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JUDICIAL REDRESS ACT OF 2015

OCTOBER 20, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 1428]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1428) to extend Privacy Act remedies to citizens of certified states, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

The Judicial Redress Act provides citizens of covered foreign countries with the ability to bring suit in Federal district court for certain Privacy Act violations by the Federal Government related to the sharing of law enforcement information between the United States and a covered foreign government. Any such lawsuit is subject to the same terms and conditions that apply to U.S. citizens

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and lawful permanent residents who seek redress against the Federal Government under the Privacy Act. Under current law, only U.S. citizens and lawful permanent residents may bring claims against the Federal Government pursuant to the Privacy Act despite the fact that many countries provide U.S. citizens with the ability to seek redress in their courts when their privacy rights are violated. Enactment of this legislation is necessary in order to promote and maintain law enforcement cooperation and information sharing between foreign governments and the United States and to complete negotiations of the Data Protection and Privacy Agreement with the European Union.

Background and Need for the Legislation

For many years, the European Union and many of its member states have complained to U.S. officials about the fact that the Privacy Act of 1974 [1] only applies to U.S. citizens and lawful permanent residents, and not to foreign citizens. Although other U.S. laws provide any person with judicial remedies for specified types of privacy violations, the absence of a broader right of action with respect to privacy violations by the Federal Government has remained a point of friction with the European Union. Complaints have accelerated as it has become possible, due to digitalization of the economy, and indeed necessary for public security reasons, for U.S. and EU law enforcement agencies to exchange increasing quantities of information. In contrast to the Privacy Act, U.S. citizens have rights under EU and member state data protection laws to challenge adverse decisions by European government agencies in court.

Following several highly publicized, unauthorized disclosures of classified U.S. intelligence information, European officials have expressed increased concerns about U.S. intelligence collection and the need for enhanced U.S. privacy protections for EU data.[2] Indeed, these disclosures have led to threats by the European Union to suspend the Safe Harbor Framework,[3] the U.S.-EU Passenger Name Agreement,[4] and the Terrorist Finance Tracking Program Agreement.[5]

Moreover, since 2011, the United States has been in the process of negotiating a Data Protection and Privacy Agreement (DPPA, often referred to as the "umbrella agreement") with the European Union, in order to address the EU desire for clear standards governing the privacy of personal information exchanged for law enforcement purposes. The United States entered into these negotiations in order to ensure that robust information sharing with Europe for law enforcement purposes will continue. During the course

[1] 5 U.S.C. § 552a.

[2] *See, e.g.,* European Commission Communication to the European Parliament and Council, *Rebuilding Trust in EU–US Data Flows* (Nov. 2013) *available at* http://ec.europa.eu/justice/data-protection/files/com_2013_846_en.pdf.

[3] The U.S.-EU Safe Harbor Framework is an important tool for U.S. businesses to avoid experiencing interruptions in their business dealings with the European Union or facing prosecution by EU member state authorities under EU member state privacy laws. Under the Safe Harbor Framework, U.S. businesses may register with the U.S. Department of Commerce and self-certify compliance with a variety of data privacy practices.

[4] This agreement regulates the transfer of passenger name records by air carriers to the United States.

[5] The Terrorist Finance Tracking Program Agreement between the European Union and the United States allows U.S. authorities to monitor financial transactions on the Society for Worldwide Interbank Financial Telecommunications (Swift).

of the negotiations, the European Commission and Parliament have both made it clear that there will be no agreement without the enactment of a U.S. law that enables EU citizens to sue the U.S. government for major privacy violations.[6]

In order to address the concerns of the European Union, and move forward with negotiations on the umbrella agreement, on June 25, 2014, the Justice Department announced that, as part of successfully concluding the negotiations between the United States and the European Union, "the Obama Administration is committed to seeking legislation that would ensure that, with regard to personal information transferred within the scope of our proposed DPPA Regarding Police and Judicial Cooperation, EU citizens would have the same right to seek judicial redress for intentional or willful disclosures of protected information, and for refusal to grant access or to rectify any errors in that information, as would a U.S. citizen under the Privacy Act."[7] A legislative proposal to implement that commitment was developed with the work of the Justice Department and the Members of Congress who introduced the Judicial Redress Act earlier this year.

