Calendar No. 252

115TH CONGRESS, *1st Session* | SENATE | REPORT 115–182

FISA AMENDMENTS REAUTHORIZATION ACT OF 2017

NOVEMBER 7, 2017.—Ordered to be printed

Mr. BURR, from the Select Committee on Intelligence, submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 2010]

The Select Committee on Intelligence, having considered an original bill (S. 2010) to extend the FISA Amendments Act of 2008 for 8 years, and for other purposes, reports favorably thereon and recommends that the bill do pass.

SECTION-BY-SECTION ANALYSIS AND EXPLANATION

The following is a section-by-section analysis and explanation of the FISA Amendments Reauthorization Act of 2017 that is being reported by the Committee.

Section 1. Short title

Section 1 provides that the Act may be cited as the "FISA Amendments Reauthorization Act of 2017."

Section 2. Eight-year extension of FISA Amendments Act of 2008

Section 2 extends the FISA Amendments Act of 2008 for eight additional years, replacing the current sunset date of December 31, 2017 with a new sunset date of December 31, 2025.

Section 3. Congressional review and oversight of Abouts collection

Section 3 codifies the Intelligence Community's (IC's) current prohibition on a subset of FISA collection under 50 U.S.C. § 1881a (hereinafter, "Section 702") known as "Abouts" Upstream collection.

Section 3 further provides an exception that would permit the Director of National Intelligence and the Attorney General to recommence "Abouts" collection if they submit a written notice of their intent to recommence the collection, an order from the Foreign Intelligence Surveillance Court (FISC) approving such collection, and any other supporting materials, to the congressional intelligence committees and the congressional judiciary committees. Section 3 also provides Congress with the ability to review the written notice, and, upon expedited consideration, enact qualifying legislation disapproving of the "Abouts" collection, thereby continuing the prohibition.

Section 4. Appointment of amici curiae by Foreign Intelligence Surveillance Court

Section 4 provides a presumption requiring the FISC to appoint an amicus if the IC seeks reauthorization of the "Abouts" Upstream collection, unless the FISC determines affirmatively that such an appointment is unnecessary.

Section 5. Authorization for Foreign Intelligence Surveillance Court to compensate amici curiae and technical advisors for assistance provided

Section 5 authorizes the FISC to compensate amicus curiae legal or technical experts appointed pursuant to 50 U.S.C. § 1803(i).

Section 6. Minimization and disclosure provisions

Section 6 provides restrictions on the Federal Bureau of Investigation's (FBI's) use of Section 702-derived information, so that the FBI can use the information as evidence only in court proceedings involving national security-related crimes or other enumerated crimes, including death, kidnapping, serious bodily injury, offenses against minors, harm to critical infrastructure, cybersecurity crimes, transnational crimes, and human trafficking.

Section 6 further provides for increased IC transparency, including reporting on the number of targets FBI has authority to surveil under FISA Title I, Title III, and 50 U.S.C. §§ 1881a–c, including the number of targets who are U.S. persons and the number who are non-U.S. persons; the number of times that the FBI received Section 702 information in response to a query that was reasonably designed to find evidence of a crime; the number of instances in which the FBI opened a criminal investigation of a United States person based in whole or in part on Section 702 information; and the number of criminal proceedings in which the FBI provided notice that the government intended to use FISA-derived information.

Section 7. Querying procedures required

Section 7 requires the Attorney General (AG), in consultation with the Director of National Intelligence (DNI), to adopt querying procedures, which are subject to annual FISC review, for data collected pursuant to Section 702. Section 7 also requires these querying procedures to ensure the retention of records of all queries using an identifier associated with a known U.S. person. Section 7 further requires the AG and DNI to assess compliance with the querying procedures in the semiannual assessments provided to congressional intelligence and judiciary committees. Section 7

also authorizes the Inspectors General of the Department of Justice and relevant IC agencies to include querying procedures in their oversight obligations.

