

108TH CONGRESS  
2D SESSION

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IN THE SENATE OF THE UNITED STATES

Mr. KENNEDY (for himself, Mr. LEAHY, Mr. DURBIN, Mr. FEINGOLD, and Mr. CORZINE) introduced the following bill; which was read twice and referred to the Committee on \_\_\_\_\_

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**A BILL**

To restore civil liberties under the First Amendment, the Immigration and Nationality Act, and the Foreign Intelligence Surveillance Act, 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 “Civil Liberties Restora-  
5 tion Act of 2004”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) Fighting terrorism is a priority for our Na-  
9 tion.

1           (2) As Federal, State, and local law enforce-  
2           ment work tirelessly every day to prevent another  
3           terrorist attack, our Nation must continue to work  
4           to ensure that law enforcement have the legal tools  
5           and resources to do their job.

6           (3) At the same time, steps that are taken to  
7           protect the United States from terrorism should not  
8           undermine constitutional rights and protections.

9           (4) Some of the steps taken by the Administra-  
10          tion since September 11, 2001, however, have under-  
11          mined constitutional rights and protections.

12          (5) Our nation must strive for both freedom  
13          and security.

14          (6) This Act seeks to restore essential rights  
15          and protections without compromising our Nation's  
16          safety.

17           **TITLE I—RESTORING FIRST**  
18           **AMENDMENT RIGHTS**

19           **SEC. 101. LIMITATION ON CLOSED IMMIGRATION HEAR-**  
20           **INGS.**

21           (a) IN GENERAL.—Section 240 of the Immigration  
22           and Nationality Act (8 U.S.C. 1229a) is amended—

23           (1) by redesignating subsection (e) as sub-  
24           section (f); and

1           (2) by inserting after subsection (d) the fol-  
2           lowing new subsection:

3           “(e) STANDARDS FOR CLOSING REMOVAL HEAR-  
4           INGS.—

5           “(1) IN GENERAL.—Subject to paragraph (2), a  
6           removal proceeding held pursuant to this section  
7           shall be open to the public.

8           “(2) EXCEPTIONS.—Portions of a removal pro-  
9           ceeding held pursuant to this section may be closed  
10          to the public by an immigration judge on a case by  
11          case basis, when necessary—

12           “(A) to preserve the confidentiality of ap-  
13           plications for asylum, withholding of removal,  
14           relief under the Convention Against Torture  
15           and Other Cruel, Inhuman or Degrading Treat-  
16           ment or Punishment, the Violence Against  
17           Women Act of 1994 (Public Law 103–322; 108  
18           Stat. 1902), or the Victims of Trafficking and  
19           Violence Prevention Act of 2000 (Public Law  
20           106–386; 114 Stat. 1464), or other applications  
21           for relief involving confidential personal infor-  
22           mation or where portions of the removal hear-  
23           ing involve minors or issues relating to domestic  
24           violence, all with the consent of the alien;

1           “(B) to prevent the disclosure of classified  
2 information that threatens the national security  
3 of the United States and the safety of the  
4 American people; or

5           “(C) to prevent the disclosure of the iden-  
6 tity of a confidential informant.

7           “(3) COMPELLING GOVERNMENT INTEREST.—  
8 In order for portions of removal proceedings to be  
9 closed to the public in accordance with this sub-  
10 section, the government must show that such closing  
11 of the proceedings is necessitated by a compelling  
12 governmental interest and is narrowly tailored to  
13 serve that interest.”.

14           (b) TECHNICAL AND CONFORMING AMENDMENTS.—  
15 Section 240(b) of the Immigration and Nationality Act (8  
16 U.S.C. 1229a(b)) is amended—

17           (1) in paragraph (5)(C)(i), by striking “sub-  
18 section (e)(1)” and inserting “subsection (f)(1)”;  
19 and

20           (2) in paragraph (7), by striking “subsection  
21 (e)(1)” and inserting “subsection (f)(1)”.

1           **TITLE II—PROVIDING DUE**  
2           **PROCESS FOR INDIVIDUALS**

3   **SEC. 201. TIMELY SERVICE OF NOTICE.**

4           (a) IN GENERAL.—Section 236 of the Immigration  
5 and Nationality Act (8 U.S.C. 1226) is amended by add-  
6 ing at the end the following:

7           “(f) NOTICE OF CHARGES.—The Secretary of Home-  
8 land Security shall serve a notice to appear on every alien  
9 arrested or detained under this Act, except those certified  
10 under section 236A(a)(3), within 48 hours of the arrest  
11 or detention of such alien. Any alien, except those certified  
12 under section 236A(a)(3), held for more than 48 hours  
13 shall be brought before an immigration judge within 72  
14 hours of the arrest or detention of such alien. The Sec-  
15 retary of Homeland Security shall—

16           “(1) document when a notice to appear is  
17 served on a detainee in order to determine compli-  
18 ance by the Department of Homeland Security with  
19 the 48-hour notice requirement; and

20           “(2) submit to the Committees on the Judiciary  
21 of the Senate and the House of Representatives an  
22 annual report concerning the Department of Home-  
23 land Security’s compliance with such notice require-  
24 ment.”.

