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Watered-Down Warrant Proposal Is the Worst of Both Worlds

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Background: Backdoor searches and the need for a warrant requirement. Section 702 of the Foreign Intelligence Surveillance Act (FISA) authorizes warrantless surveillance and therefore may only be used to target non-U.S. persons outside the United States. But this surveillance inevitably sweeps in enormous volumes of Americans' communications. Although the law requires agencies to "minimize" the use and retention of these "incidentally" collected communications, the FBI, NSA, CIA, and National Counterterrorism Center (NCTC) routinely conduct searches of Section 702 data for the express purpose of finding Americans' phone calls, text messages, and emails. These warrantless "backdoor searches" (a.k.a. "U.S. person queries") create a massive end-run around the protections of the Fourth Amendment and FISA.

Backdoor searches have led to widespread abuses, including baseless searches for the communications of protestors across the political spectrum; 19,000 donors to a congressional campaign; members of Congress; a congressional chief of staff; and multiple U.S. government officials, political commentators, and journalists.

For over a decade, there has been strong bipartisan support for requiring the government to get a warrant or a FISA Title I order (a type of warrant issued by the FISA Court in foreign intelligence investigations) before accessing Americans' communications collected under Section 702. The House has twice passed such a measure. When polled, 76% of Americans favor this reform.

The Himes proposal would not protect Americans' rights. Rep. Himes is offering a supposed "compromise" that would allow the FBI to access communications retrieved through a U.S. person query if the FISA Court found the communications were "reasonably likely to include foreign intelligence information." That is lower than the current standard, which requires "reasonable likelihood" at the *query* stage (i.e., before the FBI knows whether the American's communications appear in the database), not the *access* stage.

At any stage, "reasonably likely to include foreign intelligence information" is much too low a bar. FISA's definition of "foreign intelligence information" is exceedingly broad. The Himes proposal could force the FISA Court to greenlight FBI agents reading the emails and text messages of journalists who communicate with foreign officials, members of Congress who sit on foreign relations committees, and businesspeople who communicate with foreign companies that do business with their own governments.

The Himes proposal also includes a sweeping exception allowing FBI agents to bypass judicial approval if they believe there is a significant and time-sensitive threat to national security. There is no requirement for the FBI to go back to the FISA Court for retroactive approval once the purported time urgency abates. That means the government would decide for itself whether this broad and subjective exception applies. There can be little question that this exception would swallow the rule.

Finally, the Himes proposal requires judicial approval only for U.S. person queries performed by the FBI. The NSA, CIA, and NCTC also conduct thousands of backdoor searches every year, despite having no domestic mandate, and the NSA in particular has a long history of violating the rules that govern those searches—including one NSA agent's searches for the communications of people he met on an online dating service.

The Himes proposal would be more burdensome than a warrant requirement. Opponents of a warrant requirement, including Rep. Himes himself, have claimed that it would impose too great a burden on the courts. The Himes proposal confirms that this is not the case. In fact, a warrant requirement would impose a much smaller burden than Himes' proposal. The majority of backdoor searches currently are mere fishing expeditions in which the government (by its own admission) has nothing close to probable cause. The government would simply not apply for warrants or attempt to access communications in such cases. By contrast, the government has long interpreted the "reasonably likely" standard to permit such fishing expeditions. The "reasonably likely" standard would thus result in a much larger number of cases requiring judicial approval — without actually protecting Americans' rights.

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