

Higgins Proposal Would Place No Limits on Accessing Americans' Private Communications

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.

Requiring warrants only where probable cause exists would defeat the purpose of a warrant and render it meaningless.

Rep. Higgins has put forward a proposal under which the government would be required to obtain a warrant to access Americans' communications in cases where "there is probable cause" that the U.S. person is an agent of a foreign power or has committed a crime, but the government could access communications without a warrant in cases where there is no probable cause.

This approach is, in a word, baffling. The central purpose of the warrant requirement is to prevent the government from intruding on Americans' privacy when it does *not* have probable cause. That is exactly what is happening now. Most backdoor searches are essentially fishing expeditions that occur when the government may have little information about the potential threat (as openly [acknowledged](#) by government officials). This proposal would do nothing to limit those.

Of course, the government should also have to obtain a warrant in cases where it believes that it has probable cause, as this determination ultimately must be made by a neutral magistrate—i.e, a judge. But allowing the government to access Americans' private communications in cases where even the government admits it lacks probable cause would turn the Fourth Amendment on its head. Searches that lack probable cause are precisely what warrants are designed to prevent.

Indeed, the Higgins proposal would place no limits on accessing information in *any* situation. Imagine that an FBI agent, believing that probable cause exists, applies for a warrant to access an American's communications collected under Section 702. If the court agrees that there is probable cause and grants the warrant, the agent may access the communications. If the court finds that there is no probable cause and denies the warrant, *the agent may still access the communications*—because under this proposal, no warrant is needed unless there *is* probable cause. The grant or denial of the warrant application is meaningless; the agent may access the communications either way. **The proposal is "heads I win, tails you lose" for the government.**

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