1 (b) APPLICABILITY OF OTHER LAW.—Nothing in  
2 section 236(f) of the Immigration and Nationality Act, as  
3 added by subsection (a), shall be construed to repeal sec-  
4 tion 236A of such Act (8 U.S.C. 1226a).

5 **SEC. 202. INDIVIDUALIZED BOND DETERMINATIONS.**

6 (a) IN GENERAL.—Section 236(a) of the Immigra-  
7 tion and Nationality Act (8 U.S.C. 1226(a)) is amended—

8 (1) by striking “On a warrant” and inserting  
9 the following:

10 “(1) IN GENERAL.—On a warrant”;

11 (2) by striking “Except as provided” and all  
12 that follows through the end and inserting the fol-  
13 lowing: “This subsection shall apply to all aliens de-  
14 tained pending a decision on their removal or admis-  
15 sion, regardless of whether or not they have been ad-  
16 mitted to the United States, including any alien  
17 found to have a credible fear of persecution under  
18 section 235(b)(1)(B) or any alien admitted or seek-  
19 ing admission under the visa waiver program pursu-  
20 ant to section 217. Except as provided in subsection  
21 (c) and pending such decision, the Secretary of  
22 Homeland Security shall—

23 “(A) make an individualized determination  
24 as to whether the alien should be released pend-  
25 ing administrative and judicial review, to in-

1           clude a determination of whether the alien  
2           poses a danger to the safety of other persons or  
3           property and is likely to appear for future  
4           scheduled proceedings; and

5           “(B) grant the alien release pending ad-  
6           ministrative and judicial review under reason-  
7           able bond or other conditions, including condi-  
8           tional parole, that will reasonably assure the  
9           presence of the alien at all future proceedings,  
10          unless the Secretary of Homeland Security de-  
11          termines under subparagraph (A) that the alien  
12          poses a danger to the safety of other persons or  
13          property or is unlikely to appear for future pro-  
14          ceedings.

15          “(2) INDIVIDUALIZED DETERMINATIONS.—An  
16          individualized determination made by the Secretary  
17          of Homeland Security pursuant to paragraph (1)(A)  
18          shall be reviewable at a hearing held before an immi-  
19          gration judge pursuant to section 240. An immigra-  
20          tion judge who reviews an initial bond determination  
21          by the Secretary of Homeland Security, or who  
22          makes a bond determination prior to a decision by  
23          the Secretary of Homeland Security, shall apply the  
24          same standards set forth in subparagraphs (A) and  
25          (B) of paragraph (1).”.

1           (b) REVOCATION OF BOND OR PAROLE.—Section  
2 236(b) of the Immigration and Nationality Act (8 U.S.C.  
3 1226(b)) is amended by striking “The Attorney General”  
4 and all that follows through the period and inserting the  
5 following: “The bond or parole determination made pursu-  
6 ant to subsection (a)(1)(B) may be revoked or modified  
7 only by an immigration judge in proceedings held pursu-  
8 ant to section 240, and only if the party seeking to revoke  
9 or modify the bond or parole determination can establish  
10 a change in circumstances. The administrative decision  
11 finding the alien removable does not, in and of itself, con-  
12 stitute a change in circumstances. At such a hearing, if  
13 changed circumstances are established, the immigration  
14 judge shall make a new individualized determination in the  
15 manner described in subsection (a).”.

16           (c) TECHNICAL AND CONFORMING AMENDMENTS.—  
17 Section 236 of the Immigration and Nationality Act (8  
18 U.S.C. 1226) is amended—

19           (1) by striking “Attorney General” each place  
20 that term appears and inserting “Secretary of  
21 Homeland Security”; and

22           (2) in subsection (e), by striking “Attorney  
23 General’s” and inserting “Secretary of Homeland  
24 Security’s”.

1 **SEC. 203. LIMITATION ON STAY OF A BOND.**

2 Section 236 of the Immigration and Nationality Act  
3 (8 U.S.C. 1226), as amended by section 201, is further  
4 amended by adding at the end the following:

5 “(g) STAY OF A BOND DETERMINATION.—An order  
6 issued by an immigration judge to release an alien may  
7 be stayed by the Board of Immigration Review, for not  
8 more than 30 days, only if the Government  
9 demonstrates—

10 “(1) the likelihood of success on the merits;

11 “(2) irreparable harm to the Government if a  
12 stay is not granted;

13 “(3) that the potential harm to the Government  
14 outweighs potential harm to alien; and

15 “(4) that the grant of a stay is in the interest  
16 of the public.”.

