

When Friends Spy on Friends: A US Spy Tool Could Spell Trouble for the Middle East

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Since June of this year, the debate about the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008 has appeared to gain momentum. Discourse on the spying law has started in earnest now because the statute's current authorization terminates this December due to what is known as a "sunset" provision and, over the last decade, the law has proven to be extremely controversial. At the heart of the debate is national security vs. personal privacy, pitting defense hawks against civil liberties advocates. Many Congress members, like Senator Tom Cotton (R-Arkansas), believe the FISA Amendments Act (FAA) should be reauthorized, permanently, in its entirety. The nation's national security and intelligence communities echo this sentiment. However, a large number of elected officials disagree with a blanket reauthorization like that proposed by Senator Cotton. Instead, a number of senators and representatives from both parties have advocated for reauthorizing FAA, but expect to maintain the five-year sunset provision and equip the law with more privacy safeguards.

The dominate aspect in the debate about the FAA is Section 702, the provision that affords the US government the ability to place foreign entities and individuals under electronic surveillance. Advocates of the statute believe it is a vital national security tool with appropriate measures in place to protect the privacy of US citizens. Critics, however, are troubled by the scope and ambiguity of the government's surveillance activity. This particular spying authorization is an extremely broad and powerful tool for the US executive

branch. For that reason, it is crucial to understand how President Donald Trump stands to influence the use of the tool. Instead of analyzing the traditional implications of FISA Section 702—and Donald Trump's influence on it—for the US public, this paper will analyze the implications FISA Section 702 has for citizens of the countries in the Middle East and North Africa.

FISA Section 702

The FISA, originally sanctioned in 1978, allows the US government to collect intelligence of foreign agents. The government operated under the law's authorities rather innocuously until, at the end of 2005, it was reported that the National Security Agency (NSA) had employed wide scale, warrantless wiretapping of US citizens' international communications in response to the September 11, 2001 terrorist attacks. After this disclosure, members of Congress voted to exert broader oversight over the intelligence communities' surveillance activities. Ultimately Congress adopted the FAA in 2008. Section 702 was one of several provisions contained in the adopted amendments, but it became the most infamous.

Section 702 was crafted to address a novel problem facing the United States' national security apparatus. By 2008, technology had reached heights impossible to predict in the 1970s and foreign entities and individuals all around the globe were communicating with one another through US-based telecommunications providers. Per the original language of FISA, if

a foreign citizen outside the borders of the United States was using telephone or Internet services based within the United States, the US government was required to approach a court and secure a warrant before it was legally able to capture the communications of that individual. To many national security and intelligence officials, this seemed inefficient and costly. Basically it was viewed as an unnecessary burden for conducting surveillance on foreign persons that were not protected by the Fourth Amendment of the Constitution. It was in this context that authors of the FAA unshackle the intelligence community to take advantage of the sprawling network of US service providers operating internationally. Now, with millions of people using US-based electronic communications worldwide, Section 702 is a valuable surveillance tool. The legislation affords the government the ability to compel US service or telecom providers—which are some of the biggest in the world—to turn over the communications of foreign individuals that reside outside the United States. While there are punitive measures in place for those companies that choose to resist working with the government, they are rarely necessary because many companies cooperate with the government willingly since they are compensated and are immune from legal action (e.g., AT&T, Verizon, and Microsoft cooperate, among many more).

What concerns civil liberties and personal privacy advocates most about Section 702 that the threshold for foreign surveillance is

shockingly low. As it stands under the current law, an individual is technically eligible for electronic surveillance under FISA Section 702 if he or she is simply be a non-US person that is reasonably believed to be residing abroad. There is no evidentiary requirement to satisfy in order for the NSA to capture the content of a foreign person's phone or Internet communications. In fact, the agency does not even have to indicate a specific target. Instead of obtaining a warrant—as would be required for any US citizen—the Attorney General and Director of National Intelligence submit an annual “certification” to the Foreign Intelligence Surveillance Court (FISC) that contains a set of loosely defined measures. When defining these measures, the Attorney General and DNI must specify what categories of foreign intelligence the intelligence community is seeking and they must establish procedures for “targeting” foreign entities and “minimizing” the identification or distribution of US persons' communications that were inadvertently collected through the bulk sweep of data.

To many observers, the aforementioned certification is proof that the legislation is working as it should; it requires specific information and utilizes important safeguards to protect US citizens. However, others are more skeptical. For example, the information that is deemed targetable, based on its inclusion as a category of foreign intelligence, is often very broad. One such category of information that is frequently identified in the annual certifications is “information relevant to the foreign affairs of

the United States.” That, almost any reasonable definition, is ambiguous. Further, the FISC court that reviews and certifies the annual requests meets in secret and only hears arguments from Department of Justice lawyers.

Implications for the Middle East

While the debate over FISA Section 702 will be heated, the international surveillance of foreign persons is hardly the real concern of the parties. Instead, congress members and the public are more concerned about the incidental collection of Americans’ international communications during the dragnet collection process. However, as surveillance policy is explored, it is wise to consider how FISA Section 702 could affect US relations with foreign governments and populations.

The most glaring downside to mass surveillance of foreign entities or individuals is the potential for stoking anti-American sentiment. The Pew Research Center indicated in 2015 that a large majority of those polled disapproved of US surveillance of them, their leaders, or their fellow citizens. It is conceivable that as the world becomes more interconnected and US online services and applications grow more popular, so too will concerns of American pervasiveness and resentment of the United States.

Another realistic concern is how the NSA and other agencies within the executive branch will utilize the broad surveillance authorities

under President Donald Trump. This should be of significant concern for citizens in the Middle East. The Trump administration is hyper-focused on the region due to the threats of ISIL and Iran. It is plausible that he will demand even more resources be poured into conducting foreign surveillance in the region or push the limits of the authorization even further.

A third concern must be understood through the context of US intelligence sharing with allies abroad. The Office of the Director of National Intelligence cites successes in warning an ally of the presence of an al-Qaeda operative within its borders in a report about FISA. This is undoubtedly a positive use of the Section 702. However, what concerns many critics is the conflation of otherwise innocent individuals with terrorists. As noted before, the certification issued by the Attorney General and DNI broadly defines what can be collected (information relevant to US foreign affairs) and many fear that this would result in the targeting of academics, journalists, business people, and lawyers. With this in mind, what if—in his affinity for the Middle East autocrats that have lavished praise on him—Trump agreed to gather the electronic communications of critical journalists in Egypt or political dissidents in the Gulf and turn them over to his counterparts, thus exacerbating ongoing crackdowns on human rights?

In this particular case, friend do spy on friends. Perhaps not so much on friends as for them. Donald Trump has more in common with illiberal friends of convenience than the

traditional US allies around the globe. Much like the leaders from Cairo to Abu Dhabi, President Trump despises critical speech and media coverage. In addition, he shares with the

presidents, emirs, and kings in the Middle East a similar sensitivity to his legitimacy and a simple binary view of international affairs.

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