

FISA AMENDMENTS ACT REAUTHORIZATION ACT OF 2012

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AUGUST 2, 2012.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed
—————

Mr. ROGERS of Michigan, from the Permanent Select Committee on
Intelligence, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 5949]

[Including cost estimate of the Congressional Budget Office]

The Permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 5949) to extend the FISA Amendments Act of 2008 for five years, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “FISA Amendments Act Reauthorization Act of 2012”.

SEC. 2. FIVE-YEAR EXTENSION OF FISA AMENDMENTS ACT OF 2008.

(a) EXTENSION.—Section 403(b) of the FISA Amendments Act of 2008 (Public Law 110–261; 122 Stat. 2474) is amended—

(1) in paragraph (1), by striking “December 31, 2012” and inserting “December 31, 2017”; and

(2) in paragraph (2) in the material preceding subparagraph (A), by striking “December 31, 2012” and inserting “December 31, 2017”.

(b) CONFORMING AMENDMENT.—The heading of section 404(b)(1) of the FISA Amendments Act of 2008 (Public Law 110–261; 122 Stat. 2476) is amended by striking “DECEMBER 31, 2012” and inserting “DECEMBER 31, 2017”.

PURPOSE AND SUMMARY

The purpose of H.R. 5949 is to extend the authorities contained in the FISA Amendments Act of 2008 (“FAA”), currently set to expire on December 31, 2012, to December 31, 2017.

COMMITTEE STATEMENT AND VIEWS

A. INTRODUCTION

In 2008, with significant bipartisan support, Congress passed the FAA. The FAA modernized the Foreign Intelligence Surveillance Act of 1978 to account for significant changes in technology that made the 30 year-old law an impractical and ineffective tool for combatting the quickly evolving threats facing our nation. The FAA gave our intelligence community the speed and agility necessary to meaningfully collect foreign intelligence while still preserving civil liberties. H.R. 5949 would extend the FAA for five years.

H.R. 5949 was requested by the Executive Branch. The Director of National Intelligence and Attorney General have stated that reauthorization of the FAA, which will expire at the end of this year if Congress does not act, is “the top legislative priority of the Intelligence Community.”

In seeking a clean extension of the FAA, the Administration has stated that the FAA “allows the Intelligence Community to collect vital information about international terrorists and other important targets overseas” while, “at the same time . . . provid[ing] a comprehensive regime of oversight by all three branches of Government to protect the privacy and civil liberties of U.S. persons.” Moreover, the Administration has stated that collection under the FAA is “vital in keeping the nation safe” and that the “[f]ailure to reauthorize [the FAA] would result in a loss of significant intelligence and impede the ability of the Intelligence Community to respond quickly to new threats and intelligence opportunities.” (Emphasis added).

H.R. 5949 would reauthorize the FAA for five years from its current expiration date, extending its authorities through December 31, 2017. Consistent with the Administration’s request, H.R. 5949, as reported, makes no modifications to the original FAA. The Committee notes, however, that it continues to review whether amendments should be made in the future to strengthen authorities and oversight procedures, consistent with issues identified as part of the Committee’s oversight, the needs of the Intelligence Community, and civil liberties protections.

B. FOREIGN INTELLIGENCE COLLECTION UNDER THE FISA AMENDMENTS ACT

The FAA authorizes intelligence collection targeted against non-U.S. persons located outside the United States. It permits this collection to take place only under statutorily-required, court approved targeting and minimization procedures. Such procedures are designed to ensure that the government’s surveillance under this authority does not target Americans anywhere in the world and, to ensure that if and when the communications of Americans are incidentally intercepted, they are handled pursuant to specific

procedures designed to protect the rights of such individuals, as approved by the court.

It is also important to note that the FAA significantly increased protections for Americans around the world by requiring that any electronic surveillance targeting a U.S. person, no matter where they are located, be conducted pursuant to court order. Prior to 2008, targeting U.S. persons located outside the United States for intelligence collection only required Attorney General authorization in many circumstances. If Congress does not reauthorize the FAA, the requirement for court approval for such surveillance will also expire.

