



**How Section 702 Reform Stacks Up:**

**OTI's Reform Priorities and the House ([H.R. 3989](#)) and Senate ([S. 2158](#)) USA Liberty Acts, the USA Rights Act ([S. 1997](#)), and the Senate ([S. 2010](#)) and House ([H.R. 4478](#)) FISA Amendments Reauthorization Act of 2017**

OTI PRIORITY	Does the House USA Liberty Act Accomplish OTI's Reform Priorities? (Yes, No, Partially)	What the USA Liberty Act Does (House Judiciary Committee; H.R. 3989)	Does the Senate USA Liberty Act Accomplish OTI's Reform Priorities? (Yes, No, Partially)	What the Senate USA Liberty Act Does (Leahy and Lee, S. 2158)	Does the Senate USA Rights Act Accomplish OTI's Reform Priorities? (Yes, No, Partially)	What the USA Rights Act Does (Wyden and Paul, S. 1997)	Does the Senate FISA Amendments Re-authorization Act of 2017 Accomplish OTI's Reform Priorities? (Yes, No, Partially)	What the FISA Amendments Re-authorization Act of 2017 Does (Burr, S. 2010)	Does the House FISA Amendments Re-authorization Act of 2017 Accomplish OTI's Reform Priorities? (Yes, No, Partially)	What the House FISA Amendments Reauthorization Act of 2017 Does (Nunes)
<b>Limit the scope of surveillance to include only information necessary to national security, and to exclude information relevant to U.S. foreign affairs and national defense</b>	No	The bill does not address the scope of collection authorized under Section 702.	No	The bill does not address the scope of collection authorized under Section 702.	No	The bill does not address the scope of collection authorized under Section 702. However, it would clarify the prohibition on reverse targeting and establish a clear prohibition against the collection of wholly domestic communications. (Sec. 3, Sec. 5)	No	The bill would actually expand surveillance under Section 702. It would authorize the collection from "a facility, place, premises, or property," which is far more expansive than what is currently allowed. Additionally, the bill would fail to narrow the purposes for surveillance.	No, the bill would significantly expand the authorized scope of surveillance under all FISA authorities, including but not limited to Section 702.	The bill would significantly expand surveillance under all FISA authorities, including Section 702. It would expand surveillance under all FISA authorities by creating entirely new categories of individuals and entities that can be targeted as a foreign power or agent of a foreign power. This bill would allow for surveillance under all FISA authorities of entities that are not "substantially composed of United States persons" that engage in "international malicious cyber activity, or activities in preparation therefor, that threatens the national defense or security of the United States," or individuals who are engaged in or who knowingly aid or abet those activities. There is no definition for what constitutes an entity that is "substantially composed of United States Persons," so this could allow for a significant increase in the target surveillance and incidental collection of Americans' communications. (Sec. 102)  It would also expand surveillance under Section 702 by authorizing the collection from "a facility, place, premises, or property," which is far more expansive than what is currently allowed. Additionally, the bill would fail to narrow the purposes for surveillance. (Sec. 203(b)(1)(A))