17 **SEC. 204. IMMIGRATION REVIEW COMMISSION.**

18 (a) ESTABLISHMENT OF COMMISSION.—

19 (1) IN GENERAL.—There is established within  
20 the Department of Justice an independent regu-  
21 latory agency to be known as the Immigration Re-  
22 view Commission (referred to in this section as the  
23 “Commission”). The Executive Office of Immigra-  
24 tion Review is hereby abolished and replaced with  
25 such Commission.

1           (2) TRANSFER OF AUTHORITY.—The Commis-  
2           sion shall perform all administrative, appellate, and  
3           adjudicatory functions that were, prior to the date of  
4           enactment of this Act, the functions of the Executive  
5           Office of Immigration Review or were performed by  
6           any officer or employee of the Executive Office of  
7           Immigration Review in the capacity of such officer  
8           or employee. Such functions shall not include the  
9           policy-making, policy-implementation, investigatory,  
10          or prosecutorial functions of the Department of  
11          Homeland Security.

12          (3) ORGANIZATION.—The Commission shall  
13          consist of:

14                 (A) The Office of the Director.

15                 (B) The Board of Immigration Review.

16                 (C) The Office of the Chief Immigration  
17                 Judge.

18                 (D) The Office of the Chief Administrative  
19                 Hearing Officer.

20          (b) OFFICE OF THE DIRECTOR.—

21                 (1) APPOINTMENT.—There shall be as the head  
22                 of the Commission, a Director who shall be ap-  
23                 pointed by the President with the advice and consent  
24                 of the Senate.

1           (2) TRANSFER OF OFFICES.—The following of-  
2           ficers shall be transferred from the Executive Office  
3           for Immigration Review to the Office of the Director  
4           for the Commission:

5                   (A) Deputy Director.

6                   (B) General Counsel.

7                   (C) Pro Bono Coordinator.

8                   (D) Public Affairs.

9                   (E) Assistant Director of Management  
10           Programs.

11                   (F) Equal Employment Opportunity.

12           (3) RESPONSIBILITIES.—

13                   (A) The Director shall oversee the admin-  
14           istration of the Commission, and the creation of  
15           rules and regulations affecting the administra-  
16           tion of the courts.

17                   (B) The Director shall appoint a Deputy  
18           Director to assist with the duties of the Direc-  
19           tor and shall have the power to appoint such  
20           administrative assistants, attorneys, clerks, and  
21           other personnel as may be needed.

22           (c) BOARD OF IMMIGRATION REVIEW.—

23                   (1) IN GENERAL.—The Board of Immigration  
24           Review (referred to in this section as the “Board”)

1 shall perform the appellate functions of the Commis-  
2 sion.

3 (2) APPOINTMENT.—The Board shall be com-  
4 posed of a Chairperson and not less than 14 other  
5 immigration appeals judges, appointed by the Presi-  
6 dent, in consultation with the Director. The term of  
7 office of each member of the Board shall be 6 years.

8 (3) CURRENT MEMBERS.—Each individual who  
9 is serving as a member of the Board on the date of  
10 enactment of this Act shall be appointed to the  
11 Board utilizing a system of staggered terms of ap-  
12 pointment based on seniority.

13 (4) MEMBERS.—The Chairperson and each  
14 other member of the Board shall be an attorney in  
15 good standing of a bar of a State or the District of  
16 Columbia and shall have at least 7 years of profes-  
17 sional, legal expertise in immigration and nationality  
18 law.

19 (5) CHAIRPERSON DUTIES.—The Chairperson  
20 shall—

21 (A) be responsible, on behalf of the Board,  
22 for the administrative operations of the Board  
23 and shall have the power to appoint such ad-  
24 ministrative assistants, attorneys, clerks, and

1 other personnel as may be needed for that pur-  
2 pose;

3 (B) direct, supervise, and establish internal  
4 operating procedures and policies of the Board;  
5 and

6 (C) designate a member of the Board to  
7 act as Chairperson in the Chairperson's absence  
8 or unavailability.

9 (6) BOARD MEMBERS DUTIES.—In deciding the  
10 cases before the Board, the Board shall exercise its  
11 independent judgment and discretion and may take  
12 any action, consistent with its authorities under this  
13 section and regulations established in accordance  
14 with this section, that is appropriate and necessary  
15 for the disposition of such cases.

16 (7) JURISDICTION.—The Board shall have—

17 (A) such jurisdiction as was, prior to the  
18 date of enactment of this Act, provided by stat-  
19 ute or regulation to the Board of Immigration  
20 Appeals;

21 (B) de novo review of any decision by an  
22 immigration judge, and any final order of re-  
23 moval; and

24 (C) retention of jurisdiction over any case  
25 of an alien removed by the United States if the

1 alien's case was pending for consideration be-  
2 fore the Board prior to removal of the alien.

