

## How the GOP Leadership Proposal Expands the Government's Authority to Use Section 702 Against Americans in Court

A provision in the Trump-backed Cotton-Grassley-Warner proposal purports to restrict the government's authority to use Section 702-acquired information against Americans in criminal proceedings. On its face, that's what it appears to do. But when redlined against existing law, it becomes clear that the provision actually removes an existing restriction against such use.

Under current law, the government is prohibited from using Section 702-acquired information in criminal proceedings against Americans unless the case falls within certain exceptions, including a list of particularly serious cases such as kidnapping. This [redline](#) (reprinted here courtesy of the Center for Democracy & Technology) shows how the provision in the Cotton-Grassley-Warner proposal changes existing law:

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**(a) Information acquired under section 1881a**  
**(1) In general**

Information acquired from an acquisition conducted under [section 1881a of this title](#) shall be deemed to be information acquired from an [electronic surveillance](#) pursuant to subchapter I for purposes of [section 1806 of this title](#), except for the purposes of subsection (j) of such section.

**(2) United States persons**

**(A) In general**

Any information concerning a [United States person](#) acquired under [section 1881a of this title](#) shall not be used in evidence against that [United States person](#) pursuant to paragraph (1) in any criminal proceeding **except in a criminal prosecution as provided in subparagraph (C)** unless—

- (i) the Federal Bureau of Investigation obtained an order of the [Foreign Intelligence Surveillance Court](#) to access such information pursuant to [section 1881a\(f\)\(2\) of this title](#); or
- (ii) the [Attorney General](#) determines that—
  - (I) the criminal proceeding affects, involves, or is related to the national security of the [United States](#); or
  - (II) the criminal proceeding involves—
    - (aa) death;
    - (bb) kidnapping;
    - (cc) serious bodily injury, as defined in [section 1365 of title 18](#);
    - (dd) conduct that constitutes a criminal offense that is a specified offense against a minor, as defined in [section 20911 of title 34](#);
    - (ee) incapacitation or destruction of critical infrastructure, as defined in [section 5195c\(e\) of title 42](#);
    - (ff) cybersecurity, including conduct described in [section 5195c\(e\) of title 42](#) or section 1029, 1030, or 2511 of title 18;
    - (gg) transnational crime, including transnational narcotics trafficking and transnational organized crime; or
    - (hh) human trafficking.

**(B) No judicial review**

A determination by the [Attorney General](#) under subparagraph (A)(ii) is not subject to judicial review.

**(C) RESTRICTION ON USE IN PROSECUTIONS.—No information concerning a United States person acquired under section 702 may be used in evidence against a United States person who is an aggrieved person (as defined in section 101(k) (50 U.S.C. 1801(k)) as to that information in any criminal prosecution, except if the information pertains to a United States person who is or has been subject to an order from the Foreign Intelligence Surveillance Court under this Act.**

The new subparagraph (C) added by the proposal states that a FISA Court order is needed for the government to use Section 702-acquired information in any criminal proceeding. If that were the only change made by the proposal, it would indeed create a new restriction. Paragraph (a)(2)(A) would continue to prohibit the use of Section 702-acquired information in all cases except those on the list of exceptions; for cases on that list, subparagraph (C) would establish a court order requirement.

However, the proposal also changes paragraph (a)(2)(A) in a way that makes two things clear: (1) the general prohibition in that paragraph on using Section 702-acquired evidence is subject to a new exception, i.e., when the government has obtained a FISA Court order; and (2) the prohibition does not apply at all—and therefore the exception set forth in subparagraph (C) is not needed—if the case falls within the subsequent listed categories.

In short, the proposal does not disturb the government’s existing authority to use Section 702-acquired information against Americans, without limitation, when the case falls within certain categories. For all other cases, the proposal takes what is currently a flat prohibition and turns it into an authorization to use Section 702-acquired information as long as the government can obtain any type of FISA Court order—an easy bar to clear, given that some FISA Court orders are issued on a mere showing of “relevance,” the lowest standard in the law.