

## Johnson's Bill (S. 1318) Is a Thinly Veiled Straight Reauthorization of Section 702 That Places No Limits on Warrantless Access to Americans' 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 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 and reviewing 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.

Bipartisan sponsors have introduced legislation in the Senate and House that would reauthorize Section 702 with this reform: the [Security and Freedom Enhancement Act](#) (SAFE Act), S. 4280, and the [Government Surveillance Reform Act](#) (GSRA), S. 4082. On April 29, however, House members—denied an opportunity to vote for reforms—passed [legislation](#) backed by Speaker Johnson that would reauthorize Section 702 for three years without a warrant requirement. **Indeed, S. 1318 places no new limits on backdoor searches whatsoever and is the functional equivalent of a three-year clean extension of Section 702.**

### Johnson's bill (S. 1318) creates no limits on backdoor searches, let alone a warrant requirement.

The leading reform merely restates existing law. The provision prohibits the "targeting" of U.S. persons for collection under Section 702 and states 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.

Moreover, the provision is entirely irrelevant to the issue at hand, namely, backdoor searches. "Targeting" refers to the collection of communications in the first instance, not the searches that happen after collection. The truism that only foreigners abroad may be "targeted" under Section 702 does not prevent the "incidental" collection of massive amounts of Americans' communications. And it has no bearing on the practice of searching through those communications for Americans' private texts, calls, and emails.

Other reforms do not limit backdoor searches. The legislation includes only three provisions that address backdoor searches. None of them makes any change at all to either the standard or the procedures for conducting these searches:

- Under existing law, FBI agents must document their reasons for conducting backdoor searches, and the documentation is audited by DOJ's National Security Division. The Johnson bill requires the ODNI Civil Liberties Protection Officer (CLPO) to conduct the same audit, and to report any violations to the Inspector General of the Intelligence Community (IGIC). This just follows the old, familiar pattern of responding to each new revelation of abuses with yet more layers of oversight or reporting by the executive branch—a placebo that has consistently failed to end compliance violations. Alerting the

Inspector General would be particularly toothless given that President Trump [has fired 21 Inspectors General](#) in his second term, many without cause and in violation of federal law.

- The Johnson bill 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 FBI policy and practice.

**The SAFE Act and the GSRA include real warrant requirements—with reasonable exceptions.**

The SAFE Act and the GSRA are bipartisan reform bills that 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 bills also include several exceptions 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 S. 1318 just restates existing law, and (2) the difference between S. 1318 and the real reform bills 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 S. 1318	Under the SAFE Act or the GSRA
To target a <u>foreigner</u> located abroad for electronic surveillance	✗	✗	✗
To access the <u>metadata</u> of a <u>foreigner’s</u> communications collected under Section 702	✗	✗	✗
To access the <u>metadata</u> of a <u>U.S. person’s</u> communications collected under Section 702	✗	✗	✗
To access the <u>content</u> of a <u>foreigner’s</u> communications collected under Section 702	✗	✗	✗
To access the <u>content</u> of a <u>U.S. person’s</u> communications collected under Section 702 and retrieved using a backdoor search	✗	✗	✓

For questions about Section 702, contact Liza Goitein at [goiteine@brennan.law.nyu.edu](mailto:goiteine@brennan.law.nyu.edu) or Hannah James at [jamesh@brennan.law.nyu.edu](mailto:jamesh@brennan.law.nyu.edu).