3 (8) ACTING IN PANELS.—

4 (A) IN GENERAL.—All cases shall be sub-  
5 ject to review by a 3 member panel. The Chair-  
6 person shall divide the Board into 3 member  
7 panels and designate a presiding member of  
8 each panel such that—

9 (i) a majority of the number of Board  
10 members authorized to constitute a panel  
11 shall constitute a quorum for such panel;  
12 and

13 (ii) each panel may exercise the ap-  
14 propriate authority of the Board that is  
15 necessary for the adjudication of cases be-  
16 fore it.

17 (B) FINAL DECISION.—A final decision of  
18 a panel shall be considered to be a final deci-  
19 sion of the Board.

20 (9) EN BANC PROCESS.—

21 (A) IN GENERAL.—The Board may on its  
22 own motion, by a majority vote of the Board  
23 members, or by direction of the Chairperson,  
24 consider any case as the full Board en banc, or  
25 reconsider as the full Board en banc any case

1 that has been considered or decided by a 3-  
2 member panel or by a limited en banc panel.

3 (B) QUORUM.—A majority of the Board  
4 members shall constitute a quorum of the  
5 Board sitting en banc.

6 (10) DECISIONS OF THE BOARD.—

7 (A) IN GENERAL.—The decisions of the  
8 Board shall constitute final agency action. The  
9 precedent decisions of the Board shall be bind-  
10 ing on the Department of Homeland Security  
11 and the immigration judges.

12 (B) AFFIRMANCE WITHOUT OPINION.—  
13 Upon individualized review of a case, the Board  
14 may affirm the decision of an immigration  
15 judge without opinion only if the decision of the  
16 immigration judge resolved all issues in the  
17 case. An affirmance without opinion signifies  
18 the Board's adoption of the immigration judge's  
19 findings and conclusion in total.

20 (C) NOTICE OF APPEAL.—The decision by  
21 the Board shall include notice to the alien of  
22 the alien's right to file a petition for review in  
23 the court of appeals within 30 days of the date  
24 of the decision.

25 (d) OFFICE OF THE CHIEF IMMIGRATION JUDGE.—

1           (1) ESTABLISHMENT OF OFFICE.—There is es-  
2           tablished within the Commission an Office of the  
3           Chief Immigration Judge to oversee all the immigra-  
4           tion courts and their proceedings throughout the  
5           United States. The head of the office shall be the  
6           Chief Immigration Judge who shall be appointed by  
7           the Director.

8           (2) DUTIES OF THE CHIEF IMMIGRATION  
9           JUDGE.—The Chief Immigration Judge shall be re-  
10          sponsible for the general supervision, direction, and  
11          procurement of resources and facilities, and for the  
12          coordination of the schedules of immigration judges  
13          to enable the judges to conduct the various pro-  
14          grams assigned to them. The Chief Immigration  
15          Judge may be assisted by a Deputy Chief Immigra-  
16          tion Judge and Assistant Chief Immigration Judge.

17          (3) APPOINTMENT OF IMMIGRATION JUDGES.—

18               (A) IN GENERAL.—Immigration judges  
19               shall be appointed by the Director, in consulta-  
20               tion with the Chief Immigration Judge and the  
21               Chair of the Board of Immigration Review. The  
22               term of each immigration judge shall be 12  
23               years.

24               (B) QUALIFICATIONS.—Each immigration  
25               judge, including the Chief Immigration Judge,

1 shall be an attorney in good standing of a bar  
2 of a State or the District of Columbia and shall  
3 have at least 7 years of professional, legal ex-  
4 pertise in immigration and nationality law.

5 (C) CURRENT MEMBERS.—Each individual  
6 who is serving as an immigration judge on the  
7 date of enactment of this Act shall be appointed  
8 as an immigration judge utilizing a system of  
9 staggered terms of appointment based on se-  
10 niority.

11 (4) DUTIES OF IMMIGRATION JUDGES.—In de-  
12 ciding the cases before them, immigration judges  
13 shall exercise their independent judgment and dis-  
14 cretion and may take any action, consistent with  
15 their authorities under this section and regulations  
16 established in accordance with this section, that is  
17 appropriate and necessary for the disposition of such  
18 cases.

19 (5) JURISDICTION AND AUTHORITY OF IMMI-  
20 GRATION COURTS.—The Immigration Courts shall  
21 have such jurisdiction as was, prior to the date of  
22 enactment of this Act, provided by statute or regula-  
23 tion to the Immigration Courts within the Executive  
24 Office for Immigration Review.