The importance of the collection of foreign intelligence under the FISA Amendments Act—while challenging to describe in detail in an unclassified setting—cannot be underscored enough. In short, intelligence collected under the FAA is critically important to maintaining our national security. The information collected under this authority is often unique, unavailable from any other source, and regularly provides critically important insights and operationally actionable intelligence on terrorists and foreign intelligence targets around the world.

The Attorney General and Director of National Intelligence have provided the following unclassified description of specific, actionable intelligence that was obtained through the unique contribution of collection under the FISA Amendments Act:

It provides information about the plans and identities of terrorists, allowing us to glimpse inside terrorist organizations and obtain information about how those groups function and receive support. In addition, it lets us collect information about the intentions and capabilities of weapons proliferators and other foreign adversaries who threaten the United States.

The intelligence community has provided the intelligence committees in both the House and the Senate with additional details on the examples discussed above in a classified setting, as well as other even more compelling examples of specific, actionable intelligence obtained through the unique lens of FISA Amendments Act collections. In addition, the Permanent Select Committee on Intelligence has and will continue to make available classified information to all Members of the House regarding the information collected under the FISA Amendments Act prior to consideration of the extension by the House. The Committee believes that it is important for all Members to have a better opportunity to understand how critically important the information obtained under these authorities is to our national security and hopes Members will avail themselves of the opportunity to gain a better understating of the FAA.

C. OVERSIGHT REGARDING COLLECTIONS CONDUCTED UNDER THE FISA AMENDMENTS ACT

Collection under the FAA is subject to extensive oversight by all three branches of government. By statute, the Executive Branch is required to conduct detailed oversight over collection conducted under the FAA and to report to Congress with respect to this oversight. Specifically, the FISA Amendments Act requires: (1) the At-

torney General and Director of National Intelligence to conduct semiannual assessments of compliance with targeting and minimization procedures and provided them to Congress; (2) the Inspectors General of the Department of Justice and certain elements of the Intelligence Community to conduct reviews of the implementation of certain FISA Amendments Act authorities and provide them to Congress; (3) the heads of the elements of the intelligence community conducting collection under the FAA to conduct annual reviews of the implementation of certain FAA authorities and provide them to Congress; (4) the Attorney General to provide to Congress a comprehensive semiannual report on the implementation of the FAA, including a description of all compliance incidents.

In addition, the Attorney General is required, under other provisions of FISA, to provide a semiannual report to Congress on the implementation of FISA generally, including summaries of significant legal interpretations of FISA made by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review, and copies of all decisions, orders, or opinions of these courts or government pleadings that include a significant construction or interpretation of FISA. The Executive Branch also conducts its oversight through on-site reviews conducted every 60 days by the Department of Justice's National Security Division and the Office of the Director of National Intelligence.

Likewise, the Legislative Branch conducts extensive oversight over collections conducted under the FAA. As noted above, statutes require the provision of detailed information to the Congressional intelligence and judiciary committees regarding the oversight conducted by the Executive Branch and reports of noncompliance with statutes and required procedures. Since the passage of the FAA, the House Permanent Select Committee on Intelligence has conducted extensive oversight on the implementation of this legislation and the collection conducted under its authority. In the 112th Congress alone, the House Intelligence Committee has conducted two hearings and over a dozen meetings and briefings specifically focused on FISA and FAA.

Finally, the Judicial Branch, through the Foreign Intelligence Surveillance Court, conducts its own independent oversight of collection under the FISA Amendments Act through its review of government certifications and targeting and minimization procedures. The record before this Committee indicates that the Foreign Intelligence Surveillance Court takes its job very seriously, oftentimes digging deep into the details of the government's collection methodology and procedures, including the government's efforts to fully comply with the law. And, rather than simply admonishing the government when it experiences unavoidable compliance issues, a review of the classified record presented to the Committee demonstrates that the Court often strongly encourages the government to impose stringent requirements upon itself to address or ameliorate compliance issues, often going well beyond the requirements of the FISA statute and the Fourth Amendment.

The oversight this Committee has conducted since the FAA was enacted in 2008 has shown no evidence that the Intelligence Community has engaged in any intentional or willful failure to comply with statutory requirements or Executive Branch policies and procedures.

