

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY JEAN GALBRAITH*

In this section:

- Executive Branch Imposes Limited Russia-Related Sanctions After Statutory Deadlines
- Time-Limited Provisions of the Foreign Intelligence Surveillance Act Reauthorized Through 2023
- President Trump Recognizes Jerusalem as the Capital of Israel
- Trump Administration Ends Participation in Global Compact on Migration, Citing Concerns Regarding U.S. Sovereignty
- United States Reaches Agreement to Limit Arctic Fishing
- Trump Administration Continues Push to Reshape American Trade Relations by Imposing Tariffs on Steel and Aluminum Imports
- Responses by the United States to Attacks on the Rohingya in Burma
- President Trump Issues Executive Order Keeping the Guantánamo Bay Detention Camp Open

* The section editor has been corrected since original publication. An erratum notice detailing this change was also published (DOI: 10.1017/ajil.2018.57).

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Executive Branch Imposes Limited Russia-Related Sanctions After Statutory Deadlines

doi:10.1017/ajil.2018.38

Despite the passage of several statutory deadlines, by February 2018 the Trump administration had imposed no Russia-related sanctions pursuant to certain provisions of the Countering America's Adversaries Through Sanctions Act (CAATSA),¹ suggesting at one point that the threat of sanctions alone would be sufficient to deter further malfeasance.² Then, on March 15, 2018, more than five months after the passage of an initial statutory deadline,³ the Trump administration announced that it would impose sanctions on five entities and nineteen individuals for their involvement in "malign" cyber activities on behalf of the Russian government.⁴

Passed in the late summer of 2017 by a vote of 419–3 in the House and 98–2 in the Senate, CAATSA imposes sanctions on Iran, Russia, and North Korea.⁵ Title II of CAATSA, the Countering Russian Influence in Europe and Eurasia Act of 2017,⁶ entrenches preexisting sanctions,⁷ provides the deadlines and conditions for the imposition of certain new sanctions,⁸ places various limits on presidential discretion,⁹ and establishes several reporting requirements.¹⁰ The new sanctions that CAATSA imposes include measures directed at persons who participate in cyberattacks on behalf of the Russian government,¹¹ foreign persons who are involved in the commission of human rights abuses in territories controlled by

¹ Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017) (codified as amended in scattered sections of 22 U.S.C.).

² See Patricia Zengerle, *Trump Administration Holds Off on New Russia Sanctions, Despite Law*, REUTERS (Jan. 29, 2018), at <https://ca.reuters.com/article/topNews/idCAKBN1FI2V7-OCATP>; Carol Morello, *White House Says There's No Need for New Russia Sanctions*, WASH. POST (Jan. 29, 2018), at https://www.washingtonpost.com/world/national-security/rich-russians-still-waiting-to-exhale/2018/01/29/7df459ca-052a-11e8-8777-2a059f168dd2_story.html?utm_term=.9dd3aa3574b6.

³ See Countering America's Adversaries Through Sanctions Act, *supra* note 1, at § 224(a), 131 Stat. at 908 (requiring the imposition of sanctions with respect to Russian cyber activities "[o]n and after the date that is 60 days after the date of the enactment of this Act").

⁴ See Peter Baker, *White House Penalizes Russia over Election Meddling and Cyberattacks*, N.Y. TIMES (Mar. 15, 2018), at <https://www.nytimes.com/2018/03/15/us/politics/trump-russia-sanctions.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>; U.S. Dep't of Treas. Press Release, *Treasury Sanctions Russian Cyber Actors for Interference with the 2016 U.S. Elections and Malicious Cyber-Attacks* (Mar. 15, 2018), at <https://home.treasury.gov/news/press-releases/sm0312> [<https://perma.cc/LR4Z-BBSR>].

⁵ See generally Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 1015 (2017) (discussing the Countering America's Adversaries Through Sanctions Act's substantive provisions); see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 483, 483–504 (discussing evidence of Russian interference with the 2016 U.S. election, the response of the Obama administration, and the approach taken initially by the Trump administration).

⁶ Countering America's Adversaries Through Sanctions Act, *supra* note 1, at § 201, 131 Stat. at 898.