1           (6) CONTEMPT AUTHORITY.—The contempt au-  
2           thority provided to immigration judges under section  
3           240(b)(1) of the Immigration and Nationality Act (8  
4           U.S.C. 1229a(b)(1)) shall—

5                   (A) be implemented by regulation not later  
6                   than 120 days after the date of enactment of  
7                   this Act;

8                   (B) provide that any contempt sanctions,  
9                   including any civil money penalty, shall be ap-  
10                  plicable to all parties appearing before the im-  
11                  migration judge and shall be imposed by a sin-  
12                  gle process applicable to all parties.

13           (e) OFFICE OF THE CHIEF ADMINISTRATIVE HEAR-  
14           ING OFFICER.—

15                   (1) IN GENERAL.—The Office of the Chief Ad-  
16                   ministrative Hearing Officer shall be headed by a  
17                   Chief Administrative Hearing Officer who shall be  
18                   appointed by the Director.

19                   (2) DUTIES AND RESPONSIBILITIES.—The du-  
20                   ties and responsibilities of the current Office of the  
21                   Chief Administrative Hearing Officer shall be trans-  
22                   ferred to the Commission.

23           (f) REMOVAL AND REVIEW OF JUDGES.—

1           (1) IN GENERAL.—Immigration judges and  
2 members of the Board of Immigration Review may  
3 be removed from office only for good cause—

4           (A) by the Director, in consultation with  
5 the Chair of the Board, in the case of the re-  
6 moval of a member of the Board; or

7           (B) by the Director, in consultation with  
8 the Chief Immigration Judge, in the case of the  
9 removal of an immigration judge.

10          (2) INDEPENDENT JUDGMENT.—No immigra-  
11 tion judge or member of the Board shall be removed  
12 or otherwise subject to disciplinary or adverse action  
13 for their exercise of independent judgment and dis-  
14 cretion as prescribed by subsections (c)(6) and  
15 (d)(4).

16          (g) REGULATIONS.—Not later than 180 days after  
17 the date of enactment of this Act, the Director shall issue  
18 regulations to implement this section.

19           **TITLE III—EFFECTIVE LAW**  
20           **ENFORCEMENT**

21          **SEC. 301. TERMINATION OF THE NSEERS PROGRAM; ESTAB-**  
22           **LISHMENT OF REASONABLE PENALTIES FOR**  
23           **FAILURE TO REGISTER.**

24          (a) TERMINATION OF NSEERS.—

1           (1) IN GENERAL.—The National Security  
2           Entry-Exit Registration System (NSEERS) pro-  
3           gram administered by the Secretary of Homeland  
4           Security is hereby terminated.

5           (2) INTEGRATED ENTRY AND EXIT DATA SYS-  
6           TEM.—Nothing in this section shall amend the Inte-  
7           grated Entry and Exit Data System established in  
8           accordance with section 110 of the Illegal Immigra-  
9           tion Reform and Immigrant Responsibility Act of  
10          1996 (8 U.S.C. 1365a).

11          (3) ADMINISTRATIVE CLOSURE OF REMOVAL  
12          PROCEEDINGS.—

13                (A) IN GENERAL.—All removal proceedings  
14                initiated against any alien as a result of the  
15                NSEERS program shall be administratively  
16                closed. This paragraph shall apply to all aliens  
17                who were—

18                        (i) placed in removal proceedings sole-  
19                        ly for failure to comply with the require-  
20                        ments of the NSEERS program; or

21                        (ii) placed in removal proceedings  
22                        while complying with the requirements of  
23                        the NSEERS program and—

24                                (I) had a pending application be-  
25                                fore the Department of Labor or the

1 Department of Homeland Security for  
2 which there is a visa available;

3 (II) did not have a pending appli-  
4 cation before the Department of  
5 Labor or the Department of Home-  
6 land Security for which there is a visa  
7 available but were eligible for an im-  
8 migration benefit; or

9 (III) were eligible to apply for  
10 other forms of relief from removal.

11 (B) EXCEPTIONS.—This paragraph shall  
12 not apply in cases in which the aliens are re-  
13 movable under—

14 (i) section 212(a)(3) of the Immigra-  
15 tion and Nationality Act (8 U.S.C.  
16 1182(a)(3)); or

17 (ii) paragraph (2) or (4) of section  
18 237(a) of that Act (8 U.S.C. 1227(a)(2) or  
19 (4)).

20 (4) MOTIONS TO REOPEN.—Notwithstanding  
21 any limitations imposed by law on motions to reopen  
22 removal proceedings, any alien who received a final  
23 order of removal as a result of the NSEERS pro-  
24 gram shall be eligible to file a motion to reopen the

1 removal proceeding and apply for any relief from re-  
2 moval that such alien may be eligible to receive.

