

Calendar No. 336

115TH CONGRESS }
2d Session }

SENATE

{ REPORT
115-210 }

REPORTING EFFICIENTLY TO PROPER
OFFICIALS IN RESPONSE TO TERRORISM
ACT OF 2017

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1884

TO PROVIDE FOR JOINT REPORTS BY RELEVANT FEDERAL
AGENCIES TO CONGRESS REGARDING INCIDENTS OF TERRORISM,
AND FOR OTHER PURPOSES



FEBRUARY 26, 2018.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

79-010

WASHINGTON : 2018

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

RON JOHNSON, Wisconsin, *Chairman*

| | |
|---------------------------|------------------------------|
| JOHN McCAIN, Arizona | CLAIRE McCASKILL, Missouri |
| ROB PORTMAN, Ohio | THOMAS R. CARPER, Delaware |
| RAND PAUL, Kentucky | HEIDI HEITKAMP, North Dakota |
| JAMES LANKFORD, Oklahoma | GARY C. PETERS, Michigan |
| MICHAEL B. ENZI, Wyoming | MAGGIE HASSAN, New Hampshire |
| JOHN HOEVEN, North Dakota | KAMALA D. HARRIS, California |
| STEVE DAINES, Montana | DOUG JONES, Alabama |

CHRISTOPHER R. HIXON, *Staff Director*
GABRIELLE D'ADAMO SINGER, *Chief Counsel*
ELIZABETH E. MCWHORTER, *Senior Professional Staff Member*
MARGARET E. DAUM, *Minority Staff Director*
STACIA M. CARDILLE, *Minority Chief Counsel*
CHARLES A. MOSKOWITZ, *Minority Senior Legislative Counsel*
JULIE G. KLEIN, *Minority Professional Staff Member*
LAURA W. KILBRIDE, *Chief Clerk*

Calendar No. 336

115TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 115-210

REPORTING EFFICIENTLY TO PROPER OFFICIALS IN
RESPONSE TO TERRORISM ACT OF 2017

FEBRUARY 26, 2018.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 1884]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1884) to provide for joint reports by relevant Federal agencies to Congress regarding incidents of terrorism, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

CONTENTS

| | Page |
|--|------|
| I. Purpose and Summary | 1 |
| II. Background and Need for the Legislation | 2 |
| III. Legislative History | 4 |
| IV. Section-by-Section Analysis | 5 |
| V. Evaluation of Regulatory Impact | 5 |
| VI. Congressional Budget Office Cost Estimate | 6 |
| VII. Changes in Existing Law Made by the Bill, as Reported | 7 |

I. PURPOSE AND SUMMARY

The purpose of S. 1884, the Reporting Efficiently to Proper Officials in Response to Terrorism Act of 2017, or REPORT Act, is to require that an unclassified report on each act of terrorism that occurs in the United States be provided to Congress not later than one year after a Federal investigation of such act concludes. The Federal agency investigating the act of terrorism shall coordinate with the Department of Homeland Security (DHS), the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and as

appropriate, the National Counterterrorism Center (NCTC) on such a report. The report must include the facts of the act of terrorism, identification of national security gaps that require redress to prevent similar future acts of terrorism, and recommendations for new measures law enforcement could implement or changes in law that could strengthen homeland security and prevent future acts of terrorism. A public summary of the report must also accompany the more detailed report for Congress. This reporting requirement can be waived by the DHS Secretary, the Attorney General, the FBI Director, or the NCTC Director if that individual determines that the report could jeopardize an ongoing investigation or prosecution. In such instances, Congress must be notified of the waiver before the reporting requirement deadline.