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<p><b>Terminate upstream surveillance altogether, or at least prohibit "abouts" collection</b></p> <p><b>Upstream collection is the practice where the NSA, with providers' assistance, wiretaps the cables that transit the majority of global internet traffic (internet backbone) and scans that data for information to or from a target. About collection includes scanning for information that is "about" a target, such as an email between two non-targets that includes a target's email address in the body of the email.</b></p>	Partially	<p>The bill does not prohibit upstream collection.</p> <p>Until recently, the NSA was also scanning the contents of communications to identify information "about" a target, but the FISA Court found the practice unconstitutional when the NSA could not implement adequate protections, so "about" collection was stopped.</p> <p>The bill makes clear that collection may only be targeted at communications that are sent or received by the target. Thus, the bill makes clear that "abouts" collection is not authorized. This limitation on collection expires (sunsets) on September 30, 2023. (Sec. 102(a)(2)(4)(A))</p>	Partially	<p>The bill does not prohibit upstream collection.</p> <p>Until recently, the NSA was also scanning the contents of communications to identify information "about" a target, but the FISA Court found the practice unconstitutional when the NSA could not implement adequate protections, so "about" collection was stopped.</p> <p>The bill makes clear that collection may only be targeted at communications that are sent or received by the target. Thus, the bill makes clear that "abouts" collection is not authorized. (Sec. 103(a)(2)(4)). The text is nearly identical to the USA Liberty Act but it omits the sunset date for this limitation.</p>	Partially	<p>The bill does not prohibit upstream collection.</p> <p>Until recently, the NSA was also scanning the contents of communications to identify information "about" a target, but the FISA Court found the practice unconstitutional when the NSA could not implement adequate protections, so "about" collection was stopped.</p> <p>The bill makes clear that upstream collection is only authorized to permit surveillance and collection of communications that are sent or received by the target. This means that "about" collection is not authorized. (Sec. 4)</p>	No	<p>The bill does not prohibit upstream collection.</p> <p>The bill would codify about collection. It would also establish in statute that the FISC can re-authorize the government to conduct "abouts" collection - which the FISA Court can do now without legislation - but it would require that the Attorney General notify Congress and would impose a one-month period during which Congress could pass a law preventing the collection from restarting. If Congress failed to pass a bill within that month, it would have silently assented to "abouts" collection. (Sec. 3)</p> <p>It would also expand current "abouts" collection authorities by allowing for the immediate unintentional acquisition of "abouts" communications, and it would expand the types of permissible targets to facilities, places, properties, and premises. (Sec. 3(a)(3))</p>	No	<p>The bill does not prohibit upstream collection.</p> <p>The bill would codify about collection. It would also establish in statute that the FISC can re-authorize the government to conduct "abouts" collection - which the FISA Court can do now without legislation - but it would require that the Attorney General notify Congress and would impose a one-month period during which Congress could pass a law preventing the collection from restarting. If Congress failed to pass a bill within that month, it would have silently assented to "abouts" collection. (Sec. 203)</p> <p>It would also expand current "abouts" collection authorities by allowing for the immediate unintentional acquisition of "abouts" communications, and it would expand the types of permissible targets to facilities, places, properties, and premises. (Sec. 203(a)(3))</p>

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<p><b>Require a warrant for querying to seek U.S. person information in databases containing Section 702 data (often referred to as closing the "backdoor search loophole")</b></p>	Partially	<p>The bill would require the government to obtain a warrant before accessing or disseminating the contents of communications collected under Section 702 except in certain circumstances such as where "the purpose" of the search is to obtain foreign intelligence (FI) information. The FI purpose exception would cover all NSA, CIA, and NCTC searches. There is a risk that it could be read extremely broadly to apply to many FBI searches as well, and could undermine the criminal warrant requirement if there were "dual" purposes for a search. It would also set a troubling precedent that one's constitutional rights are lesser in foreign intelligence investigations than they are in criminal investigations. (Sec. 101(a)(2)(j)(2)(A)" and "(j)(2)(D)(i)")</p> <p>An additional exception to the warrant requirement would include if the AG determines, based on a review of noncontents, that the subject of the query is or is communicating with someone believed to be involved in international terrorism or providing material support or resources to terrorists. Other exceptions would be for emergencies and with the consent of the subject of the query. (Sec. 101(a)(2) "(j)(2)(D)(ii-v)")</p> <p>There would be no warrant requirement or judicial oversight of access to Americans' noncontents information (i.e. metadata). There would be some minimal internal protection because supervisory approval to access noncontents would be required. Additionally, noncontents could not be accessed if the data were sought solely on the basis of First Amendment protected activities. (Sec. 101(a)(2)(j)(2)(C)")</p>	Partially	<p>This provision is the principal area of difference from the House version. The bill would require the government to obtain a warrant based on probable cause before it could access or disseminate the contents of communications concerning a U.S. person or a person located in the U.S., regardless of the purpose of the query or the agency making it. This would not establish warrant protections for access to metadata, but the bill would require Attorney General approval and that the data is relevant to an authorized investigation for access to metadata. (Sec. 101(a)(2)(j)(a)" and Sec. 102"(4)")</p>	Yes	<p>The bill would require the government to obtain a warrant based on probable cause before it could conduct a search for a U.S. person's communications. This would establish warrant protections for access to both metadata and contents. (Sec. 2)</p>	No	<p>The bill would codify the so-called "backdoor search loophole" where the government warrantlessly searches Section 702-collected data for specific Americans' communications. It would impose new requirements for the FISC to review query procedures, and for the FBI, after it conducts queries seeking U.S. person information, to submit those queries together with a written justification to the FISC for review. The FISC already allows the FBI to conduct warrantless searches for any lawful purpose, including those wholly unrelated to national security or foreign intelligence. As such, this codifies authorization for warrantless queries and only requires that the FISC review queries after they are conducted. By only providing potential protection in practice and codifying permission for the FBI to search for information on U.S. persons without a warrant, this provision could be a step back for Americans' privacy. (Sec. 7-8)</p>	No	<p>The bill would codify the so-called "backdoor search loophole" where the government warrantlessly searches Section 702-collected data for specific Americans' communications. It would impose a new provision where the FBI could apply for an optional order from the court based on an affidavit or statement of facts substantiating a belief that the contents of communications responsive to a U.S. person query are evidence of a crime. Notably, the belief does not need to be reasonable. However, the standard is poorly drafted because for the court to issue the order, it has to find probable cause that the communications will contain evidence of "(I) criminal activity; (II) contraband, fruits of a crime, or other items illegally possessed by a third party; or (III) property designed for use, intended for use, or used in committing a crime." Additionally, the order would only be required if the FBI wanted to use the communications as evidence in a criminal case, but there are a long list of exceptions, meaning that the optional order would apply to almost no situations. The bill would also impose new requirements for the FISC to review query procedures (Sec. 201)</p>