Section 8. Review of queries conducted by Federal Bureau of Investigation of acquisitions obtained under Section 702 of the Foreign Intelligence Surveillance Act of 1978

Section 8 requires the FBI to submit to the FISC, within one business day, any query that returns information from the FBI's repository of Section 702 information that concerns a person the FBI has affirmatively determined to be a known U.S. person, along with the responsive information and justification for executing the query in a manner consistent with FISC-approved procedures. Section 8 further requires the FISC, within the next two business days, expeditiously to review the query submissions for consistency with the Fourth Amendment. If the FISC determines that such query was not consistent with the Fourth Amendment, Section 8 prohibits the U.S. Government from using any of the responsive information in court proceedings. Section 8 further requires the FISC to submit an annual report to the congressional intelligence committees that includes the total number of query submissions and the total number of those submissions that the FISC found not to be consistent with the Fourth Amendment.

Section 9. Section 705 emergency provision

Section 9 provides for emergency authorizations pursuant to 50 U.S.C. § 1881d ("Section 705"), which, among other things, permits collections on United States persons located *outside* of the United States who are likely to use facilities both *inside* the United States and *outside* the United States. Section 9 thereby creates consistency between the authorities for collections under Section 705 and the emergency authorizations already permitted under 50 U.S.C. § 1881b ("Section 703"), which permits collections on United States persons located *outside* the United States who are likely to use facilities *inside* the United States, and 50 U.S.C. § 1881c ("Section 704"), which permits collections on United States persons located *outside* the United States who are likely to use facilities *outside* the United States.

Section 10. Privacy and Civil Liberties Oversight Board reform

Section 10 provides an exemption for the Privacy and Civil Liberties Oversight Board (PCLOB) from certain statutory requirements regarding public reporting and public meeting accessibility, given that much of PCLOB's activities involve classified matters.

Section 11. Flexibility for Privacy and Civil Liberties Oversight Board in staffing matters

Section 11 provides the PCLOB with hiring authorities in the absence of a chairperson or a quorum.

Section 12. Increased penalties for unauthorized removal and retention of classified documents or material

Section 12 provides for up to ten years imprisonment for unauthorized removal and retention of classified documents of material.

COMMITTEE ACTION

On October 24, 2017, a quorum being present, the Committee met to consider the bill and amendments. The Committee took the following actions:

Votes on amendments to committee bill and this report

By unanimous consent, the Committee made the Chairman and Vice Chairman's bill the base text for purposes of amendment.

By voice vote, the Committee adopted *en bloc* four amendments to the bill: (1) an amendment by Vice Chairman Warner to increase the PCLOB's hiring authorities; (2) an amendment by Vice Chairman Warner to provide compensation for amici curiae legal and technical experts that support the FISC; (3) an amendment by Senator King and Senator Cornyn, to provide querying procedures and reporting requirements; and (4) an amendment by Senator Cotton to enhance the penalties for unauthorized removal and retention of classified information.

By a vote of four ayes to eleven noes, the Committee rejected a second-degree amendment by Senator Feinstein, cosponsored by Senator Harris, to an amendment by Vice Chairman Warner that would have required the government to show probable cause and obtain a warrant from the FISC before undertaking certain Section 702 queries. The votes in person or by proxy were as follows: Chairman Burr—no; Senator Risch—no; Senator Rubio—no; Senator Collins—no; Senator Blunt—no; Senator Lankford—no; Senator Cotton—no; Senator Cornyn—no; Vice Chairman Warner—no; Senator Feinstein—aye; Senator Wyden—aye; Senator Heinrich—aye; Senator King—no; Senator Manchin—no; and Senator Harris—aye.

By a vote of fifteen ayes, the Committee unanimously adopted an amendment by Vice Chairman Warner that requires the FISC to provide subsequent review of certain FBI queries of Section 702 information. The votes in person or by proxy were as follows: Chairman Burr—aye; Senator Risch—aye; Senator Rubio—aye; Senator Collins—aye; Senator Blunt—aye; Senator Lankford—aye; Senator Cotton—aye; Senator Cornyn—aye; Vice Chairman Warner—aye; Senator Feinstein—aye; Senator Wyden—aye; Senator Heinrich—aye; Senator King—aye; Senator Manchin—aye; and Senator Harris—aye.