3 **SEC. 302. EXERCISE OF PROSECUTORIAL DISCRETION.**

4 (a) SENSE OF CONGRESS REGARDING PROSECU-  
5 TORIAL DISCRETION.—

6 (1) FINDINGS.—Congress finds the following:

7 (A) Exercising prosecutorial discretion is  
8 not an invitation to violate or ignore the law,  
9 rather it is a means by which the resources of  
10 the Secretary of Homeland Security may be  
11 used to best accomplish the mission of the De-  
12 partment of Homeland Security in admin-  
13 istering and enforcing the immigration laws of  
14 the United States.

15 (B) Although a favorable exercise of dis-  
16 cretion by any office within the Department of  
17 Homeland Security should be respected by  
18 other offices of such Department, unless the  
19 facts and circumstances in a specific case have  
20 changed, the exercise of prosecutorial discretion  
21 does not grant lawful status under the immigra-  
22 tion laws, and there is no legally enforceable  
23 right to the exercise of prosecutorial discretion.

24 (2) SENSE OF CONGRESS.—It is the sense of  
25 Congress that the exercise of prosecutorial discretion

1 does not lessen the commitment of the Secretary of  
2 Homeland Security to enforce the immigration laws  
3 to the best of the Secretary's ability.

4 (b) PROSECUTORIAL DISCRETION.—The Secretary of  
5 Homeland Security shall exercise prosecutorial discretion  
6 in deciding whether to exercise its enforcement powers  
7 against an alien. This discretion includes—

8 (1) focusing investigative resources on par-  
9 ticular offenses or conduct;

10 (2) deciding whom to stop, question, and arrest;

11 (3) deciding whether to detain certain aliens  
12 who are in custody;

13 (4) settling or dismissing a removal proceeding;

14 (5) granting deferred action or staying a final  
15 removal order;

16 (6) agreeing to voluntary departure, permitting  
17 withdrawal of an application for admission, or tak-  
18 ing other action in lieu of removing an alien;

19 (7) pursuing an appeal; or

20 (8) executing a removal order.

21 (c) FACTORS FOR CONSIDERATION.—The factors  
22 that shall be taken into account in deciding whether to  
23 exercise prosecutorial discretion favorably toward an alien  
24 include—

25 (1) the immigration status of the alien;

1           (2) the length of residence in the United States  
2 of the alien;

3           (3) the criminal history of the alien;

4           (4) humanitarian concerns;

5           (5) the immigration history of the alien;

6           (6) the likelihood of ultimately removing the  
7 alien;

8           (7) the likelihood of achieving the enforcement  
9 goal by other means;

10           (8) whether the alien is eligible or is likely to  
11 become eligible for other relief;

12           (9) the effect of such action on the future ad-  
13 missibility of the alien;

14           (10) current or past cooperation by the alien  
15 with law enforcement authorities;

16           (11) honorable service by the alien in the  
17 United States military;

18           (12) community attention; and

19           (13) resources available to the Department of  
20 Homeland Security.

21 **SEC. 303. CIVIL PENALTIES FOR TECHNICAL VIOLATIONS**

22 **OF REGISTRATION REQUIREMENTS.**

23           (a) **REGISTRATION PENALTIES.**—Section 266(a) of  
24 the Immigration and Nationality Act (8 U.S.C. 1306(a))  
25 is amended by striking “Any alien” and all that follows

1 through the period and inserting the following: “(1) A civil  
2 penalty shall be imposed, in accordance with paragraph  
3 (2), on any alien who is required to apply for registration  
4 and be fingerprinted under section 262 or 263, who will-  
5 fully fails or refuses to make such application or be  
6 fingerprinted, and any parent or legal guardian required  
7 to apply for the registration of any alien who willfully fails  
8 or refuses to file application for the registration of such  
9 alien as required by such section.

10 “(2) The Secretary of Homeland Security may levy  
11 a civil monetary penalty of up to—

12 “(A) \$100 for a first violation of section 262 or  
13 263;

14 “(B) \$500 for a second violation of section 262  
15 or 263; and

16 “(C) \$1,000 for each subsequent violation of  
17 section 262 or 263 after the second violation.

18 (b) OTHER PENALTIES.—Section 266(b) of the Im-  
19 migration and Nationality Act (8 U.S.C. 1306(b)) is  
20 amended to read as follows:

21 “(b)(1) A penalty shall be imposed, in accord-  
22 ance with paragraph (2), on any alien or the parent  
23 or legal guardian in the United States of any alien  
24 who fails to submit written notice to the Secretary  
25 of Homeland Security as required by section 265.

1 No penalty shall be imposed with respect to a failure  
2 to submit such notice if the alien establishes that  
3 such failure was reasonably excusable or was not  
4 willful.

5 “(2) Except as provided in paragraphs (4) and (5),  
6 the Secretary of Homeland Security shall levy a civil mon-  
7 etary penalty of—

8 “(A) up to \$100 against an alien who fails to  
9 submit written notice in compliance with section  
10 265;

11 “(B) up to \$500 against an alien for a second  
12 violation of section 265; and

13 “(C) up to \$1,000 for each subsequent violation  
14 of section 265 after the second violation.