D. CHALLENGES IN COLLECTION AND OVERSIGHT MATTERS UNDER THE
FISA AMENDMENTS ACT

As the Committee reports H.R. 5949 to the full House and urges a clean extension for five years, it is important to note that the classified record before the Committee makes clear that there are specific amendments to the FAA that would substantially improve the government's ability to collect foreign intelligence while also appropriately protecting the rights of Americans.

A detailed discussion of potential changes to the authorities is outside the scope of this report. The Committee notes, however, that possible future amendments might be beneficial to ensure the government can collect on the full scope of communication techniques used by terrorists and other foreign intelligence targets. Future amendments may also clarify the appropriate scope and detail of the Foreign Intelligence Court's review of certifications and other FAA matters, (including the remedial authority of that Court), and address the Executive Branch's responsibility to provide full and timely information to Congress regarding its analysis of legal matters before the Foreign Intelligence Surveillance Court. The Committee is fully aware and cognizant of these matters and is prepared to return to consideration of them at the appropriate juncture.

E. CONCLUSION

If Congress does not reauthorize the authorities proposed to be extended by H.R. 5949 the risk of potential catastrophic results is real and significant. The Committee has conducted substantial, ongoing, detailed oversight and the record supports extension for—at a minimum—the proposed five-year period. The Committee therefore unanimously reports H.R. 5949 favorably and urges the House to approve it expeditiously in the interest of our national security.

COMMITTEE HEARINGS

The Committee held two hearings and multiple classified briefings in the 112th Congress on the implementation of and performance under authorities that would be extended by this bill.

COMMITTEE CONSIDERATION AND ROLLCALL VOTES

On June 28, 2012, the Committee met in open session and considered the bill H.R. 5949. Ms. Schakowsky offered an amendment to H.R. 5949 that would amend the date of sunset from December 31, 2017 to June 1, 2015.

The amendment was not agreed to by a record vote of 13 noes and 4 ayes:

Noes: Mr. Rogers (Chairman), Mr. Thornberry, Mrs. Myrick, Mr. Miller, Mr. Conaway, Mr. King, Mr. LoBiondo, Mr. Nunes, Mr. Rooney, Mr. Heck, Mr. Ruppersberger, Mr. Langevin, Mr. Chandler.

Ayes: Mr. Thompson, Ms. Schakowsky, Mr. Schiff, Mr. Gutierrez. Ms. Schakowsky offered an amendment that would amend the form of the assessments of procedures targeting certain persons located outside the United States. The amendment was not agreed to by a record vote of 15 noes and 2 ayes:

Noes: Chairman Rogers, Mr. Thornberry, Mrs. Myrick, Mr. Miller, Mr. Conaway, Mr. King, Mr. LoBiondo, Mr. Nunes, Mr. Rooney, Mr. Heck, Mr. Ruppersberger, Mr. Thompson, Mr. Langevin, Mr. Schiff, Mr. Chandler.

Ayes: Ms. Schakowsky, Mr. Gutierrez.

The Committee then adopted a motion by the Chairman to favorably report the bill H.R. 5949 to the House. The motion was agreed to by record vote of 17 ayes and 0 noes.

Ayes: Mr. Rogers (Chairman), Mr. Thornberry, Mrs. Myrick, Mr. Miller, Mr. Conaway, Mr. King, Mr. LoBiondo, Mr. Nunes, Mr. Rooney, Mr. Heck, Mr. Ruppersberger, Mr. Thompson, Ms. Schakowsky, Mr. Langevin, Mr. Schiff, Mr. Gutierrez, Mr. Chandler.

Noes: None.

SECTION-BY-SECTION ANALYSIS AND EXPLANATION

Section 1. Short Title

The short title of the Act is the FISA Amendments Act Reauthorization Act of 2012.

Section 2. Five-Year Extension of the FISA Amendments Act

Section []: In General

This section of the Act amends Section 403 of the FISA Amendments Act of 2008 by striking December 31, 2012 and replacing it with December 31, 2017, in each appropriate location in order to extend the expiration of the FISA Amendments Act for five years. In addition, this section of the Act makes conforming changes to other appropriate portions of the FISA Amendments Act.