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<b>Limit permissible uses of Section 702 data to investigations that are related to the purposes for collection</b>	Partially	The bill would limit the use of evidence accessed through one of the exceptions permitting warrantless queries. Specifically, it would prohibit the government from introducing as evidence or otherwise using any communications that were warrantlessly accessed pursuant to the AG's determination that the subject of the search is or is in communication with a person involved in terrorism. Such information may only be used in investigations or introduced as evidence with prior AG approval and if the prosecution involves terrorism, espionage, proliferation of WMDs, a cybersecurity threat from a foreign country, incapacitation or destruction of critical infrastructure, or a threat to U.S. armed forces. (Sec. 101(c)(2))	No	The bill does not address the use of Section 702 data in investigations that are unrelated to the purposes for collection. However, as compared with the House version of USA Liberty, the warrantless queries subject to use limits under the House bill would not be permitted as warrantless queries in the first place.	Yes	The bill would only allow the use of communications collected under Section 702 in civil, criminal and administrative proceedings and investigations where there is prior AG approval and those proceedings and prosecutions are "directly related to and necessary to address a specific threat of" terrorism, espionage, proliferation of weapons of mass destruction, a cyber attack from a foreign nation, incapacitation or destruction of critical infrastructure, or a threat to U.S. armed forces. (Sec. 6)	Partially	The bill would prevent the use of Section 702-collected data that is to, from, or about a U.S. person in a criminal proceeding against that U.S. person, unless the proceeding concerns national security, death, kidnapping, serious bodily injury, certain crimes against children, the incapacitation or destruction of critical infrastructure, cybersecurity (including CFAA violations), any transnational crime, and any human trafficking (including domestic). No court could review the AG determination that the proceeding at hand falls into this list, and this provision would not impose any limit whatsoever on the use of Section 702 data in any investigation, or civil or administrative proceeding. (Sec. 6)	Partially	The bill does not address permissible uses of Section 702-collected data. It imposes limitations on <i>how</i> data can be used, as described above, but it may still be used for any purpose whatsoever.

