



Congress Considers Reform to Queries of FISA Information as Reauthorization Deadline Approaches

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UPDATE: The House Rules Committee has [announced](#) a meeting to consider H.R. 4478 on Tuesday, January 9, 2018 (as an amendment in the nature of a substitute to S. 139).

The text of the original post follows below.

Title VII of the Foreign Intelligence Surveillance Act (FISA) is currently scheduled to sunset on January 19, 2018. Of the expiring provisions, [Section 702](#), which authorizes “programmatically” surveillance of non-U.S. persons while they are outside of the United States, has received the greatest amount of [attention](#), possibly because Section 702 provides the Attorney General (AG) and Director of National Intelligence (DNI) more leeway to authorize surveillance than other FISA provisions.

Generally, before the AG and DNI may authorize electronic surveillance under Title VII, the [Foreign Intelligence Surveillance Court](#) (FISC) must issue an order finding, *inter alia*, that probable cause exists to believe that the target of the proposed surveillance is [a foreign power or an agent of a foreign power](#). Pursuant to Section 702, however, the AG, in consultation with the DNI, develop targeting and minimization procedures to identify targets and acquire communications, which they submit to the FISC for approval. The AG and DNI also certify to the FISC that surveillance of a target will comply with Section 702, including the proposed targeting and minimization procedures. While Section 702 requires the FISC to issue orders on procedures and certifications within thirty days of their submission, Section 702 also permits the AG and DNI to determine that exigent circumstances necessitate their authorizing surveillance of non-U.S. persons located outside of the United States prior to the FISC approving the targeting and minimization procedures and certification. In addition, once the FISC approves the targeting and minimization procedures, elements of the U.S. intelligence community, such as the National Security Agency (NSA), may use those procedures to acquire the communications of non-U.S. persons who are

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reasonably believed to be outside of the United States without first acquiring a FISC order approving surveillance of each specific target for the duration of the order. Consequently, under Section 702, the FISC does not have to find that surveillance of a specific identifiable target is based on probable cause prior to the U.S. government acquiring that target's communications.

Although Section 702 is scheduled to expire in January, transition procedures would allow existing FISC orders to continue in effect until they would otherwise have expired. Consequently, because the FISC may authorize surveillance for up to one year under Section 702, an order issued after January 19, 2017, could continue to have effect until its one-year anniversary date in 2018 or into January 2019, notwithstanding Title VII's January 19, 2018 sunset.

In anticipation of the impending sunset, congressional committees have held mark-ups of three reauthorization proposals:

- [S. 2010](#) the FISA Amendments Reauthorization Act of 2017, [reported](#) by the Senate Select Committee on Intelligence (SSCI);
- [H.R. 3989](#), the USA Liberty Act of 2017, [ordered](#) to be reported by the House Judiciary Committee; and
- [H.R. 4478](#), the FISA Amendments Reauthorization Act of 2017, [reported](#) by the House Permanent Select Committee on Intelligence (HPSCI).

All three bills would extend Title VII for varying lengths of time. The SSCI bill would reauthorize Title VII for roughly eight years until December 31, 2025. The House Judiciary bill would extend the same provisions for approximately six years until September 30, 2023. Lastly, the HPSCI bill would postpone the sunset for about four years until December 31, 2021.

In addition to reauthorizing Title VII, the three bills substantively change Title VII by restricting searches of information previously collected under Section 702. While varying, the bills address, to some degree, commentator [concerns](#) over law enforcement queries of Section 702 information using specific references to U.S. persons to detect whether evidence of a crime may exist.

Under current law, FISC-approved minimization procedures govern the retention and dissemination of information acquired pursuant to FISA Section 702. Because agencies have a variety of minimization procedures, agency ability to query Section 702 information varies. For example, minimization procedures declassified in 2017 appear to allow the [NSA](#) and the [Central Intelligence Agency](#) to query information collected under FISA Section 702 using U.S. person identifiers (e.g., an email address or telephone number) only when such queries are reasonably likely to return foreign intelligence information. In contrast, [Federal Bureau of Investigation](#) (FBI) minimization procedures appear to allow queries of Section 702-acquired information that could show evidence of a crime.

The three bills would modify this practice in several ways:

- [S. 2010](#) would require records of all queries using a known U.S. person identifier to be kept by the relevant intelligence agency. Additionally, the FBI Director would be required to notify the FISC, within one business day, that the FBI had acquired information concerning a known U.S. person through a query of information acquired under Section 702. If the FISC subsequently determined that this query violated the Fourth Amendment, the FBI would not be able to use the information in any court proceeding.
- [H.R. 3989](#), in contrast, would generally require the government to apply for a court order *before* using a query to access the contents of communications acquired under Section 702. The FISC would issue the order only if probable cause existed to believe that the contents of the communication included evidence of certain crimes for which traditional domestic surveillance would be available under the [Electronic Communications Privacy](#)

Act. A lower standard would apply to queries seeking non-content information such as dialing, routing, addressing, or signaling information. For this type of information or metadata, a supervisor would be required to approve the query, but a FISC order authorizing the query would not generally be required.

- **H.R. 4478** would give the government the option to obtain a FISC order prior to accessing the contents of Section 702-acquired communications, but would not require it to do so. However, if a FISC order was not obtained prior to the government accessing the contents of a communication, those contents would generally be inadmissible in any subsequent criminal prosecution.

In addition to placing new restrictions on queries of Section 702 information, all three bills deal with a wide variety of other topics, such as “**about collection,**” procedures for revealing U.S. person identities in information collected under FISA, and reforms to the Privacy and Civil Liberties Oversight Board.
