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GOP Leadership Proposal Would Preserve Warrantless Access to 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 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.

Instead, the Trump administration, its allies in Congress (led by Senator Cotton), and Senator Warner are backing an anti-reform bill that was negotiated behind closed doors with no supporters of reform present. **The bill is packed with provisions to create the impression of reform, but it is carefully designed to preserve the status quo regarding warrantless access to Americans' communications.**

The proposal creates no limits on backdoor searches, let alone a warrant requirement.

Of the bill's 20 provisions, only 7 address U.S. person queries. Some of these provisions merely codify existing law or practice. Others throw yet more internal oversight, recordkeeping, and reporting requirements at the problem. **Not a single provision changes the standard or the procedures for conducting backdoor searches**.

- Section 12 prohibits conducting backdoor searches "solely" for information about the exercise of constitutional rights or for the purpose of interfering in the political process. Such searches are already barred by the U.S. Constitution and by existing Section 702 rules that require a valid foreign intelligence purpose for queries. These protections have not prevented abuse—and restating them, which is all this provision does, will not be helpful—because agencies never acknowledge that monitoring constitutionally protected activity is their "sole" purpose.
- Under existing law, FBI agents must document their reasons for conducting backdoor searches, and the documentation is audited by DOJ's National Security Division. Section 2 of the bill requires the ODNI Civil Liberties Protection Officer to conduct the same audit, and to report any violations to the Inspector General of the Intelligence Community. 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.
- Section 8 requires backdoor searches to be approved by an FBI attorney, rather than either an attorney or a supervisor (as the law currently permits). This change merely codifies existing FBI policy and practice.
- Section 4 requires the FBI to maintain written records of "sensitive" queries. Under existing law, however, the FBI already must maintain records of *all* U.S. person queries. Although the bill requires DOJ's Inspector General to review the records of sensitive queries, current threats to Inspector General independence undermine the limited value such a review might otherwise provide.

- Section 18 requires annual reporting on the number of sensitive queries the FBI performs. In doing so, it expressly blesses warrantless searches for the communications of elected officials and appointees; political candidates; and political, media, and religious organizations. That is not reform.
- Section 16 requires FBI agents who are trained in querying procedures to "certify in writing" that they will comply with them. If the fact that the FISA Court and the Attorney General require such compliance is not sufficient, it is hard to see how requiring agents to sign their names on training materials will help.
- Section 5 provides criminal penalties for willful and knowing violations of internal querying procedures. But 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 fear criminal prosecution under this provision.

The restriction on use of Section 702 evidence in criminal proceedings is meaningless.

Current law prohibits the government from using Section 702-acquired information as evidence against Americans in criminal proceedings outside of a list of certain serious crimes (such as kidnapping). Section 3 of the bill would require the government to obtain a probable-cause order from the FISA Court to use Section 702 evidence in cases on that list. No court order would be required, however, to search for and review the contents of Americans' private communications (the practice known as "backdoor searches").

While this use restriction may appear to be a significant change, it would have little to no effect in practice. 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 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 bill 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 documents can be lawfully introduced in court.

The proposal's restatement of existing law for "targeting" Americans is a decoy.

Section 6 of the bill 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 criminal warrant (or, since 1978, a FISA Title I order) to collect an American's communications. This provision thus does nothing more than restate existing law.

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.

The process is rotten. This bill was negotiated behind closed doors by members who have long opposed Section 702 reforms. Members who support reform were shut out of the process, and there are no plans to allow amendment votes even though there is still time to do so. **Members should demand an opportunity to vote on real reforms, including a warrant requirement to access Americans' communications.**

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