By a vote of four ayes to eleven noes, the Committee rejected an amendment by Senator Wyden that would have prohibited acquisition under Section 702 of communications known to be entirely domestic under authority to target certain persons outside of the United States. The votes in person or by proxy were as follows: Chairman Burr—no; Senator Risch—no; Senator Rubio—no; Senator Collins—no; Senator Blunt—no; Senator Lankford—no; Senator Cotton—no; Senator Cornyn—no; Vice Chairman Warner—no; Senator Feinstein—aye; Senator Wyden—aye; Senator Heinrich—aye; Senator King—no; Senator Manchin—no; and Senator Harris—aye.

By a vote of four ayes to eleven noes, the Committee rejected an amendment by Senator Wyden that would have codified the IC's current prohibition on "Abouts" Upstream collection without the exception provided for in Section 3. The votes in person or by proxy

were as follows: Chairman Burr—no; Senator Risch—no; Senator Rubio—no; Senator Collins—no; Senator Blunt—no; Senator Lankford—no; Senator Cotton—no; Senator Cornyn—no; Vice Chairman Warner—no; Senator Feinstein—no; Senator Wyden—aye; Senator Heinrich—aye; Senator King—aye; Senator Manchin—no; and Senator Harris—aye.

By a vote of four ayes to eleven noes, the Committee rejected an amendment by Senator Wyden, as modified by Senator King, which would have revised the standard on current reverse targeting prohibitions to replace "the" with "a," such that the statute would state "If *a* purpose of such acquisition is to target a particular known person." The votes in person or by proxy were as follows: Chairman Burr—no; Senator Risch—no; Senator Rubio—no; Senator Collins—no; Senator Blunt—no; Senator Lankford—no; Senator Cotton—no; Senator Cornyn—no; Vice Chairman Warner—no; Senator Feinstein—no; Senator Wyden—aye; Senator Heinrich—aye; Senator King—aye; Senator Manchin—no; and Senator Harris—aye.

By a vote of two ayes to thirteen noes, the Committee rejected an amendment by Senator Wyden that would have imposed further restrictions on use of Section 702-derived information in investigations and legal proceedings. The votes in person or by proxy were as follows: Chairman Burr—no; Senator Risch—no; Senator Rubio—no; Senator Collins—no; Senator Blunt—no; Senator Lankford—no; Senator Cotton—no; Senator Cornyn—no; Vice Chairman Warner—no; Senator Feinstein—no; Senator Wyden—aye; Senator Heinrich—aye; Senator King—no; Senator Manchin—no; and Senator Harris—no.

Vice Chairman Warner offered four amendments, which he subsequently withdrew, as follows: (1) an amendment to require a semiannual assessment of querying practices; (2) an amendment to strike Section 10 of the bill; (3) an amendment to increase the period of FISC review for certain certifications; and (4) an amendment regarding FBI oversight.

Senator Rubio offered three amendments, which he subsequently withdrew, as follows: (1) an amendment permanently reauthorizing roving surveillance authorities; (2) an amendment permanently reauthorizing lone wolf surveillance authorities; and (3) an amendment striking Section 3 of the bill.

Senator Cotton offered three amendments, which he subsequently withdrew, as follows: (1) an amendment providing a clean reauthorization of FISA Title VII to September 11, 2026; (2) an amendment providing a clean, permanent reauthorization of FISA Title VII; and (3) an amendment repealing Presidential Policy Directive 28.

Senator Cotton and Senator Cornyn offered two amendments, which they subsequently withdrew, as follows: (1) an amendment providing a clean, permanent reauthorization of FISA Title VII, with the authorities provided in Section 9 of the bill; and (2) an amendment providing a clean reauthorization of FISA Title VII to September 11, 2026, with the authorities provided in Section 9 of the bill.

Senator Heinrich offered one amendment, which he subsequently withdrew, that would have required the FISC to undertake prior review of government queries of the Section 702 database for U.S.

person communications, with *certain* exceptions, including for emergencies.

Senator Cornyn offered three amendments, which he subsequently withdrew, as follows: (1) an amendment authorizing certain acquisitions of data stored abroad; (2) an amendment providing for electronic communications transactional records authorities; and (3) an amendment to Section 3, regarding the Senate procedural requirements for certain qualifying legislation.