II. BACKGROUND AND THE NEED FOR LEGISLATION

After-action reviews of terrorist incidents help policymakers develop evidence-based terrorism prevention policies and procedures. Reviews of the September 11th attacks, for example, found “excessive secrecy interfered with the detection and prevention of the attacks.”¹ In 2016, first responders testified to the Committee during a hearing titled *Frontline Response to Terrorism in America* that “the information gap still remains,” which leaves important partners with an incomplete representation of the threat.² Also during the hearing, former Boston Police Commissioner Edward Davis suggested that the Federal Government conduct a regular audit of “the transfer of information” that occurs before terrorist attacks.³

Although agencies typically provide public reports after an act of terrorism, decisions to conduct such reports are ad hoc and the timing of their release is not standardized. Agency reporting timelines after a terrorism incident vary: two months after Nidal Hasan killed thirteen people at Fort Hood, the Department of Defense published an independent review;⁴ it took a year after the 2013 Boston Bombing for the Intelligence Community Inspectors General (ICIG) to report on the pre-attack performance of intelligence and information sharing entities;⁵ it took nine months after the 2015 San Bernardino attack for the DOJ to report on law enforcement lessons learned; and it took 18 months after the Orlando Pulse Nightclub shooting in June 2016 for the DOJ to publish its review.⁶

¹*Overclassification and Pseudo-classification: The Impact on Information Sharing: Hearing Before the Subcomm. On Intelligence, Information Sharing, and Terrorism Risk Assessment, H. Comm. On Homeland Sec., 110th Cong., at 3 (Mar. 22, 2007)* (<https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg35279/pdf/CHRG-110hhrg35279.pdf>).

²*Frontline Response to Terrorism in America: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs, 114th Cong. (2016)* (testimony of Mark S. Ghilarducci, Director, California Office of Emergency Services and the Governor’s Homeland Security Advisor) [hereinafter *Frontline Hearing*].

³*Frontline Hearing, supra* note 2, (testimony of Edward F. Davis III, Former Commissioner, Boston Police Department).

⁴Dept of Def., *Indep. Review Related to Fort Hood, Protecting the Force: Lessons from Fort Hood* (2010), available at https://www.defense.gov/Portals/1/Documents/pubs/DOD-ProtectingTheForce-Web_Security_HR_13Jan10.pdf.

⁵The Inspectors Gen. of the Intelligence Cmty., Cent. Intelligence Agency, Dep’t of Justice, and Dep’t of Homeland Sec., *Unclassified Summary of Information Handling and Sharing Prior to the April 15, 2013 Boston Marathon Bombings* (2014), available at <https://oig.justice.gov/reports/2014/s1404.pdf>.

⁶Rick Brazziel, Frank Straub, George Watson & Rod Hoops, *Bringing Calm to Chaos: A critical incident review of the San Bernardi no public safety response to the December 2, 2015, terrorist shooting incident at the Inland Regional Center* (2016), <https://www.justice.gov/usao-cdca/file/891996/download>.

The Federal Government's investigation into the Orlando Pulse Nightclub shooting in June 2016 is illustrative of an increasing focus on response rather than prevention. The DOJ announced an investigation into the police response one month after the attack.⁷ The completed review was published only recently, 18 months after the incident occurred.⁸ The report focused on the response of the Orlando police department and suggested changes in police protocol and improvements in counterterrorism training for local law enforcement.⁹ In addition, Chairman Johnson requested "a thorough, independent review" of the FBI's decision to remove the shooter, Omar Mateen, from the Terrorist Screening Database.¹⁰ In response, the DOJ Inspector General began an audit of broader FBI management, policies, and processes relevant to homegrown violent extremist threats, including how the FBI identifies and assesses these threats.¹¹ The Committee is still awaiting the results of that audit.

Additionally, after-action reviews should identify or make recommendations to address national security gaps, including actions that can be taken to prevent future attacks. Some past reviews have focused on improved response, but have not included recommendations to improve the DHS stated mission of terrorism prevention. In the case of the ICIG review of the Boston Bombing to assess the pre-attack performance of intelligence and information sharing entities, the Committee's analysis of the ICIG review found no "recommendations about how DHS's grant funding or intelligence and information sharing programs could have played a role in preventing the bombing."¹² A DHS report about the same attack, and released in the same month as the ICIG report, focused on the good preparation of first responders but similarly made no recommendations for how the Department could have prevented the attack.¹³

S. 1884 requires the primary Government agency investigating an act of terrorism to collaborate with the Secretary of DHS, the Attorney General, the Director of the FBI, and, as appropriate, the Director of NCTC to submit a public report to Congress within one year after such investigation concludes. The Committee understands that Federal investigators must carefully sift through a sig-

⁷ Press Release, Dep't of Justice, Department of Justice to Conduct After-Action Review of Police Response to Orlando Nightclub Mass Shooting (July 15, 2016), <https://www.justice.gov/opa/pr/departments-justice-conduct-after-action-review-police-response-orlando-nightclub-mass>.