⁷ *Id.* § 222(a), 131 Stat. at 906–07.

⁸ See generally *id.* §§ 221–38, 131 Stat. at 906–22.

⁹ *E.g., id.* § 216, 131 Stat. at 900–06.

¹⁰ *Id.* §§ 241–243, 131 Stat. at 922–25.

¹¹ *Id.* § 224(a), 131 Stat. at 908–10.

Russia;¹² and persons who engage in “significant” transactions with the Russian intelligence and defense sectors.¹³

Several of these provisions, including those related to Russian cyber activities and to persons engaged in transactions with the Russian intelligence and defense sectors, mandate the imposition of sanctions within a certain time period after the enactment of CAATSA. For example, Section 224, the sanctions provision related to Russian cyber activity, provides, in part:

- (a) IN GENERAL.—On and after the date that is 60 days after the date of the enactment of this Act, the President shall—
 - (1) Impose the sanctions described in subsection (b) with respect to any person that the President determines—
 - (A) knowingly engages in significant activities undermining cybersecurity against any person, including a democratic institution, or government on behalf of the Government of the Russian Federation; or
 - (B) is owned or controlled by, or acts or purports to act for or on behalf of, directly or indirectly, a person described in subparagraph (A);
 - ...
- (c) APPLICATION OF NEW CYBER SANCTIONS.—The President may waive the initial application under subsection (a) of sanctions with respect to a person only if the President submits to the appropriate congressional committees—
 - (1) a written determination that the waiver—
 - (A) is in the vital national security interests of the United States; or
 - (B) will further the enforcement of this title; and
 - (2) a certification that the Government of the Russian Federation has made significant efforts to reduce the number and intensity of cyber intrusions conducted by that Government.¹⁴

A similar structure can be found in Section 231, the CAATSA provision imposing sanctions on persons who “knowingly . . . engage[] in a significant transaction” with “the defense or intelligence sectors of the Government of the Russian Federation.”¹⁵ Section 231 sanctions are to be imposed “[o]n and after the date that is 180 days from the enactment of this Act.”¹⁶ Section 231 has a waiver provision that is identical to Section 224(c) given above,¹⁷ and additionally provides as follows:

- (c) DELAY OF IMPOSITION OF SANCTIONS.— The President may delay the imposition of sanctions under subsection (a) with respect to a person if the President certifies to the appropriate congressional committees, not less frequently than every 180 days while the delay is in effect, that the person is

¹² *Id.* § 228, 131 Stat. at 913–15.

¹³ *Id.* § 231, 131 Stat. at 916–17.

¹⁴ *Id.* § 224(a), (c), 131 Stat. at 908–09.

¹⁵ *Id.* § 231(a), 131 Stat. at 916.

¹⁶ *Id.*

¹⁷ *Id.* § 231(b), 131 Stat. at 916–17.

substantially reducing the number of significant transactions . . . in which that person engages.¹⁸

The Trump administration allowed these statutory deadlines to pass without imposing sanctions on Russia, despite bipartisan encouragement to take robust measures.¹⁹ For example, on the day on which the president was due to impose sanctions related to the Russian defense and intelligence sectors under Section 231 of CAATSA—180 days after the Act’s enactment, or January 29, 2018—State Department spokeswoman Heather Nauert said the administration had informed Congress that the imposition of sanctions was not necessary. She explained:

[s]ince the enactment of the . . . legislation, we estimate that foreign governments have abandoned planned or announced purchases of several billion dollars in Russian defense acquisitions From that perspective, if the law is working, sanctions on specific entities or individuals will not need to be imposed because the legislation is, in fact, serving as a deterrent.²⁰

Although not explicit on this point, Nauert’s statement implies that the president has invoked Section 231(c) quoted above, which permits sanctions to be delayed at 180-day intervals for persons who are “substantially reducing the number of significant transactions” in which they engage.²¹ Although Section 231(c) reads as though it requires individualized determinations, the Trump administration’s decision to delay in imposing sanctions appears to be more general.

On February 16, Special Counsel Robert S. Mueller III indicted thirteen Russian nationals and three companies for conspiracy to defraud the United States “for the purpose of interfering with the U.S. political and electoral processes, including the presidential election of

¹⁸ *Id.* § 231(c), 131 Stat. at 917.

