

Department officials have confirmed to reporters that the *Forbes* list, kremlin.ru, and other public sources were referenced in constructing the list.<sup>43</sup>

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

*Time-Limited Provisions of the Foreign Intelligence Surveillance Act Reauthorized Through 2023*  
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President Trump signed the FISA Amendments Reauthorization Act on January 19, 2018, reauthorizing the mass surveillance provisions of the Foreign Intelligence Surveillance Act (FISA) through December 31, 2023.<sup>1</sup> The Act renewed Title VII of FISA and most notably its Section 702, which provides for the surveillance of foreign targets located outside the United States.<sup>2</sup> The six-year reauthorization faced opposition from lawmakers and advocates concerned for Americans' privacy interests, although Trump "would have preferred a permanent reauthorization of Title VII to protect the safety and security of the Nation."<sup>3</sup>

FISA was originally enacted in 1978, authorizing electronic surveillance in order to gather foreign intelligence information on "agent[s] of foreign powers" considered a potential threat to U.S. national security.<sup>4</sup> It was subsequently amended several times, including by the USA PATRIOT Act following the September 11, 2001 terrorist attacks.<sup>5</sup> Consistent with that history, the Trump administration similarly highlighted recent terrorist attacks as reason for why the reauthorized foreign intelligence gathering is essential for national security.<sup>6</sup>

Section 702 is a controversial portion of FISA as it allows the National Security Agency (NSA) to collect from U.S. companies the communications of foreign targets abroad—which in turn may include communications with U.S. persons—without obtaining a warrant. Congress first enacted Section 702 in 2008 so that the government could obtain communications of foreign targets located abroad without having to secure individual judicial approval for the surveillance.<sup>7</sup> Instead, the specialized court created by FISA approves "annual

<sup>43</sup> Taylor, *supra* note 42; see also Dep't of Treas. Press Release, *supra* note 35 ("The unclassified report was derived from open source materials which include websites, government documents, public records, and news stories among other items. The classified version was derived from classified sources and methods.").

<sup>1</sup> Pub. L. No. 115–118, 132 Stat. 19 (2018) (codified at 50 U.S.C. §§ 1881a–e); Donald J. Trump, Statement on FISA Amendments Reauthorization Act of 2017, 2018 DAILY COMP. PRES. DOC. 40 (Jan. 19, 2018) [hereinafter Trump Signing Statement].

<sup>2</sup> White House Press Release, Statement by the Press Secretary on the FISA Amendments Reauthorization Act of 2017 (Jan. 19, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-fisa-amendments-reauthorization-act-2017> [<https://perma.cc/NEB2-D2JM>] [hereinafter White House Press Secretary Press Release].

<sup>3</sup> Trump Signing Statement, *supra* note 1.

<sup>4</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, 92 Stat. 1783, 1784, 1790.

<sup>5</sup> For a discussion of FISA at the time of enacting the USA PATRIOT Act, see Sean D. Murphy, Contemporary Practice in the United States, 96 AJIL 237, 252–53 (2002).

<sup>6</sup> Trump Signing Statement, *supra* note 1; White House Press Secretary Press Release, *supra* note 2.

<sup>7</sup> *The FISA Amendments Act: Q&A*, OFF. DIR. NAT'L INTELLIGENCE (Apr. 18, 2017), available at <https://www.dni.gov/files/icotr/FISA%20Amendments%20Act%20QA%20for%20Publication.pdf>; see also *id.* at 2 (noting that this provision was important given that "by 2008, technology had changed considerably and many terrorists

certifications” submitted by the attorney general and the director of national intelligence of what is frequently called “702 collection” of communications.<sup>8</sup> The certification permits the U.S. intelligence community to “target non-U.S. persons reasonably believed to be located outside of the United States to acquire certain categories of foreign intelligence information.”<sup>9</sup> Section 702 (as with Title VII more generally) was originally set to expire on December 31, 2012,<sup>10</sup> and was reauthorized for another five years in 2012.<sup>11</sup>

Section 702 does not permit the targeted surveillance of U.S. persons.<sup>12</sup> Nevertheless, opponents of Section 702 point out that the collected communications of foreign individuals abroad would include any communications they have with U.S. citizens, which constitutes a warrantless search and implicates significant privacy concerns for those U.S. citizens.<sup>13</sup> The intelligence community has previously tried to address some of these concerns by instituting certain policy changes. For example, the NSA stated in April 2017 that it would “no longer collect certain internet communications that merely mention a foreign intelligence target” in order “to reduce the chance that it would acquire communications of U.S. persons or others who are not in direct contact with a foreign intelligence target.”<sup>14</sup> Despite this policy shift, 702 collections could still gather communications to or from a U.S. person in direct contact with a foreign intelligence target.

Concerns for the privacy of American citizens sparked unique alliances in Congress during debate over FISA reauthorization. “Some of the most conservative Republicans in the House joined with some of the most liberal Democrats” to fight for additional privacy protections by amending the proposed legislation.<sup>15</sup> Indeed, a bipartisan substitute bill introduced in the Senate in January 2018, known as the “USA Rights” Act, would have required a warrant to search through any records collected in the NSA database under Section 702 that contain

and other foreign intelligence targets abroad were using communication services based in this country, especially those provided by U.S.-based Internet service providers”).