15 “(3) Notwithstanding any other provision of this Act,  
16 no change of immigration status shall result from failure  
17 to submit written notice as required by section 265.

18 “(4) During the transition period, a failure to comply  
19 with section 265 shall not result in a penalty or a change  
20 in immigration status. At the conclusion of the transition  
21 period, the Secretary of Homeland Security shall collect  
22 and maintain statistics concerning all enforcement actions  
23 related to this subsection.

24 “(5) The penalties imposed under this subsection  
25 shall not apply to an alien who previously failed to submit

1 a change of address prior to the date of enactment of the  
2 Civil Liberties Restoration Act of 2004 or the end of the  
3 transition period if the alien submits a change of address  
4 within 6 months after the end of the transition period.  
5 A penalty shall be imposed, in accordance with paragraph  
6 (2), on any alien who fails to submit a change of address  
7 within the 6-month period following the transition period.

8 “(6) In this subsection, the term ‘transition period’  
9 means the period beginning on the date of enactment of  
10 the Civil Liberties Restoration Act of 2004 and ending 1  
11 year after the date of enactment of such Act, at which  
12 time the Secretary of Homeland Security shall implement  
13 a system to record and preserve on a timely basis address-  
14 es provided under section 265.”.

15 **SEC. 304. NCIC COMPLIANCE WITH THE PRIVACY ACT.**

16 Data entered into the National Crime Information  
17 Center database must meet the accuracy requirements of  
18 section 552a of title 5, United States Code (commonly re-  
19 ferred to as the “Privacy Act”).

1 **TITLE IV—PROTECTING PRI-**  
2 **VACY AND ENSURING DUE**  
3 **PROCESS FOR TARGETS OF**  
4 **SURVEILLANCE**

5 **SEC. 401. MODIFICATION OF AUTHORITIES ON REVIEW OF**  
6 **MOTIONS TO DISCOVER MATERIALS UNDER**  
7 **FOREIGN INTELLIGENCE SURVEILLANCE ACT**  
8 **OF 1978.**

9 (a) **ELECTRONIC SURVEILLANCE.**—Section 106(f) of  
10 the Foreign Intelligence Surveillance Act of 1978 (50  
11 U.S.C. 1806(f)) is amended—

12 (1) in the first sentence, by striking “shall,”  
13 and inserting “may,”; and

14 (2) by striking the last sentence and inserting  
15 the following new sentence: “In making this deter-  
16 mination, the court shall disclose, if otherwise dis-  
17 coverable, to the aggrieved person, the counsel of the  
18 aggrieved person, or both, under the procedures and  
19 standards provided in the Classified Information  
20 Procedures Act (18 U.S.C. App.), portions of the ap-  
21 plication, order, or other materials relating to the  
22 surveillance unless the court finds that such disclo-  
23 sure would not assist in determining any legal or  
24 factual issue pertinent to the case.”.

1 (b) PHYSICAL SEARCHES.—Section 305(g) of the  
2 Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.  
3 1825(g)) is amended—

4 (1) in the first sentence, by striking “shall,”  
5 and inserting “may,”; and

6 (2) by striking the last sentence and inserting  
7 the following new sentence: “In making this deter-  
8 mination, the court shall disclose, if otherwise dis-  
9 coverable, to the aggrieved person, the counsel of the  
10 aggrieved person, or both, under the procedures and  
11 standards provided in the Classified Information  
12 Procedures Act (18 U.S.C. App.), portions of the ap-  
13 plication, order, or other materials relating to the  
14 physical search, or may require the Attorney General  
15 to provide to the aggrieved person, the counsel of the  
16 aggrieved person, or both a summary of such mate-  
17 rials unless the court finds that such disclosure  
18 would not assist in determining any legal or factual  
19 issue pertinent to the case.”.

20 (c) PEN REGISTERS AND TRAP AND TRACE DE-  
21 VICES.—Section 405(f) of the Foreign Intelligence Sur-  
22 veillance Act of 1978 (50 U.S.C. 1845(f)) is amended by  
23 striking paragraph (2) and inserting the following:

24 “(2) Unless the court finds that such disclosure  
25 would not assist in determining any legal or factual issue

1 pertinent to the case, the court shall disclose, if otherwise  
2 discoverable, to the aggrieved person, the counsel of the  
3 aggrieved person, or both, under the procedures and  
4 standards provided in the Classified Information Proce-  
5 dures Act (18 U.S.C. App.), portions of the application,  
6 order, or other materials relating to the use of the pen  
7 register or trap and trace device, as the case may be, or  
8 evidence or information obtained or derived from the use  
9 of a pen register or trap and trace device, as the case may  
10 be.”.