OVERSIGHT FINDINGS AND RECOMMENDATIONS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives. The Committee held two hearings and multiple classified briefings in the 112th Congress on the implementation of and performance under authorities that would be extended by this bill. The findings have been incorporated in the Committee's classified annex to annual Intelligence Authorization bills. In addition, the bill extends requirements to include FAA provisions in the Attorney General's long existing semi-annual report, and additional, extensive semi-annual reporting to Congress on the new authorities. The bill, as reported by the Committee, reflects conclusions reached by the Committee in light of this oversight activity. The Committee's views are further described in the descriptive portions of this report.

GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, this legislation does not authorize funding, and therefore clause 3(c)(4) does not apply. The Committee's general performance goals and objectives for the legislation are, however, reflected in the descriptive portions of this report.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104-4) requires a statement of whether the provisions of the reported bill include unfunded mandates. In compliance with this requirement, the Committee has received a letter from the Congressional Budget Office included herein.

STATEMENT ON CONGRESSIONAL EARMARKS

Pursuant to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee states that the bill as reported contains no congressional earmarks, limited tax benefits, or limited tariff benefits.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 5949 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 19, 2012.

Hon. MIKE ROGERS,
*Chairman, Permanent Select Committee on Intelligence,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5949, the FISA Amendments Act Reauthorization Act of 2012.

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

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 5949—FISA Amendments Act Reauthorization Act of 2012

H.R. 5949 would extend the authority of the federal government to conduct surveillance pursuant to the FISA Amendments Act of 2008 (Public Law 110-261). Because CBO does not provide cost estimates for classified programs, this estimate addresses only the budgetary effects on unclassified programs affected by the bill. On that basis, CBO estimates that implementing H.R. 5949 would have no significant cost to the federal government.

Enacting the bill could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that any effects would be insignificant for each year.

The FISA Amendments Act of 2008 clarified the authority of the federal government to surveil and intercept communications of cer-

tain persons located outside the United States. H.R. 5949 would extend the provisions of that act by five years (otherwise they expire after December 31, 2012). As a result, the government might be able to prosecute criminal cases that it otherwise would not be able to pursue. CBO expects that H.R. 5949 would apply to a relatively small number of additional offenders, however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 5949 could be subject to criminal fines, the federal government might collect additional fines if the legislation is enacted. Criminal fines are deposited as revenues in the Crime Victims Fund and later spent. CBO expects that any additional revenues and direct spending would not be significant because of the relatively small number of cases likely to be affected.

The bill would impose both private-sector and intergovernmental mandates by extending an existing mandate that would limit civil actions and require providers of communication services to provide information. There is little information about the prevalence of electronic surveillance in those cases or the scope or size of potential awards from such cases. Consequently, CBO cannot determine whether the costs of those mandates would exceed the annual threshold established by the Unfunded Mandates Reform Act (UMRA) for private-sector mandates (\$146 million in 2012, adjusted annually for inflation). However, few public entities receive requests for such information, and the costs on them would be small. The bill also would extend an existing preemption on state and local governments regarding legal rights of action. CBO estimates that the costs to public entities of all the intergovernmental mandates in the bill would be small and well below the annual threshold established in UMRA (\$73 million in 2012, adjusted annually for inflation).

On July 2, 2012, CBO transmitted a cost estimate for H.R. 5949, the FISA Amendments Act Reauthorization Act of 2012, as ordered reported by the House Committee on the Judiciary on June 19, 2012. Both versions of H.R. 5949 and their estimated costs are the same. On July 19, 2012, CBO also transmitted a cost estimate for S. 3276, the FISA Amendments Act Reauthorization Act of 2012, as reported by the Senate Select Committee on Intelligence on June 7, 2012. That bill is very similar to both versions of H.R. 5949, and the estimated costs are also the same.