DISCUSSION

The Judicial Redress Act provides citizens of covered countries with a limited number of civil remedies, similar to those provided to U.S. citizens and lawful permanent residents under the Privacy Act.[8] This narrowly tailored legislation enables citizens of designated foreign countries to bring suit against the Federal Government with respect to information obtained through international law enforcement channels under the same terms and restrictions as a U.S. citizen or lawful permanent resident is subject to under the Privacy Act.

Specifically, the bill extends certain Privacy Act protections to citizens of a foreign country that has been designated as a "covered country." A country may be designated as a "covered country" if the Attorney General determines that either: 1) the country or regional economic integration organization has an agreement in place with the United States that provides appropriate privacy protections for information shared for law enforcement purposes, or 2) the country or regional economic organization effectively shares law enforcement information with the United States and has appropriate privacy protections in place for such shared information. Once a country has been designated as a covered country, its citizens may

[6] Claude Barfield, *A Good Data Deal,* U.S. News & World Report (Sept. 10, 2015) ("The umbrella agreement will not go into effect until the U.S. Congress legislates new judicial rights for EU citizens."); David Meyer, *EU and U.S. Sign Data Protection "Umbrella Agreement,"* Politico (Sept. 8, 2015) ("[A]cceptance by the European Parliament is contingent on the U.S. first passing legislation that would give Europeans limited judicial redress over the misuse of their data by U.S. Federal agencies.").

[7] Press Release, U.S. Department of Justice, Attorney General Holder Pledges Support for Legislation to Provide E.U. Citizens with Judicial Redress in Cases of Wrongful Disclosure of Their Personal Data Transferred to the U.S. for Law Enforcement Purposes (June 25, 2014).

[8] The Privacy Act contains a comprehensive and detailed set of requirements for the management of confidential records held by Executive Branch agencies. It prohibits Federal agencies from disclosing "any record which is contained in a system of records by any means of communication to any person, or to another agency" without the consent of "the individual to whom the record pertains," unless the disclosure falls within one or more enumerated exceptions to the Act. 5 U.S.C. § 552a(b). The Privacy Act creates a private cause of action against an agency for its willful or intentional violation of the Act and allows for the recovery of "actual damages sustained by the individual" as a result of an agency's violation of the Act. 5 U.S.C. §§ 552a(g)(1)(D), (g)(4).

bring suit in Federal district court against the Federal Government for certain violations of the Privacy Act. Citizens of covered countries are granted the same rights that U.S. citizens and lawful permanent residents currently have to seek redress under the Privacy Act for access to, or correction of, records about them that are maintained by a designated Federal agency, or to seek redress with respect to the unauthorized, intentional or willful disclosure of those records.

The Justice Department believes that enactment of this legislation is critical for a number of reasons. First, the DPPA umbrella agreement cannot be fully implemented unless the Judicial Redress Act is enacted. The European Commission and Parliament have both made it clear that there will be no agreement without the legislation. The negative fallout from failure to enact the Judicial Redress Act and finalize the DPPA will almost certainly include diminished law enforcement cooperation, and EU insistence that nearly all law enforcement cooperation be channeled into the formal channel of mutual legal assistance. The diversion of multiple high volume channels of cooperation into a single channel would dramatically reduce law enforcement cooperation.

Second, the European Union is drafting new data protection legislation through which international transfers of personal information of EU citizens will be restricted unless the recipient country meets certain privacy requirements. Entry into force of the DPPA would meet the criteria of the draft legislation as to law enforcement sharing but, without it, the United States would be subject to increased future restrictions.

Third, this legislation and the DPPA will help the United States mitigate the climate of suspicion and mistrust that resulted from the unauthorized disclosures of classified information. Fourth, the European Commission has stated that it will not finalize the revision of the Safe Harbor Arrangement unless and until the DPPA can be successfully concluded. The Safe Harbor Arrangement is essential to American businesses operating in Europe and their ability to transfer European data to their U.S. operations.[9] Finally, as mentioned above, other key U.S. law enforcement agreements with the EU are also at risk unless the Judicial Redress Act is enacted and the DPPA successfully enters into force.