Vote to report the committee bill

The Committee voted to report the bill, as amended, by a vote of 12 ayes and 3 noes. The votes in person or by proxy were as follows: Chairman Burr—aye; Senator Risch—aye; Senator Rubio—aye; Senator Collins—aye; Senator Blunt—aye; Senator Lankford—aye; Senator Cotton—aye; Senator Cornyn—aye; Vice Chairman Warner—aye; Senator Feinstein—aye; Senator Wyden—no; Senator Heinrich—no; Senator King—aye; Senator Manchin—aye; and Senator Harris—no.

By unanimous consent, the Committee authorized the staff to make technical and conforming changes, following the completion of the mark-up.

COMPLIANCE WITH RULE XLIV

Rule XLIV of the Standing Rules of the Senate requires publication of a list of any "congressionally directed spending item, limited tax benefit, and limited tariff benefit" that is included in the bill or the committee report accompanying the bill. Consistent with the determination of the Committee not to create any congressionally directed spending items or earmarks, none have been included in the bill or the report to accompany the bill. The bill and report also contain no limited tax benefits or limited tariff benefits.

ESTIMATE OF COSTS

On October 25, 2017, the Committee transmitted this bill to the Congressional Budget Office and requested an estimate of the costs incurred in carrying out the provisions.

ADDITIONAL VIEWS OF SENATOR FEINSTEIN

While I support reauthorization of Section 702 of the Foreign Intelligence Surveillance Act, I am disappointed that the committee voted down my amendment, which would have required the government to obtain a warrant based on probable cause prior to accessing the content of an American's communications under Section 702. I strongly believe that Americans have a reasonable expectation of privacy in their communications, and that the Fourth Amendment requires the government to obtain a warrant prior to accessing the content of those messages.

Section 702 was established as part of the FISA Amendments Act of 2008. It was intended to modernize the Foreign Intelligence Surveillance Act (FISA) consistent with advances in communications technology. Section 702 permits the government to collect foreign intelligence information including phone calls and email messages on non-U.S. persons that are located overseas without obtaining a warrant. Americans cannot be targeted under the program, but can be collected incidentally if they are communicating with a non-U.S. person target. Additionally, current law also permits the government to query its Section 702 database specifically for U.S. persons incidentally caught, and access the content of any U.S. person communication collected under the program without obtaining a warrant.

However, the Supreme Court has consistently found that a warrant is required prior to law enforcement accessing the content of an American's private communications, and I believe that protection should also apply to communications incidentally collected under Section 702.

Consequently, the first criminal cases challenging the constitutionality of evidence derived from Section 702 are currently being litigated. Part of the reason is that prior to 2013, the Department of Justice did not notify defendants that evidence derived from Section 702 would be used at trial. As a result, defendants were previously unaware that they could challenge evidence derived from Section 702 collection. As soon as the Department changed that policy, defendants began challenging Section 702 as violative of the Fourth Amendment. Several of the courts that have considered these challenges to date have expressed skepticism about the constitutionality of various aspects of Section 702, including U.S. person queries.

For example, in *United States v. Mohamud,* 834 F.3d 420, 438 (9th Cir. 2016), the court purposefully excluded unresolved constitutional questions, including U.S. person queries under Section 702. The court found:

> "Although [Section] 702 potentially raises complex statutory and constitutional issues, this case does not. As explained below, the initial collection of Mohamud's email

> communications did not involve so-called "upstreaming" or targeting of Mohamud under [Section 702], more controversial methods of collecting communications. It also did not involve the retention and querying of incidentally collected communications. All this case involved was the targeting of a foreign national under Section 702, through which Mohamud's email communications were incidentally collected. Confined to the particular facts of this case, we hold that the [Section] 702 acquisition of Mohamud's email communications did not violate the Fourth Amendment."

My amendment was intended to strike a reasonable balance between the public's constitutional right to privacy and the legitimate investigative needs of law enforcement. To that end, my amendment permitted the government to continue to query U.S. persons under Section 702, but would have required a warrant based on probable cause prior to accessing the content of any American's communications.

In fact, I believe that putting a warrant requirement in place for U.S. person queries under Section 702 actually protects the program by preserving its core capability and putting it on more solid constitutional footing.

While my amendment did not pass in committee, I will continue to advocate for this change along with other privacy and civil liberty protections as the bill moves to the full Senate.