<sup>8</sup> *Id.*; see also, e.g., Joint Statement from Att’y Gen. Sessions, FBI Dir. Wray, DNI Coats, CIA Dir. Pompeo, and NSA Dir. Rogers on FISA Section 702 Reauthorization (Dec. 21, 2017), at <https://www.justice.gov/opa/pr/joint-statement-attorney-general-sessions-fbi-director-wray-dni-coats-cia-director-pompeo-and> [<https://perma.cc/A3P4-4KEL>] (“The Intelligence Community conducts and uses 702 collection in a manner that protects the privacy and civil liberties of individuals.”).

<sup>9</sup> *Release of the FISC Opinion Approving the 2016 Section 702 Certifications and Other Related Documents*, INTEL.GOV: OFF. DIR. NAT’L INTELLIGENCE, at <https://www.intelligence.gov/ic-on-the-record-database/results/3-release-of-the-fisc-opinion-approving-the-2016-section-702-certifications-and-other-related-documents> [<https://perma.cc/D7R9-YWH6>].

<sup>10</sup> Pub. L. No. 110–261, § 403(b), 122 Stat. 2436, 2474 (2008).

<sup>11</sup> Pub. L. No. 112–238, § 2, 126 Stat. 1631, 1631 (2012).

<sup>12</sup> 50 U.S.C. § 1881a(b)(1)–(3).

<sup>13</sup> See Karoun Demirjian, *Senate Passes Bill to Extend Key Surveillance Program, Sending It to Trump’s Desk*, WASH. POST (Jan. 18, 2018), at [https://www.washingtonpost.com/powerpost/senate-passes-bill-to-extend-key-surveillance-program-sending-it-to-trumps-desk/2018/01/18/3f8d5036-fc71-11e7-8f66-2df0b94bb98a\\_story.html?utm\\_term=.2c66d578624eb](https://www.washingtonpost.com/powerpost/senate-passes-bill-to-extend-key-surveillance-program-sending-it-to-trumps-desk/2018/01/18/3f8d5036-fc71-11e7-8f66-2df0b94bb98a_story.html?utm_term=.2c66d578624eb) (noting that under Section 702, federal law enforcement agents can obtain information about U.S. citizens who have communicated with foreign targets without first obtaining a warrant).

<sup>14</sup> Nat’l Sec. Agency Press Release, *NSA Stops Certain Foreign Intelligence Collection Activities Under Section 702* (Apr. 28, 2017), at <https://www.nsa.gov/news-features/press-room/press-releases/2017/nsa-stops-certain-702-activities.shtml> [<https://perma.cc/2VJU-SN85>].

<sup>15</sup> Charlie Savage, Eileen Sullivan & Nicholas Fandos, *House Extends Surveillance Law, Rejecting New Privacy Safeguards*, N.Y. TIMES (Jan. 11, 2018), at <https://www.nytimes.com/2018/01/11/us/politics/fisa-surveillance-congress-trump.html?action=click&contentCollection=Politics&module=RelatedCoverage&region=EndOfArticle&pgtype=article>.

communications from U.S. citizens.<sup>16</sup> The White House opposed this alternative,<sup>17</sup> which did not prevail. On January 11, the House passed the Reauthorization Act with only modest additional privacy protections—described below—by a vote of 256 to 164,<sup>18</sup> and the Senate by a vote of 65 to 34 on January 18.<sup>19</sup>

The final Act provides some additional requirements for the use of surveillance acquired under Section 702 in criminal cases. Law enforcement agents must now obtain a court order when doing certain searches of communications gathered through 702 collection when these searches are “in connection with a predicated criminal investigation” not related to national security.<sup>20</sup> This requirement is subject to certain exceptions. Law enforcement agents do not need to procure a court order if “there is a reasonable belief that such contents could assist in mitigating or eliminating a threat to life or serious bodily harm.”<sup>21</sup> Further, any evidence procured under Section 702 regarding a U.S. person can still be used as evidence in a criminal proceeding without a court order if the proceeding involves certain enumerated crimes, including death, kidnapping, cybersecurity, and human trafficking.<sup>22</sup>

Despite his apparent misgivings,<sup>23</sup> Trump signed the Act into law on January 19, 2018. With respect to Section 702 in particular, Trump explained why such extraterritorial surveillance was important:

This intelligence is vital to keeping the Nation safe. . . . [W]e face a constant threat from foreign terrorist networks and other foreign actors who would do us harm. In order to detect and prevent attacks before they happen, we must be able to intercept the communications of foreign targets who are reasonably believed to possess foreign intelligence information. Section 702 provides the necessary authority, and it has proven to be among the Nation’s most effective foreign intelligence tools. It has enabled our

