

LEAHY-LEE VERSUS USA LIP SERVICE: AN IMPROVEMENT, BUT STILL A DOMESTIC-AS- FOREIGN SURVEILLANCE BILL

Patrick Leahy and Mike Lee have introduced their version of Section 702 reauthorization, which like HJC they also call USA Liberty and like that bill doesn't improve liberty. For convenience and because I refuse to use Orwellian terms to whitewash surveillance, I'll refer to them going forward as Leahy-Lee and USA Lip Service, respectively.

Leahy-Lee is an improvement on USA Lip Service.

Leahy-Lee's warrant requirement is real

That's true, first of all, because the warrant requirement to access content via back door searches is real. The bill requires a probable cause warrant for both foreign intelligence and criminal purposes. And because it is a meaningful warrant requirement, the count of how many warrants are obtained will also be real.

The bill permits searches on (and with AG-plus-designates approval, access to) metadata-plus. Like USA Lip Service, the bill doesn't define the expanded definition of metadata, though it appears to permit the same location-based access that USA Lip Service does.

The bill is silent on whether metadata from searches can be the sole evidence in the warrant application to FISC, which may water down the warrant requirement dramatically.

Leahy-Lee doesn't sunset the prohibition on about collection

Also unlike USA Lip Service, Leahy-Lee does not sunset the prohibition on about collection.

There are two areas where USA Lip Service is different in ways that may make it better.

USA Lip Service may not track White House unmasking

First, in a report on the number of unmaskings, USA Lip Service requires reports on the number of unmaskings by any "element of the Federal Government."

(3) The number of—

(A) United States persons whose information is unmasked pursuant to the procedures adopted under subsection (e)(4) of such section;

(B) requests made by an element of the Federal Government, listed by each such element, to unmask information pursuant to such subsection; and

(C) requests that resulted in the dissemination of names, titles, or other identifiers potentially associated with individuals pursuant to such subsection, including the element of the intelligence community and position of the individual making the request.

Leahy-Lee only requires reporting under clause B from the IC.

(B) requests made by an element of the intelligence community, listed by each such element, to unmask information

pursuant to such subsection;

That may have the effect of missing any unmasking done at the White House. I don't much care about this stuff, but for Republicans that do, it's an interesting omission in the Senate bill.

Leahy-Lee doesn't limit use of information to 702 certificates

Perhaps most interesting, Leahy-Lee doesn't have language that was added in the manager's amendment of USA Lip Service, which would restrict the use of information collected under Section 702 to topics generally covered by the known certificates for it: terrorists, spies, proliferation, nation-state hacking, and other critical infrastructure issues.

(2) LIMITATION ON USE OF CERTAIN EXCEPTED QUERIED INFORMATION.—No information accessed or disseminated pursuant to section 702(j)(2)(D)(iv), or evidence derived therefrom, may be received in evidence or otherwise used pursuant to paragraph (1), except—

(A) with the prior approval of the Attorney General; and

(B) in a proceeding or investigation in which the information or evidence is directly related to and necessary to address a specific threat of—

(i) an act of terrorism specified in clauses (i) through (iii) of section 2332b(g)(5)(B) of title 18, United States Code;

(ii) espionage (as used in chapter 37 of title 18, United States Code);

(iii) proliferation or use of a weapon

of mass destruction (as defined in section 2332a(c) of title 18, United States Code);

(iv) a cybersecurity threat (as defined in section 101(5) of the Cybersecurity Information Sharing Act of 2015 (6 U.S.C. 1501(5)) from a foreign country;

(v) incapacitation or destruction of critical infrastructure (as defined in section 1016(e) of the USA PATRIOT Act (42 16 U.S.C. 5195c(e))); or

(vi) a threat to the armed forces of the United States or an ally of the United States or to other personnel of the United States Government or a government of an ally of the United States.

Leahy-Lee still permits the collection of entirely domestic communications

The difference is important because Leahy-Lee does nothing to stop the known collection of entirely domestic communications, which I have reported involves the collection of Tor and (probably) VPN traffic. At least under HJC, that information can't be used for many of the domestic crime purposes explicitly laid out in the SSCI bill, including murder, child porn, human trafficking (presumably including sex work), and narcotics trafficking. But Leahy-Lee would permit those uses.

Leahy rolled out his bill with this erroneous statement from Liza Goitein.

Elizabeth Goitein, co-director of the Brennan Center's Liberty and National Security Program, said: "This bill fixes the most serious problem with Section 702 surveillance today: the

government's ability to read Americans' e-mails and listen to their telephone calls without a warrant," and called the legislation "a very promising development in the reform debate."

This is false. Leahy-Lee still permits the government to access (and with DIRNSA approval, retain) the *entirely domestic* communications of the 430,000 Americans that use Tor each day. Perhaps that's why Leahy had Goitein make the comment, because he surely knows this is false.

ACLU comes out in support of a bill they admit is constitutionally deficient

And Goitein's Brennan Center is not the only NGO supporting this bill. ACLU released a statement that can only be described as schizophrenic in support of the bill. While ACLU's legislative counsel, Neema Singh Guliani, thankfully makes none of the errors that Goitein makes, she nevertheless admits that 702 remains constitutionally problematic.

"While this bill does not address all the constitutional concerns with Section 702, it represents an important step forward from the dismal status quo. The ACLU supports this bill, and urges Congress to ensure its reforms become law."

And the statement goes on to lay out, correctly, several advantages of the Wyden-Paul bill, including ensuring that defendants (and affected people, like lawyers from ACLU working with targeted clients internationally) get notice and can challenge collection.

The ACLU urges improvements to the bill that would require a court order to access metadata collected under Section 702, narrow collection, and ensure the government provides appropriate notice.

Congress is currently considering several bills in advance of the Section 702 reauthorization deadline. Sens. Ron Wyden (D-Ore.) and Rand Paul (R-Ky.) have introduced S.1997, the USA Rights Act, which completely closes the backdoor search loophole, ends the collection of known domestic communications, and takes steps to ensure that the government provides notice to individuals who have Section 702 information used against them. The ACLU supports this bill.

I'm very confused – and, as a member, gravely concerned – about why the ACLU would adopt such a schizophrenic strategy, and why it would lobby in favor of things that its other lawyers are litigating against.

ACLU risks losing the ability to sue on these issues in the future if it remains on this bill (which is one reason I was so glad they didn't back USA Freedom in 2015). And if they can't sue, then we can't fix the issues that ACLU, in its statement, lays out as problems in Leahy-Lee.