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New Johnson Proposal Places No Limits on Warrantless Access to Americans' Communications Collected under Section 702

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 because Americans communicate with foreigners. Although the law requires agencies to "minimize" the use and retention of these "incidentally" collected communications of Americans, the FBI, NSA, CIA, and NCTC routinely conduct warrantless "backdoor searches" (a.k.a. "U.S. person queries") of Section 702 data for the express purpose of finding Americans' phone calls, text messages, and emails.

Backdoor searches have led to widespread abuses, including baseless searches for the communications of protestors across the political spectrum; 19,000 congressional campaign donors; 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.

In April 2026, Representative Biggs offered an amendment that would add this reform to H.R. 8035, which reauthorizes Section 702 for 18 months. Speaker Johnson is instead backing a proposal that would reauthorize Section 702 for three years without placing any new limits on backdoor searches whatsoever.

Johnson's proposal creates no limits on backdoor searches, let alone a warrant requirement.

The leading reform merely restates existing law. The previous version of the Johnson amendment included a so-called "warrant requirement" that was nothing of the kind. The provision prohibited the "targeting" of U.S. persons for collection under Section 702 and stated that the government may seek a traditional criminal warrant or FISA Title I order to intentionally collect the communications of a U.S. person. But Section 702 already prohibits targeting U.S. persons, and it has been true for 235 years that the government may seek a traditional criminal warrant (or, since 1978, a FISA Title I order) to intentionally collect an American's communications. **The so-called "warrant requirement" thus did nothing more than restate existing law.**

The new Johnson amendment repeats the same substance. This time, however, it drops the pretense of creating a warrant requirement. The provision is now titled "Fourth Amendment Requirement for Targeting United States Persons." **The new title acknowledges that the provision simply restates a constitutional requirement that is already enshrined in the law.**

Moreover, the provision is entirely irrelevant to the issue at hand. Backdoor searches are not the product of the government intentionally "targeting" U.S. persons for collection under Section 702. Rather, backdoor searches occur when the government targets foreigners outside the United States, and then intentionally searches through the collected data — which inevitably includes large volumes of Americans' "incidentally" collected communications — for the communications of particular Americans. The truism that the government needs a warrant to "target" Americans has no bearing on this practice.

Other reforms do not limit backdoor searches. The proposal does include three provisions that address backdoor searches, but none of them make any change to either the standard or the procedures for conducting these searches, let alone require a warrant:

- Under existing law, FBI agents must document their reasons for conducting backdoor searches, and the documentation is audited by attorneys in DOJ's National Security Division. The Johnson amendment requires the ODNI Civil Liberties Protection Officer to also review this documentation and to report any

violations to the Inspector General of the Intelligence Community (IGIC). This just follows the old, familiar pattern of adding layer upon layer of oversight by the executive branch—a placebo that has consistently failed to end compliance violations. Alerting the Inspector General is particularly toothless given that President Trump has fired 21 Inspectors General in his second term, most without cause and in violation of federal law. In his first term, he fired the IGIC for reporting concerns to Congress as required by law.

- The Johnson proposal provides criminal penalties for willful and knowing violations of internal querying procedures. But those procedures, even when followed, give the government far too much leeway in accessing Americans' communications. Moreover, the threat of criminal prosecution is an empty one. The government continues to maintain that even the most egregious backdoor search violations were unintentional. If deliberately mislabeling queries and searching for the communications of racial justice protesters are considered innocent mistakes, no agent could reasonably believe that they would actually face criminal prosecution under this provision.
- The sole "change" to the procedures for conducting backdoor searches—a requirement that such searches be approved by an FBI attorney, rather than either an attorney or a supervisor (as the law currently provides)—merely codifies existing practice.

The Biggs amendment is a real warrant requirement—with reasonable exceptions.

By contrast, the Biggs amendment would actually close the backdoor search loophole by requiring the government to obtain a warrant or FISA Title I order before accessing the content of Americans' communications collected under Section 702. Importantly, the Biggs proposal includes several exceptions designed to accommodate legitimate security needs. **No court order would be required (1) if there were exigent circumstances; (2) if the subject of the search provided consent (e.g., where the purpose of the search is to identify potential victims); or (3) for certain cybersecurity-related searches.** In addition, **no court order would be required to search communications *metadata*.** The government could thus determine, without getting a court order, whether a particular U.S. person is in communication with a foreign target.

As the following chart illustrates, (1) the leading "reform" in the Johnson amendment just restates existing law, and (2) the difference between the Johnson and Biggs amendments is the crux of the issue: whether Americans are protected from warrantless government access to their private communications.

Is a warrant or FISA Title I order required?			
	Under existing law	Under the Johnson proposal	Under the Biggs amendment
To target a foreigner located abroad for electronic surveillance	✗	✗	✗
To access the metadata of a foreigner's communications collected under Section 702	✗	✗	✗
To access the metadata of a U.S. person's communications collected under Section 702	✗	✗	✗
To access the content of a foreigner's communications collected under Section 702	✗	✗	✗
To access the content of a U.S. person's communications collected under Section 702 and retrieved using a backdoor search	✗	✗	✓

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