DIANNE FEINSTEIN.

MINORITY VIEWS OF SENATOR WYDEN

I oppose the Committee bill reauthorizing Section 702 of the Foreign Intelligence Surveillance Act because it does not include provisions necessary to ensure that the government can conduct surveillance of foreign threats while also protecting the rights of innocent Americans. I and numerous other members of Congress have proposed commonsense reforms to protect Americans' rights that in no way prevent the Intelligence Community from identifying threats to our national security. These reforms are not included in the Committee bill.

The bill's failings begin with the lack of a warrant requirement for searches of Section 702 collection for communications to, from and about Americans. Under current law, the CIA, NSA and FBI can conduct these searches for no other reason than that they reasonably believe the searches will turn up foreign intelligence information. The FBI can also conduct searches for Americans to find evidence of a crime. The ability to read those Americans' communications without a warrant poses serious Fourth Amendment concerns. The Constitution requires that the government first use the authorities available to it to obtain communications metadata and other non-content information and build a case for a warrant, rather than going directly to reading the content of private communications.

The Committee bill fails to address these concerns. It requires no warrant. There is no requirement for any FISA Court review before or after the searches, meaning that extended fishing expeditions for particular Americans are beyond court oversight. The bill only requires that the FBI submit its searches to the Court if those searches have already produced information on known U.S. persons. Further, the FBI is not required to determine the nationality of the individuals whose information the FBI has retrieved, and thus any uncertainty results in no submission to the FISA Court at all. The bill provides no legal standard for the Court to consider, only a review for consistency with the Fourth Amendment. It is not clear on what basis that determination would be made, much less how the court would consider the subsequent use of the information against these Americans in ways that may have nothing to do with national security. Finally, the bill applies only to FBI searches, omitting the thousands of Americans whose content has been searched, and the tens of thousands whose metadata has been searched, by the CIA and the NSA. The constitutional rights of those Americans matter as well.

The bill fails to protect the rights of Americans in numerous other ways. It does not prohibit the "abouts" collection, which can result in the government sweeping up communications that are entirely between Americans on whom there is no suspicion at all. The government stopped this form of collection due to extensive, unre-

solved compliance problems. Congress should insist that the government seek congressional approval before resuming "abouts" collection.

The bill does not include a meaningful prohibition on reverse targeting, which would require a warrant when a significant purpose of targeting a foreigner is actually to collect the communications of the American communicant. The current standard permits the government to conduct unlimited warrantless searches on Americans, disseminate the results of those searches, and use that information against those Americans, so long as it has any justification at all for targeting the foreigner.

Nor does the bill adequately restrict the use of information on Americans derived from Section 702 for purposes other than national security. The bill limits its restrictions to the use as evidence in criminal cases, disregarding the numerous ways in which government investigations as well as administrative and civil proceedings affect the rights and liberties of Americans. The bill also includes exceptions for non-national security crimes and a broad, undefined exception for "transnational crime."

On June 7, 2017, the Director of National Intelligence testified that Section 702 could not be used to collect communications that are entirely domestic. The DNI subsequently stated that the issue was classified. I offered an amendment to the bill that would have codified the DNI's original testimony, which would be consistent with the purpose as well as the public's understanding of Section 702. The Committee rejected that amendment.

The bill lacks numerous other critical reforms. It leaves in place current statutory authority to compel companies to provide assistance, potentially opening the door to government mandated decryption without FISA Court oversight. The bill fails to provide the FISA Court amici the access to FISA information needed to ensure they can raise important legal and technical concerns with the Court. It leaves in place unnecessary restrictions on the Privacy and Civil Liberties Oversight Board, such as the arbitrary limitation on its mandate that excludes most intelligence collection efforts. And it does nothing to remove impediments to constitutional challenges by those affected by Section 702 surveillance.

I also believe that the eight-year extension provided by the bill is far too long. Rapid changes in both technology and operational activities require much more frequent congressional review, as do the government's shifting, and often secret reinterpretations of the statute.

Finally, I have concerns about this report. By omitting key information about the scope of authorities granted the government, the Committee is itself contributing to the continuing corrosive problem of secret law.

RON WYDEN.

