

RON WYDEN IS WORRIED THE GOVERNMENT WILL USE FISA PROCESS TO FORCE COMPANIES TO MAKE TECHNICAL CHANGES

Ron Wyden and Rand Paul just introduced their bill to fix Section 702. It's a good bill that not only improves Section 702 (by prohibiting back door searches, prohibiting the 2014 exception, and limiting use of 702 data), but also improves FISC and PCLOB.

The most alarming part of the bill, though, is Section 14. It prohibits the Attorney General and Director of National Intelligence from asking for technical assistance under Section 702 that is not narrowly targeted or explicitly laid out and approved by the court.

(B) LIMITATIONS.—The Attorney General or the Director of National Intelligence may not request assistance from an electronic communication service provider under subparagraph (A) without demonstrating, to the satisfaction of the Court, that the assistance sought—

(i) is necessary;

(ii) is narrowly tailored to the surveillance at issue; and

(iii) would not pose an undue burden on the electronic communication service provider or its customers who are not an intended target of the surveillance.

(C) COMPLIANCE.—An electronic communication service provider is not obligated to comply with a directive to provide assistance under this paragraph unless

(i) such assistance is a manner or method that has been explicitly approved by the Court; and

(ii) the Court issues an order, which has been delivered to the provider, explicitly describing the assistance to be furnished by the provider that has been approved by the Court.

This suggests that Wyden is concerned the government might use – or has used – FISA to make sweeping onerous technical demands of companies without explicitly explaining what those demands are to the Court.

The most obvious such application would involve asking Apple to back door its iPhone encryption.

As a reminder, national security requests to Apple doubled in the second half of last year.

The number of national security orders issued to Apple by US law enforcement doubled to about 6,000 in the second half of 2016, compared with the first half of the year, Apple disclosed in its biannual transparency report. Those requests included orders received under the Foreign Intelligence Surveillance Act, as well as national security letters, the latter of which are issued by the FBI and don't require a judge's sign-off.

We would expect such a jump if the government were making a slew of new requests of Apple related to breaking encryption on their phones.