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<b>Require the DNI to conduct and make public an estimate of the number of Americans' communications that are incidentally collected under Section 702 and provide for additional Section 702 transparency</b>	Partially	<p>The bill would require the DNI to provide Congress with a semi-annual estimate of the number of U.S. persons' communications that are incidentally collected each year under Section 702, how many U.S. persons' communications are unmasked, how many unmasked communications are disseminated, and how many communications that are evidence non-foreign intelligence related crimes were disseminated to the FBI and from the national security division of the FBI to its criminal division. The bill would not require this information to be made publicly available. (Sec. 105)</p> <p>It would also require a semi-annual report on the number of warrant applications to access the contents of communications collected under Section 702, how many warrants were issued as a result of those applications, how many approvals for access to noncontents information supervisors granted, the number of determinations the AG made authorizing warrantless access to contents in an emergency and the number of times the FISA Court disagreed with the AG's determination, and the number of determinations the AG made authorizing warrantless access to contents and the number of times the FISA Court disagreed</p>	Partially	<p>The bill would require the DNI to provide Congress with a semi-annual estimate of the number of U.S. persons' communications that are incidentally collected each year under Section 702, how many U.S. persons' communications are unmasked, how many unmasked communications are disseminated, and how many communications that are evidence non-foreign intelligence related crimes were disseminated to the FBI and from the national security division of the FBI to its criminal division. The bill would not require this information to be made publicly available. (Sec. 106"(c)")</p> <p>It would also require a semi-annual report on the number of warrant applications to access the contents of communications collected under Section 702, how many warrants were issued as a result of those applications, and how many approvals for access to noncontents information the AG made. (Sec. 107)</p> <p>It would require an annual report on the number of targets under FISA Title I electronic surveillance and pen register and trap and trace device orders, and on the number of those targets that are U.S. persons, both rounded to the nearest 500. (SEC. 108)</p> <p>The bill would require the DNI and AG to publish unclassified versions of Section 702 minimization</p>	Yes	<p>The bill would require the DNI to publish an annual estimate of the number of U.S. persons' whose communications are incidentally collected each year under Section 702, and the number of persons located inside the U.S. who are a party to a communication collected under Section 702, unless doing so is technically infeasible. (Sec. 18)</p> <p>The bill would also remove the exception for the FBI from reporting on the number of U.S. person queries it conducts in Section 702 data, in FISA pen register and trap and trace device data, and in the call detail records database under Section 215. (Sec. 17)</p> <p>Finally, the bill would require that the government</p>	No	<p>The bill would not require the DNI to provide an estimate of the number of Americans' communications that are collected under Section 702. It would require reporting on the number of targets for surveillance under Section 702. It would also require reporting on the number of times the FBI receives and reviews the contents of a U.S. person's communications in response to a query to find criminal evidence that is unrelated to foreign intelligence or national security. This would be a misleadingly low number since it would not cover queries that yielded responsive data that were done for dual criminal and foreign intelligence purposes, or that were done for foreign intelligence purposes but yielded information that may be evidence of or related to a criminal investigation. Additionally, it would require a report on the number of investigations the criminal division opened based on Section 702 data (Sec. 6(b)(1)(B))</p>	No	<p>The bill would not require the DNI to provide an estimate of the number of Americans' communications that are collected under Section 702. It would require reporting on the number of targets for surveillance under Section 702 and other FISA authorities, and the number of those targets that are and are not U.S. persons. It would also require reporting on the number of times the FBI receives and reviews the contents of a U.S. person's communications in response to a query to find criminal evidence that is unrelated to foreign intelligence or national security. This would be a misleadingly low number since it would not cover queries that yielded responsive data that were done for dual criminal and foreign intelligence purposes, or that were done for foreign intelligence purposes but yielded information that may be evidence of or related to a criminal investigation. Additionally, it would require a report on the number of investigations the criminal division opened based on Section 702 data. (Sec. 202(b))</p> <p>The bill would require the DNI and AG to publish unclassified versions of Section 702 minimization procedures.</p>

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		<p>with the AG's determination. (Sec. 106)</p> <p>It would require an annual report on the number of targets under FISA Title I electronic surveillance and pen register and trap and trace device orders, and on the number of those targets that are U.S. persons, both rounded to the nearest 500. (Sec. 107)</p> <p>The bill would require the DNI and AG to publish unclassified versions of Section 702 minimization procedures. (Sec. 103)</p>		<p>procedures. (Sec. 104)</p>		<p>declassify significant FISC opinions that predated the enactment of the USA Freedom Act. (Sec. 12)</p>				<p>(Sec. 204)</p> <p>The bill would require an annual report on the number of targets under FISA Title I electronic surveillance and pen register and trap and trace device orders, and on the number of those targets that are U.S. persons, both rounded to the nearest 500. (Sec. 206)</p> <p>The bill would require annual reports to the intelligence committees of the number of unmasking requests that were made approved, and denied. (Sec. 207(a)(1) ("Sec. 512(c)"))</p>
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<b>Allow third parties that receive national security orders to report on those orders in narrower bands</b>	No	The bill does not address third party transparency.	No	The bill does not address third party transparency.	Yes	The bill would allow third parties to report that they did not receive any of a particular type of national security demand, and it would allow more granular reporting by narrowing the range for reporting to bands of 200 for up to 1,000 selectors targeted, and precise number for any number over 1,000. (Sec. 15)	No	The bill does not address third party transparency.	No	The bill does not address third party transparency.
<b>Codify data retention limits and make those limits apply equally to encrypted and unencrypted communications</b>	No	The bill would not codify any data retention limits, including imposing a retention limit on data that were not reviewed, where no determination was made, or that were encrypted. It would require the NSA Director to submit a semi-annual affidavit stating that communications that were determined to not contain foreign intelligence information, if any, were deleted. (Sec. 201(2))	No	The bill would not codify any data retention limits, including imposing a retention limit on data that were not reviewed, where no determination was made, or that were encrypted. It would require the NSA Director to submit a semi-annual affidavit stating that communications that were determined to not contain foreign intelligence information, if any, were deleted. (Sec. 201)	No	The bill does not address data retention limits.	No	The bill does not address data retention limits.	No	The bill does not address data retention limits.