The CBO staff contacts for this estimate are Jason Wheelock and Mark Grabowicz (for federal costs), J'nell L. Blanco (for the impact on state and local governments), and Elizabeth Bass (for the impact on the private sector). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italics*, existing law in which no change is proposed is shown in *roman*):

FISA AMENDMENTS ACT OF 2008

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TITLE IV—OTHER PROVISIONS

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SEC. 403. REPEALS.

(a) * * *

(b) FISA AMENDMENTS ACT OF 2008.—

(1) IN GENERAL.—Except as provided in section 404, effective [December 31, 2012] December 31, 2017, title VII of the Foreign Intelligence Surveillance Act of 1978, as amended by section 101(a), is repealed.

(2) TECHNICAL AND CONFORMING AMENDMENTS.—Effective [December 31, 2012] December 31, 2017—

(A) * * *

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SEC. 404. TRANSITION PROCEDURES.

(a) * * *

(b) TRANSITION PROCEDURES FOR FISA AMENDMENTS ACT OF 2008 PROVISIONS.—

(1) ORDERS IN EFFECT ON [DECEMBER 31, 2012] DECEMBER 31, 2017.—Notwithstanding any other provision of this Act, any amendment made by this Act, or the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), any order, authorization, or directive issued or made under title VII of the Foreign Intelligence Surveillance Act of 1978, as amended by section 101(a), shall continue in effect until the date of the expiration of such order, authorization, or directive.

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MINORITY VIEWS

As Members of the House Intelligence Committee, we have a uniquely dual responsibility to ensure the Intelligence Community has the resources, tools, and authorities needed to protect America, and that the civil liberties of U.S. persons are protected in the course of pursuing this goal. The uniqueness of the responsibility is particularly relevant in the context of the FISA Amendments Act (FAA) Reauthorization Act of 2012.

The FAA provides the government with several of the authorities it needs to facilitate our national security. As members of the House Intelligence Committee, we have received briefings on several of the benefits and accomplishments of actions conducting using this authority. We are confident that agency personnel implementing this authority do so with deliberate consideration of the law. We are also confident that the authority has proven beneficial to the protection of our national security.

As Democrats on the House Intelligence Committee, we remain particularly committed to keeping our citizens informed, without providing our adversaries with information that can be used to circumvent our national security efforts. Amendments offered by Rep. Schakowsky emphasized several factors that were considered in the course of drafting this legislation.

The goal of the first amendment was to shorten the sunset provision of December 31, 2017 to June 1, 2015. This would ensure a more timely review of the Executive branch's use of this authority. Delaying the responsibility to review this authority for 5 years is too long. We will be in the 115th Congress, an entire presidential administration will have passed, and all without a statutory demand to reconsider and potentially realign this law with the desires of the American people. The proposed amendment was one way to give Congress the opportunity to ensure the implementation of this authority matched its aspirations.

The goal of the second amendment was to create an unclassified version of the Intelligence Community's numerous assessments and reviews reports. This would make certain that Congress could provide the public with an understanding of the actions of their government. The Foreign Intelligence Surveillance Act was initially passed to curb abuses in the collection and use of intelligence information, foreign and domestic. The FISA Amendments Act of 2008 goes a step further by authorizing the government to collect foreign intelligence information reasonably believed to be outside the United States without a warrant. Today, the Intelligence Community conducts oversight, the Foreign Intelligence Surveillance Court reviews the procedures for legal sufficiency, and the Intelligence Committee conducts its own oversight of this effort. Nearly all of this oversight, however, is conducted in secret.

While the Committee has the benefit and responsibility of having access to classified information, it is important that the public has an understanding of the foreign intelligence surveillance conducted under the FAA. The amendment to craft an unclassified report on the reviews that are conducted is a modest step towards that understanding.

Americans have the right to be informed that the Government uses its authorities narrowly, responsibly, and exclusively for foreign intelligence purposes. We will continue to strive to provide this assurance to our citizens. While the amendments were not adopted, they reflect several of the factors that were considered by this committee in the course of reaching its bi-partisan 17-0 vote in favor of the bill. This vote reflects a tradition of fully considering the tensions between security and civil liberties when crafting intelligence related legislation.

JAN SCHAKOWSKY.
LUIS GUTIERREZ.