In sum, this legislation is critical to reestablishing a trusting relationship between the European Union and the United States, to ensuring continued strong law enforcement cooperation between the United States and Europe, and to preserving the ability of American companies to do business in Europe.

Hearings

The Committee on the Judiciary held no hearings on H.R. 1428.

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[9] *See* Letter from Information Technology Industry Council et al. to the Hon. John Boehner et al. (April 28, 2015) (The Judicial Redress Act will "help restore the public trust necessary for the continued success of U.S. industry [and] . . . will help foster a robust relationship between the U.S. and the EU and rebuild trust in U.S.-EU data flows. Transnational data flows serve as a key component of the digital trade that increasingly drives U.S. economic growth.").

Committee Consideration

On September 17, 2015, the Committee met in open session and ordered the bill H.R. 1428 favorably reported, without amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 1428.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that 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, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1428, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 28, 2015.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1428, the "Judicial Redress Act of 2015."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marin Burnett, who can be reached at 226–2860.

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1428 would provide certain foreign persons and entities with the means to sue the United States in District Court for unauthorized disclosure of personal information. Currently, under the Privacy Act, United States citizens and lawful permanent residents may bring claims against the Federal Government if their personal information is disclosed in an unauthorized manner.

The bill would allow foreign persons in designated countries to bring suit against the United States under the terms of the Privacy Act for unlawful disclosure of information obtained in connection with international law enforcement efforts. This new basis for suing the United States would probably increase the number of claims reviewed by the Federal courts.

Based on information from the Administrative Office of the United States Courts (AOUSC), CBO expects that the increase in claims would not have a substantial effect on the workload of the Federal courts. Therefore, CBO estimates that the additional discretionary costs to implement H.R. 1428 would not be significant.

Enacting H.R. 1428 would affect direct spending; therefore, pay-as-you-go procedures apply. CBO expects that the increased number of claims would likely result in increased payments out of the Claims and Judgment Fund (a permanent, indefinite appropriation for claims and judgments against the United States). However, because the median payment amount over past years for such claims is less than $30,000, and fewer than 10 claims have been paid annually in recent years, the incremental increase in the cost of successful claims would probably be small. Thus, CBO estimates that the increase in annual direct spending under H.R. 1428 would be insignificant. Enacting the bill would not affect revenues.

H.R. 1428 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.

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

Duplication of Federal Programs

No provision of H.R. 1428 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 1428 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1428 provides citizens of covered foreign countries with the ability to bring suit in Federal district court for certain Privacy Act violations by the Federal Government.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1428 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Section 1. Short title.

Section 1 provides that the short title is the "Judicial Redress Act of 2015."

Section 2. Extension of Privacy Act Remedies to Citizens of Designated Countries.

Subsection (a) provides that a covered person may bring a civil action with respect to covered records to the same extent and subject to the same limitations that an individual covered by the Privacy Act may bring a lawsuit under 5 U.S.C. § 552a(g)(1)(D) with respect to: (1) intentional or willful violations of 5 U.S.C. § 552a(b), and (2) against a designated Federal agency or component under 5 U.S.C. §§ 552a(g)(1)(A) & (B). Subsection (b) provides that subsection (a) is the exclusive remedy available to covered person under the Act. Subsection (c) further provides that for purposes of the civil action described in subsection (a), a covered person shall have the same rights and be subject to the same limitations as an individual covered by the Privacy Act has under 5 U.S.C. § 552a.

Subsection (d)(1) sets forth how a country is designated as a "covered country" for purposes of the Act. The subsection provides that a foreign country, regional economic integration organization, or a member country of such organization may be designated as a covered country if the Attorney General, with the concurrence of the Secretary of State, the Secretary of the Treasury, and the Secretary of Homeland Security, determines that the country or organization has entered into an agreement with the United States that provides for appropriate privacy protections for information shared for law enforcement purposes or that such entity has effectively shared law enforcement information with the United States and has appropriate privacy protections for such shared information.