11 (d) DISCLOSURE OF CERTAIN BUSINESS  
12 RECORDS.—(1) Title V of the Foreign Intelligence Sur-  
13 veillance Act of 1978 (50 U.S.C. 1861 et seq.) is  
14 amended—

15 (A) by redesignating section 502 as section  
16 503; and

17 (B) by inserting after section 501 the following  
18 new section:

19 “DISCLOSURE OF CERTAIN BUSINESS RECORDS AND  
20 ITEMS GOVERNED BY THE CLASSIFIED INFORMA-  
21 TION PROCEDURES ACT

22 “SEC. 502. Any disclosure of applications, informa-  
23 tion, or items submitted or acquired pursuant to an order  
24 issued under section 501, if such information is otherwise  
25 discoverable, shall be conducted under the procedures and

1 standards provided in the Classified Information Proce-  
2 dures Act (18 U.S.C. App.).”.

3 (2) The table of sections for that Act is amended by  
4 striking the item relating to section 502 and inserting the  
5 following new items:

“Sec. 502. Disclosure of certain business records and items governed by the  
Classified Information Procedures Act.

“Sec. 503. Congressional oversight.”.

6 **SEC. 402. DATA-MINING REPORT.**

7 (a) DEFINITIONS.—In this section:

8 (1) DATA-MINING.—The term “data-mining”  
9 means a query or search or other analysis of 1 or  
10 more electronic databases, where—

11 (A) at least 1 of the databases was ob-  
12 tained from or remains under the control of a  
13 non-Federal entity, or the information was ac-  
14 quired initially by another department or agen-  
15 cy of the Federal Government for purposes  
16 other than intelligence or law enforcement;

17 (B) the search does not use a specific indi-  
18 vidual’s personal identifiers to acquire informa-  
19 tion concerning that individual; and

20 (C) a department or agency of the Federal  
21 Government is conducting the query or search  
22 or other analysis to find a pattern indicating  
23 terrorist or other criminal activity.

1           (2) DATABASE.—The term “database” does not  
2 include telephone directories, information publicly  
3 available via the Internet or available by any other  
4 means to any member of the public without payment  
5 of a fee, or databases of judicial and administrative  
6 opinions.

7           (b) REPORTS ON DATA-MINING ACTIVITIES.—

8           (1) REQUIREMENT FOR REPORT.—The head of  
9 each department or agency of the Federal Govern-  
10 ment that is engaged in any activity to use or de-  
11 velop data-mining technology shall each submit a  
12 public report to Congress on all such activities of the  
13 department or agency under the jurisdiction of that  
14 official.

15           (2) CONTENT OF REPORT.—A report submitted  
16 under paragraph (1) shall include, for each activity  
17 to use or develop data-mining technology that is re-  
18 quired to be covered by the report, the following in-  
19 formation:

20           (A) A thorough description of the data-  
21 mining technology and the data that will be  
22 used.

23           (B) A thorough discussion of the plans for  
24 the use of such technology and the target dates

1 for the deployment of the data-mining tech-  
2 nology.

3 (C) An assessment of the likely efficacy of  
4 the data-mining technology in providing accu-  
5 rate and valuable information consistent with  
6 the stated plans for the use of the technology.

7 (D) An assessment of the likely impact of  
8 the implementation of the data-mining tech-  
9 nology on privacy and civil liberties.

10 (E) A list and analysis of the laws and  
11 regulations that govern the information to be  
12 collected, reviewed, gathered, and analyzed with  
13 the data-mining technology and a description of  
14 any modifications of such laws that will be re-  
15 quired to use the information in the manner  
16 proposed under such program.

17 (F) A thorough discussion of the policies,  
18 procedures, and guidelines that are to be devel-  
19 oped and applied in the use of such technology  
20 for data-mining in order to—

21 (i) protect the privacy and due process  
22 rights of individuals; and

23 (ii) ensure that only accurate informa-  
24 tion is collected and used.

1           (G) A thorough discussion of the proce-  
2           dures allowing individuals whose personal infor-  
3           mation will be used in the data-mining tech-  
4           nology to be informed of the use of their per-  
5           sonal information and what procedures are in  
6           place to allow for individuals to opt out of the  
7           technology. If no such procedures are in place,  
8           a thorough explanation as to why not.

9           (H) Any necessary classified information in  
10          an annex that shall be available to the Com-  
11          mittee on Governmental Affairs, the Committee  
12          on the Judiciary, and the Committee on Appro-  
13          priations of the Senate and the Committee on  
14          Homeland Security, the Committee on the Judi-  
15          ciary, and the Committee on Appropriations of  
16          the House of Representatives.

17          (3) TIME FOR REPORT.—Each report required  
18          under paragraph (1) shall be—

19                (A) submitted not later than 90 days after  
20                the date of enactment of this Act; and

21                (B) updated once a year and include any  
22                new data-mining technologies.