



Written by [Joe Wolverton, II, J.D.](#) on December 4, 2016

## Congress Gives FBI Power to Hack Computers of Millions of Americans

Congress just failed to block a change to a federal rule of criminal procedure granting the FBI power to hack into the personal computers of millions of Americans without obtaining a constitutionally sound warrant as required by the Fourth Amendment.

On November 30, a last-ditch effort by a bipartisan quartet of senators to stall the rule change that cleared the FBI's access to personal computers failed in committee, thus the new language is in effect as of December 1.



Senators Ron Wyden (D-Ore.), Rand Paul (R-Ky.), Christopher Coons (D-Del.), and Tammy Baldwin (D-Wis.) co-sponsored S. 3485, the Stalling Damaging Hacking Act of 2016 in a now abortive attempt to prevent the federal law enforcement agency from gaining immense and intrusive access to the personal computers of citizens of the United States.

"This rule change would give the government unprecedented authority to hack into Americans' personal devices. This was an alarming proposition before the election," Wyden said in a statement e-mailed to BuzzFeed News. "Today, Congress needs to think long and hard about whether to hand this power to [FBI Director] James Comey and the administration of someone who openly said he wants the power to hack his political opponents the same way Russia does."

The outcome was predictable, sadly, but here are the details of the procedural death of the bill as reported by *The Hill*:

"Sens. Ron Wyden (D-Ore.), Steve Daines (R-Mont.) and Chris Coons (D-Del.) took to the floor and unsuccessfully asked for unanimous consent to either pass or formally vote on three bills to delay or prevent updates to the process used by law enforcement to get a warrant to hack suspects' computers," the report continued.

"We simply can't give unlimited power for unlimited hacking,' Daines argued."

Apparently we can, seeing as how a similar gambit undertaken a few days earlier by Wyden and Paul was equally futile.

As of December 1, then, the Obama administration took a tyrannical step forward in its quest toward the de facto repeal of the Fourth Amendment.

Here's how the latest legislative failure to block the betrayal began.

In November of 2104, the Obama Justice Department asked that a committee be empaneled to amend Rule 41 of the Federal Rules of Criminal Procedure (FRCP).

Section (b) of that provision begins:

Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for



the government:

a magistrate judge with authority in the district — or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district;

a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed....

In plain terms, judges may issue search warrants only within the districts where they have jurisdiction. The FBI wants this restriction removed.

Specifically, with the congressional failure to protect the Fourth Amendment, the FBI can now require a judge to issue an electronic surveillance warrant authorizing the feds to search the contents of a computer, regardless of where that computer is physically located.

The *National Journal* sees it another way, however.

In an article praising the rule change, the author of the *National Journal* piece insists that the updated Rule 41 will allow FBI and law enforcement “to better track and investigate criminals who use technology to conceal their identity and location, a practice that has become more common and sophisticated in recent years.”

Something interesting about the *National Journal's* summary of the FBI's request is its use of the word “criminal” to describe the owner of the computer that the government wants to track and tap.

Until recently in the United States, a person was not a “criminal” until he had been subject to the due process of law, specifically: a charge of committing a crime, a hearing by an impartial tribunal on the merit of those charges, an opportunity for the accused to answer those charges, and finally, conviction of having committed the crime.

Due process is a check on monarchical power that goes back 800 years to the enactment of the Magna Carta in 1215!

Over the years, the Magna Carta was occasionally revised and amended. In 1354, the phrase “due process of law” appeared for the first time. The Magna Carta as amended in 1354 says: “No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.”

This fundamental restraint on the royal presumption of the power to lop off heads on command was incorporated by our Founders in the Bill of Rights, where they declared that “No person shall ... be deprived of life, liberty, or property, without due process of law.”

On November 30, *Rare* published an analysis by Bonnie Kristian, and her take on the damage done to fundamental liberty by this rule change is spot on. Kristian writes:

The DOJ insists this change is totally no big deal, but nothing could be further from the truth. On the contrary, the revised Rule 41 lets the feds do two new things:

1. if the government wants to hack a computer using this software, federal agents can shop around for judges until they find one who will rubberstamp their requests. (Previously, they were limited to judges with direct geographic jurisdiction.)



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2. The second part of the rule change is arguably even worse. It's about investigating botnets, which are virtual networks created when a hacker infects thousands or even millions of computers with malware, allowing him to remotely control them. Compromised computers in botnets can be used for illegal activities without their owners' knowledge. With the new Rule 41, if the FBI is investigating a botnet, it can get a judge (again, this could be just about any federal magistrate judge) to issue a single warrant letting the agency hack any computer they suspect might be infected. For a really big botnet, that means the feds would be allowed to secretly poke around literally millions of Americans' computers under just one warrant.

It is likely that the impetus for this increased pressure to pry into the electronic "papers and effects" of suspected criminals was the move by tech giants — particularly Google and Apple — to protect the data stored on customers' devices from the prying eyes of the agents of the federal surveillance state.

"In one way or another, our entire lives — our social lives, our work lives — reside online and on these devices," FBI director Comey said during a White House conference a year ago when the rules were announced.

"And that's a great thing. But that's also where the bad guys are," he added.

Again, what the federal government fails to understand is that their word is not the law.

The Constitution is the law, and the Fourth Amendment to that document requires that a warrant be issued, and that such a warrant be "supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Furthermore, "bad guys" are not "bad guys" until the due process of law has determined them to be such. Until that time, they are just citizens whose rights must be protected if we are to remain a free Republic ruled by law rather than the edicts of would-be despots.



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