

S.L.C.
Arlen Specter

AMENDMENT NO. _____ Calendar No. _____

Purpose: To provide for the substitution of the United States
in certain civil actions.

IN THE SENATE OF THE UNITED STATES—110th Cong., 2d Sess.

S. 2248

AMENDMENT No. 3905

To **By** *Specter - Whitehouse* 1978,
t Act,
To: _____

S. 2248

Re *//* and
Page(s)

GPO: 2006 30-772 (Mac)

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. SPECTER (for
himself and Mr. WHITEHOUSE)

Viz:

1 On page 46, strike line 5 and all that follows through
2 page 48, line 21, and insert the following:

3 (6) FOREIGN INTELLIGENCE SURVEILLANCE
4 COURT.—The term “Foreign Intelligence Surveil-
5 lance Court” means the court established under sec-
6 tion 103(a) of the Foreign Intelligence Surveillance
7 Act of 1978 (50 U.S.C. 1803(a)).

1 **SEC. 202. SUBSTITUTION OF THE UNITED STATES IN CER-**
2 **TAIN ACTIONS.**

3 (a) IN GENERAL.—

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

11 (A) with respect to that claim, the assist-
12 ance alleged to have been provided by the elec-
13 tronic communication service provider was—

14 (i) provided in connection with an in-
15 telligence activity involving communica-
16 tions that was—

17 (I) authorized by the President
18 during the period beginning on Sep-
19 tember 11, 2001, and ending on Jan-
20 uary 17, 2007; and

21 (II) designed to detect or prevent
22 a terrorist attack, or activities in
23 preparation for a terrorist attack,
24 against the United States; and

25 (ii) described in a written request or
26 directive from the Attorney General or the

1 head of an element of the intelligence com-
2 munity (or the deputy of such person) to
3 the electronic communication service pro-
4 vider indicating that the activity was—

5 (I) authorized by the President;

6 and

7 (II) determined to be lawful; or

8 (B) the electronic communication service
9 provider did not provide the alleged assistance.

10 (2) SUBSTITUTION.—

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

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

1 (ii) as to that electronic communica-
2 tion service provider—

3 (I) dismiss all claims designated
4 by the Attorney General in that cer-
5 tification; and

6 (II) enter a final judgment relat-
7 ing to those claims.

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

15 (C) DETERMINATION.—

16 (i) IN GENERAL.—Substitution under
17 subparagraph (A) shall proceed only after
18 a determination by the Foreign Intelligence
19 Surveillance Court that—

20 (I) the written request or direc-
21 tive from the Attorney General or the
22 head of an element of the intelligence
23 community (or the deputy of such
24 person) to the electronic communica-
25 tion service provider under paragraph

1 (1)(A)(ii) complied with section
2 2511(2)(a)(ii)(B) of title 18, United
3 States Code;

4 (II) the assistance alleged to have
5 been provided was undertaken by the
6 electronic communication service pro-
7 vider acting in good faith and pursu-
8 ant to an objectively reasonable belief
9 that compliance with the written re-
10 quest or directive under paragraph
11 (1)(A)(ii) was permitted by law; or

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

15 (ii) CERTIFICATION.—If the Attorney
16 General submits a certification under para-
17 graph (1), the court to which that certifi-
18 cation is submitted shall—

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

23 (II) stay further proceedings in
24 the relevant litigation, pending the de-

1 termination of the Foreign Intel-
2 ligence Surveillance Court.

3 (iii) PARTICIPATION OF PARTIES.—In
4 reviewing a certification and making a de-
5 termination under clause (i), the Foreign
6 Intelligence Surveillance Court shall permit
7 any plaintiff and any defendant in the ap-
8 plicable covered civil action to appear be-
9 fore the Foreign Intelligence Surveillance
10 Court pursuant to section 103 of the For-
11 eign Intelligence Surveillance Act of 1978
12 (50 U.S.C. 1803).

13 (iv) DECLARATIONS.—If the Attorney
14 General files a declaration under section
15 1746 of title 28, United States Code, that
16 disclosure of a determination made pursu-
17 ant to clause (i) would harm the national
18 security of the United States, the Foreign
19 Intelligence Surveillance Court shall limit
20 any public disclosure concerning such de-
21 termination, including any public order fol-
22 lowing such an ex parte review, to a state-
23 ment that the conditions of clause (i) have
24 or have not been met, without disclosing
25 the basis for the determination.

1 (3) PROCEDURES.—

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

4 (i) the claim shall be deemed to have
5 been filed under section 1346(b) of title
6 28, United States Code, except that sec-
7 tions 2401(b), 2675, and 2680(a) of title
8 28, United States Code, shall not apply;
9 and

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

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

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

22 (ii) with respect to any claim under a
23 Federal statute that does not provide a
24 cause of action against the United States,
25 the plaintiff shall be permitted to amend

1 such claim to substitute, as appropriate, a
2 cause of action under—

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

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

8 (III) section 110 of the Foreign
9 Intelligence Surveillance Act of 1978
10 (50 U.S.C. 1810);

11 (iii) the statutes of limitation applica-
12 ble to the causes of action identified in
13 clause (ii) shall not apply to any amended
14 claim under that clause, and any such
15 cause of action shall be deemed timely filed
16 if any Federal statutory cause of action
17 against the electronic communication serv-
18 ice provider was timely filed; and

19 (iv) for any amended claim under
20 clause (ii) the United States shall be
21 deemed a proper defendant under any stat-
22 utes described in that clause, and any
23 plaintiff that had standing to proceed
24 against the original defendant shall be
25 deemed an aggrieved party for purposes of

1 proceeding under section 2712 of title 18,
2 United States Code, or section 110 of the
3 Foreign Intelligence Surveillance Act of
4 1978 (50 U.S.C. 1810).

5 (C) DISCOVERY.—

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

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

1 (b) CERTIFICATIONS.—

2 (1) IN GENERAL.—For purposes of substitution
3 proceedings under this section—

4 (A) a certification under subsection (a)
5 may be provided and reviewed in camera, ex
6 parte, and under seal; and

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

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

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

21 (d) CIVIL ACTIONS IN STATE COURT.—For purposes
22 of section 1441 of title 28, United States Code, any cov-
23 ered civil action that is brought in a State court or admin-
24 istrative or regulatory bodies shall be deemed to arise

1 under the Constitution or laws of the United States and
2 shall be removable under that section.

3 (e) RULE OF CONSTRUCTION.—Except as expressly
4 provided in this section, nothing in this section may be
5 construed to limit any immunity, privilege, or defense
6 under any other provision of law, including any privilege,
7 immunity, or defense that would otherwise have been
8 available to the United States absent its substitution as
9 party-defendant or had the United States been the named
10 defendant.

11 (f) EFFECTIVE DATE AND APPLICATION.—This sec-
12 tion shall apply to any covered civil action pending on or
13 filed after the date of enactment of this Act.