⁸ Press Release, Dep't of Justice Office of Community Oriented Policing Services, Department of Justice Releases Incident Review of the Orlando Public Safety Response to the Attack on the Pulse Nightclub (December 18, 2017), <https://cops.usdoj.gov/default.asp?Item=2952>.

⁹ Dep't of Justice Office of Community Oriented Policing Services, *Rescue, Response, and Resilience: A Critical Incident Review of the Orlando Public Safety Response to the Attack on the Pulse Nightclub* (December 18, 2017), <https://ric-zai-inc.com/ric.php?page=detail&id=COPS-W0857>; see also Frank Straub, Jennifer Zeunik & Ben Gorban, *Lessons Learned from the Police Response to the San Bernardino and Orlando Terrorist Attacks*, CTC Sentinel (Volume 10, Issue 5), Combatting Terrorism Center at West Point (May 2017), https://ctc.usma.edu/wp-content/uploads/2017/05/CTC-Sentinel_Vol10Iss517.pdf.

¹⁰ Press Release, United States Senator Ron Johnson, Chairman Johnson Seeks Independent Review of Why Orlando Terrorist Was Taken Off Terror Watchlist (July 27, 2016), <https://www.hsgac.senate.gov/media/majority-media/chairman-johnson-seeks-independent-review-of-why-orlando-terrorist-was-taken-off-terror-watchlist>.

¹¹ Letter from The Honorable Michael Horowitz, Inspector General, Dep't of Justice, to The Honorable Ron Johnson, Chairman, Committee on Homeland Sec. & Governmental Affairs, U.S. Senate (February 22, 2017).

¹² Tom Coburn, A Review of the Department of Homeland Security's Missions and Performance 22 (2015), <https://www.hsgac.senate.gov/download/?id=B92B8382-DBCE-403C-A08A-727F89C2BC9B>.

¹³ *Id.* at 20.

nificant amount of information, often information that is sensitive or classified and which could affect an ongoing prosecution. This lengthy process is necessary and must be balanced against the need for both Congress and the public to know the details of these incidents in a timely manner. The one-year waiting period in S. 1884 acknowledges the importance of protecting the details of an ongoing investigation.

S. 1884 exempts Federal investigators from this reporting requirement if disclosure could disrupt an ongoing case. This exemption should be used sparingly and every effort should be made to produce the required information.

The reports required by S. 1884 should include facts about the act of terrorism and identify any relevant gaps in national security. These facts include any domestic or international terrorism movement or foreign terrorist organization implicated by evidence uncovered in the investigation or by homeland security information. Facts about the perpetrator may include any biographical or criminal information relevant to the act of terrorism and the report should identify any relevant government programs that may have ineffectively vetted for or reported potential indicator behaviors of terrorist threats. The Committee recognizes that inspectors general may be best-placed to make recommendations to improve the efficiency and effectiveness of any such government programs. Agencies may defer to inspectors general to submit reports on these issues, since it is not the intent of this legislation to burden Federal investigators with responsibilities that detract from their mission of preventing terrorism.

This legislation also balances the need for transparency with the need for Federal authorities to protect classified information. The bill requires an unclassified report that can be complemented by a classified annex. The unclassified report should be deliverable as a separate document from such annex and available in unclassified office space, meaning it should not contain markings that would limit dissemination. Even transparency efforts to inform the public by requiring an unclassified report can be undermined by the inclusion of controlled unclassified information, which requires safeguarding or dissemination controls.¹⁴ Dissemination controls are designed to protect sensitive information. They can also deter sharing with partners who would benefit from transparency and inhibit legitimate public deliberation on counterterrorism policy.¹⁵ In the event the unclassified report does require dissemination controls, this legislation also requires a public summary. Every effort should be made to include as much information in the public summary and unclassified report with as few dissemination controls as possible.

