

## Vote “NO” on Cloture - S. 139 (FISA Amendments Reauthorization Act)

### The Top Line

When Congress reauthorizes Section 702 of FISA—a law intended to authorize surveillance of foreigners only—it should take the opportunity to shore up privacy protections for Americans. S. 139 does the opposite. It codifies the government’s practice of “backdoor searches” without any meaningful restriction. It also authorizes an expanded form of “abouts” collection. **It thus leaves Americans’ privacy more vulnerable, not less.** Moreover, the Majority Leader has filled the tree on amendments for the cloture vote. **A “NO” vote on cloture is the only way members will be able to offer and debate amendments to improve the bill.**

### The Background

Section 702 authorizes the NSA to collect the communications of foreigners overseas without a warrant. Although the targets are foreigners, the surveillance inevitably sweeps in large numbers of Americans’ communications. Section 702 thus requires the government to “minimize” the retention and sharing of such “incidentally” collected data.

**Backdoor searches.** Since Congress last reauthorized Section 702, it has emerged that the NSA, FBI, and CIA make routine use of the very communications they are supposed to “minimize.” According to the Privacy and Civil Liberties Oversight Board, the FBI regularly searches Section 702 communications to find Americans’ calls and e-mails and use them in its investigations—including cases that have nothing to do with national security. That means FBI agents can listen to Americans’ phone calls and read their e-mails without any evidence of wrongdoing, let alone a warrant.

**“Abouts” collection.** It also emerged that the NSA was collecting, not just communications to or from the targets (as would be the case in an ordinary criminal wiretap), but communications that merely mention certain information associated with those targets. This so-called “abouts” collection resulted in the acquisition of tens of thousands of wholly domestic communications each year. Although the NSA halted “abouts” collection in 2017 due to compliance problems, it could resume the practice with the FISA Court’s approval.

Neither of these practices is expressly authorized by Section 702. They fall well outside the core purpose of the statute: to allow the warrantless collection of foreigners’ communications. **Moreover, neither practice has any known security benefit. The government has cited many examples of Section 702 successes, but none has featured backdoor searches or “abouts” collection. Indeed, intelligence officials have not even claimed that either of these practices has ever helped thwart a terrorist plot.**

### The FISA Amendments Reauthorization Act

The bill drafted by members of the House intelligence committee, S. 139, authorizes backdoor searches and “abouts” collection, but purports to place limits on them. It thus masquerades as a compromise. But the limits in the bill are illusory. Indeed, the bill authorizes a form of “abouts” collection that is far more expansive than the NSA’s former practice. The bill thus represents a step backward from existing practice—and a giant step backward in the law.

**A warrant requirement?** S. 139 requires the FBI to obtain a warrant in order to access Americans' communications—but only in “predicated” criminal investigations unrelated to national security or foreign intelligence. “Predicated” investigations are those that have passed a certain point of fact-finding. Perversely, the FBI remains free to conduct warrantless searches during the earlier stages of an investigation—when there is much less evidence to justify them. **According to the Privacy and Civil Liberties Board, the FBI routinely searches Section 702 data at the very earliest stages of an investigation. The “predicated investigation” language thus ensures that the bill’s warrant requirement will never apply.**

Even if that loophole were removed, the “national security” and “foreign intelligence” exceptions would nearly swallow the rule. The government interprets these terms quite broadly, and under the bill, no one can challenge the government’s designation. When investigating an immigrant or a Muslim American, for instance, a mere desire to rule out foreign ties could be cited to justify dispensing with the warrant. **Indeed, it is likely that certain ethnic and religious minorities would be disproportionately denied the protection of a warrant.**

**Expanded “abouts” collection.** As with backdoor searches, S. 139 authorizes the practice of “abouts” collection while simultaneously purporting to impose limits on it. Once again, the limits are illusory. For instance, the bill provides that the NSA cannot restart the practice until the FISA Court approves it. But that is already the case, so this provision adds no protection. Similarly, the bill requires the government to give Congress 30 days’ notice before restarting “abouts” collection, so that Congress has the opportunity to pass a law prohibiting the practice if it wishes. But Congress can pass such a law at any time—and should do so now. Punting this decision is no protection at all.

Worst of all, the bill would authorize a much-expanded version of “abouts” collection. Previously, the NSA collected communications that included the “selectors” associated with targets—such as e-mail addresses and phone numbers. **The bill would authorize collection of communications that merely “contain a reference to” the target.** If one assumes that ISIS is a target of Section 702 surveillance (given that targets can be organizations as well as individuals), that means an e-mail between ordinary Americans that talks about the atrocities committed by ISIS would be fair game.

### **The Alternatives—Myths and Facts**

Measures have been introduced in the Senate (including the USA RIGHTS Act, the USA Liberty Act, and a Feinstein/Harris amendment) that would protect Americans’ security *and* their privacy by requiring the government to obtain a warrant before accessing Americans’ communications obtained under Section 702, and (in the case of the two bills) by prohibiting “abouts” collection. **A “no” vote on cloture would allow members to offer these or other measures as amendments to S. 139.**

**These reform measures would not touch the core functionality of Section 702: the ability to collect foreigners’ communications without obtaining a warrant. It is this ability—not backdoor searches or “abouts” collection—that has proven critical in counterterrorism efforts.**

Importantly, the warrant requirement in all of these measures contains exceptions for emergency situations, where delay in obtaining a warrant could jeopardize people’s lives or safety. **Moreover, none of them would restrict the sharing or use of terrorism information—including information of or about Americans—discovered in the course of monitoring a foreign target. In other words, none of these bills would resurrect the pre-9/11 barriers to information-sharing commonly known as “The Wall.”**