BRENNAN
CENTER
FOR JUSTICE

# Vote "YES" on Amendment to Close Backdoor Search Loophole by Requiring Warrant/FISA Title I Order for U.S. Person Queries

## The Problem

Section 702 authorizes warrantless surveillance, and therefore may only be targeted at non-U.S. persons outside the United States. But the surveillance inevitably sweeps in enormous volumes of Americans' communications, because Americans communicate with foreigners. If the government's intent were to eavesdrop on these Americans, it would have to get either a warrant (in a criminal investigation) or a FISA Title I order (in a foreign intelligence investigation). Accordingly, to prevent the government from using Section 702 as an end-run around the Fourth Amendment, Congress directed the government to "minimize" the retention and use of these "incidentally" collected communications of Americans.

Instead of following this directive, **the FBI, CIA, and NSA routinely search through Section 702 data for the express purpose of finding and reviewing Americans' phone calls, emails, and text messages. The FBI conducted 200,000 of these "backdoor searches" in 2022 alone.** An authority that is supposed to be targeted only at foreigners has thus become a powerful domestic spying tool.

Moreover, in recent years, **the FBI has engaged in what the FISA Court called "persistent and widespread violations" of the rules governing these searches.** Abuses have included searches for the communications of 141 Black Lives Matter protesters; 19,000 donors to a congressional campaign; members of Congress; multiple U.S. government officials, political commentators, and journalists; and tens of thousands of Americans engaged in "civil unrest."

## Why RISAA Fails to Address the Problem

RISAA closely tracks the "reforms" proposed by the House Intelligence Committee. These "reforms," however, are carefully crafted to preserve the status quo when it comes to backdoor searches:

- The bill's leading "reform" is a prohibition on backdoor searches performed for the sole purpose of finding evidence of a crime—i.e., with no foreign intelligence purpose. As the bill's sponsors know, however, the FBI almost never labels its searches "evidence-of-a-crime only." In 2022, a year in which the FBI conducted 204,090 backdoor searches, this prohibition would have stopped the FBI from accessing Section 702 data in only two cases. This prohibition would not have prevented any of the most egregious known abuses. The baseless searches for 141 Black Lives Matter protesters, members of Congress, 19,000 donors to a congressional campaign, a local political party, and tens of thousands of people involved in "civil unrest" were all purportedly intended to find foreign intelligence.

- The bill's other "reforms" relating to backdoor searches are equally toothless. Most of them just codify changes that the FBI has already made to its training, supervisory approval, and systems access requirements. But those changes have proved to be insufficient. *After* the FBI implemented the changes, the government continued to report FBI violations at a rate of 4,000 violations per year. The shocking abuses are also continuing, including recent searches for the communications of a U.S. Senator, a state senator, and a state court judge who contacted the FBI to report civil rights violations by a local police chief.

## The Solution

A bipartisan group of House Judiciary Committee members will offer an amendment requiring the government to obtain either a warrant or a FISA Title I order to search the content of Americans' communications obtained under Section 702. The requirement includes several exceptions designed to accommodate legitimate security needs.

**Under this amendment, no court order would be required (1) if there were exigent circumstances; (2) if the subject of the search provided consent (e.g., where the purpose of the search is to identify potential victims); or (3) for certain cybersecurity-related searches.**

In addition, **no court order would be required to search communications *metadata*.** The government could thus determine, without getting a court order, whether a particular U.S. person is in communication with a foreign target. In many cases, that information, combined with what the government already knows about the person, will be sufficient to show probable cause.

This commonsense solution has had broad bipartisan support for years. In 2013, it was unanimously recommended by a panel of experts appointed by President Obama that included former top national security officials. It has also been passed twice in the House. **Recent polling shows that 76% of Americans support a warrant requirement for backdoor searches.**

## What Opponents Will Say — and Why They're Wrong

- **"A warrant requirement for backdoor searches would prevent the government from connecting the dots and would harm national security."** A 15-year track record says otherwise. The government has provided multiple examples in which *surveillance of foreign targets* provided key information about cyberattacks, espionage, and fentanyl trafficking. By contrast, according to the Privacy and Civil Liberties Oversight Board (PCLOB), "there was little justification provided to the Board on the relative value of the close to 5 million [U.S. person queries] conducted by the FBI from 2019 to 2022." The government has been able to cite only a handful of instances in which backdoor searches for Americans' communications have been useful. In each of those cases, it appears that the government could have obtained a warrant, gotten the consent of the subject of the search, or invoked the emergency exception — a point confirmed by the Chair of the PCLOB.
- **"Every court to review Section 702 has found the program to be constitutional; the Fourth Amendment places no limits on searches of lawfully obtained data."** Outside the FISA Court, which is notoriously deferential to the government, the only federal appeals court to address backdoor searches *rejected* the government's argument in support of backdoor searches. A unanimous panel of the Second Circuit stated: "[C]ourts have increasingly recognized the need for additional probable cause or reasonableness assessments to support a search of information or objects that the government has lawfully collected . . . lawful collection alone is not always enough to justify a future search." While there is not yet a final decision in that case, the court clearly cast doubt on the constitutionality of backdoor searches.
- **"A warrant requirement for backdoor searches would overwhelm the courts."** This is a red herring. While there are currently 200,000 backdoor searches each year, the government has acknowledged that most of these are basically fishing expeditions, conducted at a point where the FBI has little to no information. What will happen going forward is that the FBI will run queries of communications *metadata*—which would not require a court order—to determine whether the U.S. person is even in communication with a foreign target. According to the government's own statistics, this will narrow the pool of inquiry by 98-99%, leaving a very manageable number of cases in which the FBI might seek a warrant to access content.
- **"This is basically a prohibition on U.S. person queries because the FBI almost never has probable cause when it conducts these searches."** It is highly doubtful that the government could never meet the probable cause standard or invoke one of the many exceptions. But if it's true that the FBI is conducting 200,000 searches for Americans' private communications every year without probable cause, in the absence of exigent circumstances, and in cases where the subject would be unwilling to consent, that is an alarming admission that merely underscores the need for a warrant requirement.

*For questions about Section 702, contact Liza Goitein at goiteine@brennan.law.nyu.edu or Noah Chauvin at chauvinn@brennan.law.nyu.edu.*