III. LEGISLATIVE HISTORY

Senators Claire McCaskill (D–MO) and Mike Lee (R–UT) introduced S. 1884 on September 28, 2017. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

¹⁴ Controlled Unclassified Information, 32 C.F.R. § 2002.1 (2017).

¹⁵ *Frontline Hearing*, *supra* note 2; see also *Examining the Costs of Overclassification on Transparency and Security: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 114th Cong. (2016) (testimony of Scott Amey, General Counsel, Project On Government Oversight); The Constitution Project's Liberty and Security Committee, *supra* note 1.

The Committee considered S. 1884 at a business meeting on October 4, 2017. Chairman Ron Johnson offered an amendment that clarified that the primary agency investigating the act of terrorism is the lead agency responsible for coordinating with other agencies to produce the joint unclassified report on that act of terrorism. The amendment also clarified that responsibility for notifying Congress if an agency believes the reporting requirement jeopardizes an investigation or prosecution falls on the primary agency in charge of such investigation or prosecution. The Chairman's amendment gave agencies the option to combine several reports into quarterly reports and clarified that a summary for public distribution must be provided to inform the public about homeland threats. The Committee adopted the amendment and ordered the bill, as amended, reported favorably, both by voice vote. Senators present for both the vote on the amendment and the vote on the bill were: Johnson, Lankford, Daines, McCaskill, Tester, Heitkamp, Hassan, and Harris.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section provides the bill's short title, the "REPORT Act."

Section 2. Duty to report

This section imposes a Congressional reporting requirement on the primary Government agency investigating an act of terrorism that occurs in the United States. It requires that the report to Congress is unclassified and coordinated with the DHS Secretary, the Attorney General, the FBI Director, and as appropriate the NCTC Director.

Subsection (a) establishes the requirement, a deadline for submitting such reports to Congress, and allows reports on several individual acts of terrorism to be combined into quarterly reports. It specifies the report should be unclassified, and can be accompanied by a classified annex.

Subsection (b) requires the report to include the facts of the act of terrorism, security vulnerabilities identified after the investigation, and recommendations for changes to policy and law enforcement practices that could help prevent future acts of terrorism. A public summary of the report shall also be included in the report.

Subsection (c) acknowledges that related investigations and prosecutions may be jeopardized by this reporting requirement. The Government agency responsible for an investigation or prosecution that could be jeopardized can waive the reporting requirement by notifying Congress before the deadline established in subsection (a).

Subsection (d) defines "act of terrorism."

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector

mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 12, 2017.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1884, the Reporting Efficiently to Proper Officials in Response to Terrorism Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

KEITH HALL,
Director.

Enclosure.

S. 1884—Reporting Efficiently to Proper Officials in Response to Terrorism Act of 2017

S. 1884 would require the primary government agency investigating an act of terrorism that occurs in the United States to report to the Congress not later than one year after completing the investigation. That agency would have to collaborate with the Department of Homeland Security and other federal bodies as appropriate. The report would identify weaknesses in national security and recommend additional measures to improve homeland security and prevent terrorist acts.

In recent years there have been few incidents of domestic terrorism, so CBO expects that implementing S. 1884 would require a small number of reports each year, on average. Based on the cost of similar activities, CBO estimates that providing the reports would cost less than \$500,000 annually; such spending would be subject to the availability of appropriated funds.

Enacting the legislation would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting S. 1884 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 1884 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On May 30, 2017, CBO transmitted a cost estimate for H.R. 625, the Reporting Efficiently to Proper Officials in Response to Terrorism Act of 2017, as ordered reported by the House Committee on Homeland Security on May 3, 2017. The two bills are similar and CBO's estimates of the budgetary effects are the same.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Because this legislation would not repeal or amend any provision of current law, it would make no changes in existing law within the meaning of clauses (a) and (b) of paragraph 12 of rule XXVI of the Standing Rules of the Senate.

