

The GOP Leadership Proposal's Revised Restriction on Use of Section 702 Evidence in Criminal Proceedings Is Meaningless

A previous version of the Trump-backed Cotton-Grassley-Warner bill purported to restrict the government's authority to use Section 702-acquired information against Americans in criminal proceedings, but in fact *expanded* that authority. Facing significant pushback, the drafters of the proposal have revised this provision.

The new version would retain the current prohibition against using Section 702-acquired information as evidence against Americans in criminal proceedings outside of a list of particularly serious crimes (such as kidnapping). For cases that are on that list, the new provision states that Section 702-acquired information may be used as evidence at the prosecution stage only if the government has obtained a probable-cause order from the FISA Court. No court order would be required, however, to search for and review the contents of Americans' private communications (the practice known as "backdoor searches").

As with the previous version, the new restriction on using Section 702-acquired information against Americans in criminal proceedings may at first blush appear to be a significant change. In fact, it would have little to no effect. That's because ***the government almost never directly introduces Section 702-acquired evidence in criminal prosecutions***, as doing so would open the door to the court ruling on the constitutionality of backdoor searches.

Instead, when the government has wanted to introduced evidence obtained through Section 702 backdoor searches in court, ***it has recreated that evidence through other means or authorities***—a practice known as "[parallel construction](#)." Without a prohibition on this practice, the new use restriction is largely meaningless.

Even if the proposal did bar parallel construction, a court order requirement that applies only *after* Americans' communications have been queried and reviewed defeats the entire purpose of judicial approval—particularly since nothing in the proposal prevents the government from using the communications themselves to establish probable cause. This would be the equivalent of police searching a house without a warrant, finding documents that indicate tax fraud, and then using those very documents to get a warrant to retroactively bless the search so the document can be lawfully introduced in court.

Retroactive court orders that the government can easily evade through parallel construction are not a serious effort at addressing the problem of backdoor searches. Congress must not reauthorize Section 702 without requiring the government to obtain a probable-cause order, subject to reasonable exceptions such as emergencies, before accessing Americans' communications that are "incidentally" collected under Section 702.

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