MINORITY VIEWS OF SENATOR HEINRICH

On October 24, 2017, the Senate Intelligence Committee reported out the FISA Amendments Reauthorization Act, which would extend the expiration of the existing FISA Amendments Act until December 2025. I opposed passage of the bill.

I strongly support the use of the Foreign Intelligence Surveillance Act (FISA) and specifically Section 702 to gather intelligence on foreign targets. The value of the program to the Intelligence Community and our national security is indisputable. However, it has become disturbingly routine for the government to use this authority to search through the communications of Americans whose information has been inadvertently swept up under this surveillance program.

The FISA Amendments Reauthorization Act is a modest improvement on the statute it would replace. Among other provisions, it would codify procedures for querying data collected incidentally under Section 702. It would require the Director of National Intelligence and the Attorney General to ensure there is a technical procedure in place to keep a record of all queries referencing a known American, which the FBI currently does not do. The bill would also require the FBI to seek a FISA Court review following a query in which a U.S. person's information was identified—before law enforcement could use that information.

While I support these improvements to the program, they merely nibble around the edges of the real problem with the existing statute: It contains a loophole that allows the government to effectively conduct warrantless searches for Americans' communications. The FISA Amendments Reauthorization Act does not close that loophole or adequately protect the privacy of Americans.

When Section 702 was added to the original FISA statute in 2008, it was designed to give the government new authorities to collect the communications of people who are reasonably believed to be foreigners outside the United States. Although Section 702 contemplated the "incidental" collection of Americans' communications, the purpose of the law was clear—to go after foreign terrorists and spies.

Calling it "incidental" collection makes light of the fact that the government regularly uses this foreign intelligence surveillance authority to sweep up communications of Americans that would otherwise require a warrant. The communications of Americans were never intended to be collected under this law, and yet it has been interpreted to allow the government to do exactly that.

There should be clear rules regarding the government's authority to search through Section 702 communications in an effort to find the phone calls or emails of particular Americans. If there is clear evidence that an American is a terrorist or spy, or is involved in serious crime, then the government should be permitted to search

for the communications of that American—after getting a warrant or an emergency authorization for that search.

During the markup, Senator Wyden introduced an amendment that would require a warrant or an emergency authorization prior to any searches of the Section 702 database for Americans' communications, a proposal that I have long supported but that did not have the votes to pass in the Committee.

Searching through the communications of any American should require a warrant before the search takes place. That is what our framers sought to ensure with the Fourth Amendment to the Constitution. I hope we can further improve this legislation by requiring a warrant for any searches of Americans' communications. Such a change would properly balance our liberty and our security and would secure my support for this reauthorization.

MARTIN HEINRICH.

MINORITY VIEWS OF SENATOR HARRIS

Section 702 of the FISA Amendments Act is a vital tool for protecting our national security and ensuring public safety. Like other members of this Committee, I have seen the men and women of our Intelligence Community use these authorities to combat grave threats to the American people. These intelligence professionals are patriots doing a difficult job and Congress must ensure they remain equipped with the tools they need.

Yet this reauthorization should be about more than simply rubber-stamping existing authorities. It's also a chance to reevaluate the effectiveness of these tools. Nearly a decade has gone by since Congress passed Section 702. In that time, we have learned important lessons about how it works—and how it can be improved.

As our daily life becomes increasingly digital, I believe it is more important than ever that reauthorization legislation sufficiently protects both the privacy and security of Americans. Innocent individuals should not have to worry that their calls or correspondence are being monitored by their government. Regrettably, I do not believe the Committee's current bill does enough to prioritize these privacy rights.

I believe we must do everything in our power to protect our country in a dangerous world. But I also believe we cannot sacrifice our deepest values in the process. I will continue working with my colleagues—including those across the aisle and in the other chamber—to craft reauthorization legislation that aligns our newest technologies with our oldest ideals.

KAMALA D. HARRIS.

EVALUATION OF REGULATORY IMPACT AND CHANGES IN EXISTING LAW

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee finds that no substantial regulatory impact will be incurred by implementing the provisions of this legislation. In accordance with paragraph 12 of rule XXVI, the Committee finds it necessary to dispense with the requirements therein to expedite the business of the Senate.

○