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<b>Strengthen the role of the amicus curiae at the FISC by permitting them to proactively raise concerns with the FISC, and creating a process for appeal to the FISC</b>	Partially	<p>The bill would require the FISC to appoint an amicus to participate in the annual Section 702 certification proceedings unless the Court determines that participation is not necessary. (Sec. 104)</p> <p>It would not permit the amicus to proactively raise concerns or appeal a FISC ruling to the FISC.</p>	Partially	<p>The bill would require the FISC to appoint an amicus to participate in the annual Section 702 certification proceedings unless the Court determines that participation is not necessary. (Sec.105)</p> <p>It would not permit the amicus to proactively raise concerns or appeal a FISC ruling to the FISC.</p>	Yes	<p>The bill would empower any amicus appointed to advise the FISC to "raise any issue with the Court at any time." It would also enable the amicus to apply for a hearing of an issue the Court decided against them en banc or by the Foreign Intelligence Surveillance Court of Review (FISCR). If the FISCR rules against the amicus, the amicus can apply to the FISCR for it to refer the matter to the Supreme Court. Additionally, it would ensure amici had access to the classified materials necessary to perform their functions. (Sec. 8(a)(1)-(4))</p> <p>It would also ensure that if a novel issue can be debated in an unclassified setting is at hand, that the court will provide public notice of that hearing and accept briefs from third parties. (Sec. 8(a)(5))</p> <p>Finally, it would require the Court to have an amicus participate in the annual certification process, unless doing so would be inappropriate. (Sec. 8(b))</p>	No	The bill would require the FISC to appoint an amicus to participate in a proceeding to reauthorize "abouts' collection, unless the Court determined it was inappropriate. This is likely an appointment the Court would have to make under current law, so it does not represent a meaningful reform. (Sec. 4)	No	The bill would require the FISC to appoint an amicus to participate in a proceeding to reauthorize "abouts' collection, unless the Court determined it was inappropriate. This is likely an appointment the Court would have to make under current law, so it does not represent a meaningful reform. (Sec. 203(b)(6))
<b>Clarify the notice requirement to ensure that defendants are told if any information that was used in their investigation came from Section 702 surveillance</b>	No	The bill would clarify that Section 702 contents and noncontents that are introduced as evidence in prosecutions are subject to the notice requirement already in the law, but it would not clarify the definition of "obtained or derived from" which triggers that requirement. (Sec. 101(a)(2) "(j)(2)(A)(i)(III)" and "(j)(2)(C)(iv)")	No	The bill would clarify that Section 702 contents and noncontents that are introduced as evidence in prosecutions are subject to the notice requirement already in the law, but it would not clarify the definition of "obtained or derived from" which triggers that requirement. (Sec. 101(a)(2) "(j)(1)(A)(i)(II)" and "Sec. 102"(4)(D)")	Yes	The bill would clarify the definition of when information is "derived" from FISA surveillance, including Section 702, to ensure that individuals are notified that such information was used in an investigation or introduced as evidence in a prosecution if "but for" the government's surveillance, the government would not have had the information. It would also require the publication of policies explaining the implementation of this new definition. (Sec. 13)	No	The bill does not address the notice requirement.	No	The bill does not address the notice requirement.

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<b>Codify standing and limit the executive branch's ability to exercise the state secrets privilege so that Section 702 may be contested in court by anyone who is affected by the surveillance authority.</b>	No	The bill does not address standing or the state secrets privilege.	No	The bill does not address standing or the state secrets privilege.	Yes	The bill would establish standing to challenge Section 702 in court for any individual who has a reasonable basis to believe that their communications will be acquired under the surveillance authority and who had taken "objectively reasonable steps to avoid" such surveillance. (Sec. 11)	No	The bill does not address standing or the state secrets privilege.	No	The bill does not address standing or the state secrets privilege.
<b>Establish a new sunset provision</b>	Yes	The bill would extend the authority until September 30, 2023, at which point Congress would have to reauthorize it or allow it to expire. (Sec. 301(a))	Yes	The bill would extend the authority until September 30, 2023, at which point Congress would have to reauthorize it or allow it to expire. (Sec. 301(a))	Yes	The bill would extend the authority until September 30, 2021, at which point Congress would have to reauthorize it or allow it to expire. (Sec. 19)	Yes	The bill would extend the authority until December 31, 2025, at which point Congress would have to reauthorize it or allow it to expire. (Sec. 2)	Yes	The bill would extend the authority until December 31, 2021, at which point Congress would have to reauthorize it or allow it to expire. (Sec. 301(a))

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