl. ¶¶ 3-5, 36-44. Indeed, now that Congress, in returning to the balance
7 it generally struck when it enacted FISA in 1978, has expressly clarified that surveillance
8 directed at individuals reasonably believed to be outside the United States does not constitute
9 electronic surveillance as defined in FISA, Plaintiffs cannot claim that any alleged surveillance
10 directed at individuals outside the United States violates FISA, the Administrative Procedure
11 Act, or the separation of powers doctrine. Moreover, because the statute subjects such
12 surveillance to certain procedures, minimization requirements, FISC review, and congressional
13 oversight, Plaintiffs' allegations of a First Amendment chill are further negated. By Plaintiffs'
14 own description, their alleged chill derives from their belief that the now-inoperative Terrorist
15 Surveillance Program did not involve FISA minimization procedures, and while we have
16 explained why that alleged chill was plainly insufficient before the FISA amendments, the
17 statute now expressly applies FISA minimization procedures to surveillance conducted pursuant
18 to the amendments and directed at individuals outside the United States.¹

19 The fact that the Protect America Act is set to expire in six months should not delay the
20 Court from dismissing this case on any number of valid grounds previously identified by
21 Defendants. As we have explained, Plaintiffs' allegations of injury were never sufficient from
22 the outset of this case, and state secrets would be needed to fully adjudicate Plaintiffs' claims.
23 Moreover, while the sunset provision should not preclude the Court from granting our motion to
24 dismiss or for summary judgment at any time, it should, at the very least, preclude the Court

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26
27 ¹ Although the statutory amendments may not be dispositive of a Fourth Amendment
claim, Plaintiffs have abandoned any claim of actual interception.

1 from granting Plaintiffs’ summary judgment motion during the next six months when FISA, on
2 its face, clarifies that surveillance directed at individuals reasonably believed to be outside the
3 United States does not constitute “electronic surveillance.”²

4
5 DATED: August 8, 2007

Respectfully Submitted,

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25 ² Of course, we submit that the Court should not grant Plaintiffs’ summary judgment
26 motion in any event, not only for the various reasons that we have argued in support of
27 dismissal, but also because, as we have explained, at the very least the state secrets questions
must be conclusively decided before Defendants could adequately respond to the merits of
Plaintiffs’ motion.