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Section 702 Surveillance Will Continue Until March 2027 Even if the Statute Lapses

Background: Section 702 reauthorization and the "go dark" myth.

Following two short-term reauthorizations this spring, Section 702 of the Foreign Intelligence Surveillance Act is scheduled to expire on June 12 unless renewed. Rather than considering commonsense, bipartisan reforms—including a warrant requirement to access Americans' communications—congressional leadership has repeatedly attempted to advance reauthorization bills that preserve the status quo without any opportunity for amendment.

In order to pressure members to accept a bill without meaningful reforms, surveillance hawks are claiming that Section 702 surveillance will "go dark" on June 12 if Congress hasn't renewed the law. **Contrary to that claim, Congress planned for potential lapses and made very clear that Section 702 surveillance may continue under existing certifications even if the statute sunsets.** Members must not be fearmongered into passing a reauthorization without protecting Americans from warrantless government access to their private communications.

The law authorizes Section 702 surveillance until March 2027 even if the statute lapses.

Section 702 surveillance operates under yearlong certifications approved by the FISA Court. The law is clear that these certifications, and the directives issued to companies under them, are grandfathered; they remain valid until their expiration date, even if the underlying statute expires. The FISA Court approved the most recent certifications on March 17, 2026, locking in Section 702 surveillance authority until March 2027.

The legal effect of this grandfathering clause has already been tested and resolved by the FISA Court. In 2008, during a brief lapse between the predecessor statute to Section 702 and the enactment of Section 702, Yahoo refused to comply with a directive. The FISA Court ruled that the directive remained valid under the grandfathering clause regardless of the statutory lapse and ordered Yahoo to comply. After that lawsuit, Congress strengthened the grandfathering provision, meaning the law is even clearer today than it was when the FISA Court ruled against Yahoo 18 years ago.

Companies' compliance with valid Section 702 directives is not optional.

Some reform opponents have nonetheless suggested that companies might stop turning over targets' communications if the underlying law has expired. However, companies do not choose whether to assist the government with Section 702 surveillance. They are served with directives, and if they fail to comply with a valid directive, they face fines of $250,000 per day or more.

The risk calculus for companies and their attorneys is easy. They have zero incentive to stop cooperating. The law states that in the event of a statutory lapse, the provision releasing electronic communication service providers from liability for complying with a directive continues to apply to all grandfathered directives. In other words, there is no litigation risk if the company continues to comply. By contrast, a company that ceases compliance would be flouting settled law and risking heavy fines.

In the unlikely event that a company decides to take that route, the FISA Court could immediately compel compliance. The specter of drawn-out litigation is a red herring, given that the law is clear and the FISA Court has already ruled on its meaning.

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