

Calendar No. 112

118TH CONGRESS }
1st Session }

SENATE

{ REPORT
118-46

REPORTING EFFICIENTLY TO PROPER
OFFICIALS IN RESPONSE TO TERRORISM
(REPORT) ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 945

TO PROVIDE FOR JOINT REPORTS BY RELEVANT FEDERAL AGEN-
CIES TO CONGRESS REGARDING INCIDENTS OF TERRORISM,
AND FOR OTHER PURPOSES



JUNE 22, 2023.—Ordered to be printed

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RESPONSE TO TERRORISM (REPORT) ACT

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Mr. PETERS, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 945]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 945), to provide for joint reports by relevant Federal agencies to Congress regarding incidents of terrorism, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

CONTENTS

	Page
I. Purpose and Summary	1
II. Background and Need for the Legislation	2
III. Legislative History	4
IV. Section-by-Section Analysis of the Bill, as Reported	5
V. Evaluation of Regulatory Impact	5
VI. Congressional Budget Office Cost Estimate	6
VII. Changes in Existing Law Made by the Bill, as Reported	6

I. PURPOSE AND SUMMARY

S. 945, the *Reporting Efficiently to Proper Officials in Response to Terrorism Act of 2023* (REPORT Act) would require agencies to submit to Congress an unclassified report on each act of terrorism that occurs in the United States within a year of concluding the investigation into the act, which may be accompanied by a classified annex. The bill would require the federal agency investigating the act of terrorism to coordinate with the Department of Homeland Security (DHS), the Department of Justice (DOJ), the Federal Bu-

reau of Investigation (FBI), and, as needed, the National Counterterrorism Center (NCTC). The report must include the facts of the act of terrorism, identified homeland and national security gaps that require correction to prevent similar future acts of terrorism, and recommendations for new measures that could strengthen homeland security. A public summary of the report must also be posted. Reports of individual acts of terrorism may be combined into quarterly reports for Congress. The DHS Secretary, Attorney General, FBI Director, or NCTC Director can withhold specific information if that official determines the information could jeopardize an ongoing investigation or prosecution. In such instances, that official must notify Congress of the determination and must still report to Congress within a year on the act of terrorism. The reporting requirement established in this bill expires five years from the date of the bill's enactment.¹

II. BACKGROUND AND NEED FOR THE LEGISLATION

This legislation would require agencies to conduct after-action reviews of terrorist incidents to help policymakers develop evidence-based terrorism prevention policies and procedures. The required reports would help identify weaknesses in our current system of terrorism prevention and response and provide recommendations for patching gaps. Collaboration and cooperation between government entities is essential when there is a threat to national security. For example, testimony before the House Committee on Homeland Security concerning the attacks on September 11, 2001 found that “excessive secrecy interfered with the detection and prevention of the attacks.”² Moreover, in a 2016 hearing before the Senate Committee on Homeland Security and Governmental Affairs concerning frontline responses to terrorism, one government official testified that “there remains an overall lack of a comprehensive ‘unity of effort’ in our information sharing environment,” and this challenge affects “information sharing and communications across all levels [of government].”³

Although some agencies conduct internal reviews after an act of terrorism, these reviews are not mandatory or uniform, and reports are released on varying timelines. In the meantime, potential security weaknesses may persist while they remain unidentified. For example, when Nidal Hasan killed thirteen people at Fort Hood in 2009, the Department of Defense published an independent review in two months, while the Intelligence Community Inspector General (ICIG) took a year after the 2013 Boston Marathon bombing

¹On March 1, 2021, the Committee approved S. 515, the Reporting Efficiently to Proper Officials in Response to Terrorism Act of 2021. That bill is substantially similar to S. 945. Accordingly, this committee report is in many respects similar to the committee report for S. 517. See S. Rept. No. 117–31. On Nov. 6, 2019, the Committee approved S. 2513, the Reporting Efficiently to Proper Officials in Response to Terrorism Act of 2019. S. 2513 is substantially similar to S. 945. Accordingly, this committee report is in many respects also similar to the committee report for S. 2513. See S. Rept. No. 116–175.

²Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment, House Committee on Homeland Security, Testimony of Meredith Fuchs, General Counsel, the National Security Archive, George Washington University, *Hearing on Overclassification and Pseudo-classification: The Impact on Information Sharing*, 110th Congress, at 14 (Mar. 22, 2007) (<https://www.gpo.gov/fdsys/pkg/CHRG-110hrg35279/pdf/CHRG-110hrg35279.pdf>).