Subsection (d)(2) sets forth the circumstances under which a covered country designation may be removed. If the Attorney General, with the concurrence of the specified agency heads, determines that a covered country is not complying with an agreement described in subsection (d)(1)(A), no longer meets the requirements set forth in subsection (d)(1)(B), or impedes the transfer of law enforcement information to the United States by a private entity or person, the Attorney General may remove the covered country designation.

Subsection (e) details how a Federal agency or component thereof is designated as a "designated Federal agency or component." The subsection provides that the Attorney General may not designate any agency or component outside of the Justice Department without the concurrence of the head of the relevant agency or of the agency to which the component belongs. Subsection (e) further provides that the Attorney General may designate a Federal agency or component if the Attorney General determines that information exchanged by such agency with a covered country is within the scope of an agreement referred to in subsection (d)(1)(A) or that designating such agency or component thereof is in the law enforcement interests of the United States.

Subsection (f) provides that the Attorney General shall publish each determination made under subsections (d) and (e) in the Federal Register and that such determinations shall not be subject to judicial or administrative review.

Subsection (g) provides that the United States District Court for the District of Columbia shall have exclusive jurisdiction over any claim arising under the Act.

Subsection (h) defines the terms: agency, covered country, covered person, covered record, designated Federal agency or component, and individual. Subsection (i) provides that nothing in the Act shall be construed to waive any applicable privilege or require the disclosure of classified information and that, upon an agency's request, the district court shall review in camera and ex parte any submission by the agency in connection with this subsection. Subsection (j) provides that the Act shall take effect 90 days after the date of its enactment.

Committee Jurisdiction Letters

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States
House of Representatives
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October 6, 2015

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
2138 Rayburn HOB
Washington, D.C. 20515

Dear Mr. Chairman:

I write concerning H.R. 1428, the Judicial Redress Act of 2015. As you know, the Committee on the Judiciary received an original referral and the Committee on Oversight and Government Reform a secondary referral when the bill was introduced on March 18, 2015. I recognize and appreciate your desire to bring this legislation before the House of Representatives in an expeditious manner, and accordingly, the Committee on Oversight and Government Reform will forego action on the bill.

The Committee takes this action with our mutual understanding that by foregoing consideration of H.R. 1428 at this time, we do not waive any jurisdiction over the subject matter contained in this or similar legislation. Further, I request your support for the appointment of conferees from the Committee on Oversight and Government Reform during any House-Senate conference convened on this or related legislation.

Finally, I would ask that a copy of our exchange of letters on this matter be included in the bill report filed by the Committee on the Judiciary, as well as in the *Congressional Record* during floor consideration, to memorialize our understanding

Sincerely,

Jason Chaffetz
Chairman

cc: The Honorable John A. Boehner, Speaker
The Honorable Elijah E. Cummings
The Honorable John Conyers, Jr.
The Honorable Thomas J. Wickham, Parliamentarian

BOB GOODLATTE, Virginia
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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States
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October 6, 2015

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chaffetz,

Thank you for your letter regarding H.R. 1428, the "Judicial Redress Act of 2015." As you noted, the Committee on Oversight and Government Reform was granted an additional referral on the bill.

I am most appreciative of your decision to forego formal action on H.R. 1428 so that it may proceed expeditiously to the House floor. I acknowledge that although you waived formal consideration of the bill, the Committee on the Oversight and Government Reform is in no way waiving its jurisdiction over the subject matter contained in those provisions of the bill that fall within your Rule X jurisdiction. I would support your effort to seek appointment of an appropriate number of conferees on any House-Senate conference involving this legislation.

I will include a copy of our letters in the Committee's report on H.R. 1428 and in the *Congressional Record* during floor consideration of H.R. 1428.

Sincerely,

Bob Goodlatte

Bob Goodlatte
Chairman

cc: The Honorable John Boehner, Speaker
The Honorable John Conyers
The Honorable Elijah Cummings
Thomas J. Wickham, Jr., Parliamentarian

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