<sup>16</sup> See Charlie Savage, *Surveillance and Privacy Debate Reaches Pivotal Moment in Congress*, N.Y. TIMES (Jan. 10, 2018), at <https://www.nytimes.com/2018/01/10/us/politics/nsa-surveillance-privacy-section-702-amendment.html> (describing the efforts of the bipartisan coalition behind the USA Rights Act); Karoun Demirjian & Josh Dawsey, *Congress Advances Bill to Renew NSA Surveillance Program After Trump Briefly Upstages Key Vote*, WASH. POST (Jan. 11, 2018), at [https://www.washingtonpost.com/politics/trump-backtracks-after-appearing-to-contradict-his-administrations-support-of-fisa/2018/01/11/5d7f7088-f6d1-11e7-91af-31ac729add94\\_story.html?utm\\_term=.ebc337a9ec81](https://www.washingtonpost.com/politics/trump-backtracks-after-appearing-to-contradict-his-administrations-support-of-fisa/2018/01/11/5d7f7088-f6d1-11e7-91af-31ac729add94_story.html?utm_term=.ebc337a9ec81) (noting how privacy advocates “rallied around an alternative measures from Rep. Justin Amash,” the USA Rights Act, “that would have required law enforcement agencies to obtain warrants before being able to sift through the NSA’s record database”).

<sup>17</sup> White House Press Release, Statement from Press Secretary Sarah Sanders (Jan. 10, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-18> [<https://perma.cc/8H88-BFJQ>].

<sup>18</sup> See Demirjian & Dawsey, *supra* note 16 (describing the House vote); Savage, Sullivan & Fandos, *supra* note 15 (same).

<sup>19</sup> See Demirjian, *supra* note 13 (describing the Senate vote).

<sup>20</sup> 50 U.S.C. § 1881a(f)(2)(A); see also Demirjian, *supra* note 13 (noting that the legislation that passed requires a court order to search data that would be used in criminal cases, but “no such restriction in cases involving counterterrorism, counterintelligence, and counterespionage”).

<sup>21</sup> 50 U.S.C. § 1881a(f)(2)(E).

<sup>22</sup> 50 U.S.C. § 1881e(a)(2)(A)(ii)(II).

<sup>23</sup> Compare Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 11, 2018, 7:33 AM), at <https://twitter.com/realDonaldTrump/status/951431836030459905> (“House votes on controversial FISA ACT today.’ This is the act that may have been used, with the help of the discredited and phony Dossier, to so badly surveil and abuse the Trump Campaign by the previous administration and others?”), with Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 11, 2018, 9:14 AM), at <https://twitter.com/realDonaldTrump/status/951457382651056128> (“With that being said, I have personally directed the fix to the unmasking process since taking office and today’s vote is about foreign surveillance of foreign bad guys on foreign land.”).

Intelligence Community to disrupt numerous plots against our citizens at home and our warfighters abroad, and it has unquestionably saved American lives.<sup>24</sup>

In hopes of assuaging concerns expressed by privacy advocates, he further underscored that Section 702 only permits the surveillance targeting of “foreigners located abroad” and not U.S. citizens.<sup>25</sup>

#### STATE DIPLOMATIC AND CONSULAR RELATIONS

*President Trump Recognizes Jerusalem as the Capital of Israel*

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On December 6, 2017, President Trump officially recognized Jerusalem as Israel’s capital city. This decision reflects Trump’s “new approach to conflict between Israel and the Palestinians.”<sup>1</sup>

In a proclamation titled “Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem,” Trump wrote:

I have determined that it is time for the United States to officially recognize Jerusalem as the capital of Israel. This long overdue recognition of reality is in the best interests of both the United States and the pursuit of peace between Israel and the Palestinians. . . .

Today’s actions—recognizing Jerusalem as Israel’s capital and announcing the relocation of our embassy—do not reflect a departure from the strong commitment of the United States to facilitating a lasting peace agreement. The United States continues to take no position on any final status issues. The specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties. The United States is not taking a position on boundaries or borders.

Above all, our greatest hope is for peace, including through a two-state solution, if agreed to by both sides. Peace is never beyond the grasp of those who are willing to reach for it. In the meantime, the United States continues to support the status quo at Jerusalem’s holy sites, including at the Temple Mount, also known as Haram al Sharif. Jerusalem is today—and must remain—a place where Jews pray at the Western Wall, where Christians walk the Stations of the Cross, and where Muslims worship at Al-Aqsa Mosque.<sup>2</sup>

<sup>24</sup> Trump Signing Statement, *supra* note 1.

<sup>25</sup> *Id.*

<sup>1</sup> Donald J. Trump, Remarks on Signing a Proclamation on Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem, 2017 DAILY COMP. PRES. DOC. 1 (Dec. 6, 2017) [hereinafter Dec. 6 Trump Remarks].

<sup>2</sup> Proclamation No. 9683, 82 Fed. Reg. 58,331 (Dec. 6, 2017); *see also* U.S. Dep’t of State Press Release, Briefing with Acting Assistant Secretary David M. Satterfield (Dec. 7, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/12/276349.htm> [<https://perma.cc/JE69-BABH>] (emphasizing that Trump recognized Jerusalem as Israel’s capital, but “[w]ith respect to boundaries of sovereignty, borders, geography, those are matters for final status negotiations between the party [sic] . . .”).