³Senate Committee on Homeland Security and Governmental Affairs, Testimony of Mark S. Ghilarducci, Director, California Office of Emergency Services and the Governor’s Homeland Security Advisor, *Hearing on Frontline Response to Terrorism in America*, 114th Congress, at 4 (Feb. 2, 2016) (S. Hrg. 114–592) (<https://www.hsgac.senate.gov/imo/media/doc/Testimony-Ghilarducci-2016-02-02.pdf>).

to release a report on the pre-attack performance of intelligence and information sharing entities.⁴ Further illustrating the disparities in reporting timelines, DOJ took nine months after the 2015 San Bernardino attack to report on law enforcement lessons learned.⁵

While many reviews took under a year to complete, DOJ took 18 months to release a review of the Orlando Pulse Nightclub attack in June of 2016.⁶ The Federal government's investigation into the attack is illustrative of an increasing focus on response rather than prevention. The DOJ announced an investigation into the police response one month after the attack.⁷ The completed review was published in December 2017, 18 months after the incident occurred.⁸ The report focused on the response of the Orlando police department and suggested changes in police protocol and improvements in counterterrorism training for local law enforcement.⁹ A reporting requirement after the conclusion of the investigation into an act of terrorism would guarantee that important lessons learned are disclosed in a timely manner.

S. 945 requires the primary government agency investigating an act of terrorism to collaborate with the Secretary of Homeland Security, the Attorney General, the Director of the FBI, and, as appropriate, the Director of NCTC to submit a public report to Congress within one year after such investigation concludes. These investigations require careful and extensive work, which can include classified information or information affecting ongoing investigations or prosecutions. In consideration of these circumstances, this legislation includes a one-year waiting period to allow for careful consideration of disclosure of information, the ability to include a classified annex to protect important information, and the ability to withhold specific information to protect ongoing investigations or prosecutions.

This legislation also balances the need for transparency with the need for Federal authorities to protect classified information. The

⁴Department of Defense Independent Review, *Protecting the Force: Lessons from Fort Hood* (Jan. 2010) (https://www.researchgate.net/publication/264082810_Protecting_the_Force_Lessons_from_Fort_Hood); The Inspectors General of the Intelligence Community, Central Intelligence Agency, Department of Justice, and Department of Homeland Security, *Unclassified Summary of Information Handling and Sharing Prior to the April 15, 2013 Boston Marathon Bombings* (Apr. 10, 2014) (<https://oig.justice.gov/reports/2014/s1404.pdf>).

⁵Braziel, Rick, Frank Straub, George Watson, and Rod Hoops, *Bringing Calm to Chaos: A Critical Incident Review of the San Bernardino Public Safety Response to the December 2, 2015 Terrorist Shooting Incident at the Inland Regional Center* (2016) (<https://www.justice.gov/usao-cdca/file/891996/download>); *A review of the San Bernardino Public Safety Response to 2015 Terrorist Shooting Incident*, Crisis Response (Sep. 23, 2016) (https://crisis-response.com/Articles/593526/A_review_of.aspx).

⁶Straub, Frank, Jack Cambria, Jane Castor, Ben Gorban, Brett Meade, David Waltemeyer, and Jennifer Zeunik, *Rescue, Response, and Resilience: A Critical Incident Review of the Orlando Public Safety Response to the Attack on the Pulse Nightclub* (2017) (<https://www.policefoundation.org/wp-content/uploads/2017/12/Orlando-Pulse.pdf>); City of Orlando, *Critical Incident Review of Orlando Public Safety Response to Pulse Tragedy* (Dec. 18, 2017) (<http://www.cityoforlando.net/police/pulsereview/>).

⁷Department of Justice, *Department of Justice to Conduct After-Action Review of Police Response to Orlando Nightclub Mass Shooting* (July 15, 2016) (<https://www.justice.gov/opa/pr/department-justice-conduct-after-action-review-police-response-orlando-nightclub-mass>).

⁸*Federal Report Sheds New Light on OPD's Pulse Response*, ClickOnOrlando.com (Dec. 18, 2017) (clickorlando.com/news/2017/12/18/federal-report-sheds-new-light-on-opds-pulse-response/).

⁹Department of Justice Office of Community Oriented Policing Services, *Rescue, Response, and Resilience: A Critical Incident Review of the Orlando Public Safety Response to the Attack on the Pulse Nightclub* (Dec. 18, 2017) (<https://www.policefoundation.org/wp-content/uploads/2017/12/Orlando-Pulse.pdf>); see also Frank Straub, Jennifer Zeunik & Ben Gorban, *Lessons Learned from the Police Response to the San Bernardino and Orlando Terrorist Attacks*, CTC Sentinel (Volume 10, Issue 5), Combatting Terrorism Center at West Point (May 2017) (https://ctc.usma.edu/wp-content/uploads/2017/05/CTC_Sentinel_Vol10Iss515.pdf).

bill requires an unclassified report that can be complemented by a classified annex. The unclassified report should be deliverable as a separate document from such annex and available in unclassified office space, meaning it should not contain markings that would limit dissemination. Even transparency efforts to inform the public by requiring an unclassified report can be undermined by the inclusion of controlled unclassified information, which requires safeguarding or dissemination controls.¹⁰ Dissemination controls are designed to protect sensitive information. They can, however, also deter sharing with partners who would benefit from transparency and inhibit legitimate public deliberation on counterterrorism policy.¹¹ In the event the unclassified report does require dissemination controls, this legislation also requires a summary to be posted on a publicly accessible website. Every effort should be made to include as much information in the public summary and unclassified report with as few dissemination controls as possible. Both the public report and classified annex are required to be made available to any Member of Congress upon request.

III. LEGISLATIVE HISTORY

Senator Margaret Wood Hassan (D–NH) introduced S. 945, the *Reporting Efficiently to Proper Officials in Response to Terrorism Act of 2023*, on March 22, 2023 with original cosponsor Senator Mike Lee (R–UT). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 945 at a business meeting on March 29, 2023. At the business meeting, Senator Hassan offered an amendment to the bill, which included language to ensure that every member of Congress would have access to both the public report provided to Congress as well as the classified annex. It also included a savings clause to clarify that the National Counterterrorism Center does not have investigative or prosecutorial powers. Senator Paul offered a second degree amendment to require that no additional funds be used to carry out the bill. The second degree amendment was not adopted by voice vote, with Senators Peters, Hassan, Sinema, Rosen, Padilla, Ossoff, Blumenthal, Paul, Lankford, Romney, Scott, and Hawley present. The Committee adopted the Hassan amendment by voice vote, with Senators Peters, Hassan, Sinema, Rosen, Padilla, Ossoff, Blumenthal, Paul, Lankford, Romney, Scott, and Hawley present. The bill, as amended by the Hassan amendment, was ordered reported favorably by roll call vote of 12 yeas and 0 nays, with Senators Peters, Hassan, Sinema, Rosen, Padilla, Ossoff, Blumenthal, Paul, Lankford, Romney, Scott, and Hawley voting in the affirmative, and with Senators Carper, Johnson, and Marshall voting yea by proxy, for the record only.

¹⁰ Controlled Unclassified Information, 32 CFR § 2002.1.

¹¹ House Committee on Oversight and Government Reform, Testimony of Scott Amey, General Counsel, Project on Government Oversight, *Hearing on Examining the Costs of Overclassification on Transparency and Security*, 114th Cong. (Dec. 7, 2016) (<https://oversight.house.gov/legislation/hearings/full-committee-hearing-examining-the-costs-of-overclassification-on>).

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short titles

This section establishes the short title of the bill as the “Reporting Efficiently to Proper Officials in Response to Terrorism Act of 2023” or the “REPORT Act.”

Section 2. Duty to report

Subsection (a) establishes the duty to report on acts of terrorism within a year of the completion of the investigation into the act. It requires the primary investigating entity to collaborate with DHS, DOJ, FBI, and, as needed, NCTC. This section requires that the reports be unclassified, but allows a classified annex; it also allows the report to be submitted as part of a quarterly report. It requires that reports be made available on a publicly available website and states that the unclassified report and classified annex must be made available to any Member of Congress upon request.

Subsection (b) details the required content of the reports. These reports must include a statement of the facts of the terrorist act, an explanation of any national security gaps, and any recommendations to improve homeland or national security.

Subsection (c) creates an exception to the reporting requirement for certain ongoing investigations and prosecutions. The exception allows the government entity to waive the requirement to report certain information if the DHS Secretary, Attorney General, FBI Director, or NCTC Director determines that information could jeopardize an ongoing investigation or prosecution. If this determination is made, the principal who made the decision must notify Congress of the determination. The determination does not affect the responsibility to submit the report and any other information not subject to the determination.

Subsection (d) defines “act of terrorism” and “appropriate congressional committees.”

Subsection (e) sunsets the reporting requirement after five years from the date of the bill’s enactment.

Subsection (f) clarifies that the Act does not provide the NCTC with prosecutorial or investigatory authority.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 945, REPORT Act			
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on March 29, 2023			
By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	0	*	not estimated
Increases <i>net direct spending</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Statutory pay-as-you-go procedures apply?	No
		Mandate Effects	
Increases <i>on-budget deficits</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between zero and \$500,000.			

S. 945 would require any federal agency that investigates an act of terrorism to submit an unclassified report to the Congress within one year of completing such an investigation, identifying weaknesses and recommending measures to improve national security. The bill would require the investigating agency to collaborate with the Department of Homeland Security, Department of Justice, and other federal agencies as appropriate to create the required report.

Using information about similar investigations, CBO expects that few reports would be required each year and estimates that the total cost of preparing them would be less than \$500,000 over the 2023–2028 period. Such spending would be subject to the availability of appropriated funds.

The CBO staff contact for this estimate is Jeremy Crimm. The estimate was reviewed by Chad Chirico, Deputy Director of Budget Analysis.

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation would make no change in existing law, within the meaning of clauses (a) and (b) of subparagraph 12 of rule XXVI of the Standing Rules of the Senate, because this legislation would not repeal or amend any provision of current law.