¹⁹ See Peter Baker, *Trump’s Conspicuous Silence Leaves a Struggle Against Russia Without a Leader*, N.Y. TIMES (Feb. 17, 2018), at <https://www.nytimes.com/2018/02/17/us/politics/trump-russia.html> (“Mr. Trump’s position stood in contrast to that of fellow Republicans who responded to the indictment with calls for tougher action against Russia.”); Rebecca Kheel, *Armed Services Chair on Russian Meddling: “There Has to Be a Price to Be Paid,”* THE HILL (Feb. 28, 2018), at <http://thehill.com/policy/defense/376114-armed-services-chairman-on-russian-meddling-there-has-to-be-a-price-to-be-paid> (quoting Republican Representative Mac Thornberry, chairman of the House Armed Services Committee, as saying in response to questions about National Security Director Michael Rogers’s earlier testimony about Russia, “An aggressor will always push forward and do more until he meets resistance. We’ve seen that time and time again over history. There has to be a price to be paid.”); Maegan Vazquez, *GOP Sen. Kennedy: Trump Should Have Talked About Russia Sanctions at SOTU*, CNN (Jan. 31, 2018), at <https://edition.cnn.com/2018/01/31/politics/john-kennedy-russia-sanctions-state-of-the-union-cnntv/index.html> (quoting Republican Senator John Kennedy’s reaction to President Trump’s State of the Union Address: “I wish he’d talked about sanctions on the Russians and explained to us why he is not immediately imposing the sanctions, because I think President Putin has acted for the past five years like a thug.”). Democratic lawmakers in both the House and Senate introduced resolutions in February calling on President Trump to impose sanctions pursuant to CAATSA. See H. Res. 749, 115th Cong. (2018); S. Res. 402, 115th Cong. (2018).

²⁰ Zengerle, *supra* note 2.

²¹ Countering America’s Adversaries Through Sanctions Act, *supra* note 1, at § 231(c), 131 Stat. at 917; see also Robert Chesney, *Is the Trump Administration Breaking the Law by Failing to Issue New Russia Sanctions*, LAWFARE BLOG (Jan. 31, 2018), at <https://www.lawfareblog.com/trump-administration-breaking-law-failing-issue-new-russia-sanctions> (concluding that the Trump administration has likely made “a ‘delay’ determination under 231(c)”).

2016.”²² At a press briefing shortly thereafter, Nauert emphasized the Trump administration’s other efforts to counter Russian influence independent of CAATSA. She remarked:

We’ve talked a little bit about CAATSA. A lot of you have said, “Oh my gosh, you haven’t imposed those sanctions just yet.” Remember, January 29th was the first day that we could impose sanctions. Among the things that we have done—and I’ll have other things I want to talk about in addition to CAATSA. But among the things that we have done, we have sent out . . . cables to all of our posts around the world, where those posts have been instructed to speak with their host governments about the new CAATSA law. In explaining to those countries, here’s what you could face if companies, if individuals are involved in these sorts of activities that meet a certain threshold that would contribute positively to Russia’s defense and intelligence and other sectors that are similar to those.

. . .

I know you all want to see results overnight. We don’t have sanctionable activity just yet, but we are working every day to try to determine if there is something that is taking place. If there is something taking place, we will sanction those countries, those individuals, and those entities. That is something we continue to look at doing very, very carefully.

In addition to CAATSA, though, when we talk about election interference and how the U.S. Government has responded as a result, we have other sanctions that have taken place. . . . We have done a lot more than just CAATSA. There have been other sanctions that have taken place. You may recall the previous administration kicked the Russians out of their dachas. We have kept them out of their dachas. We have closed a consulate in San Francisco. People seem to forget about that. We have closed facilities in Washington, D.C. and also New York. That certainly upset the Russians. That is partly because of what they did in our 2016 elections.

You may recall last month—or maybe it was late December—that we expanded the list of individuals who were sanctioned under the Magnitsky Act. We also had the Global Magnitsky Act, in which there were Russians who were named—at least one Russian or two who were named under that. In addition to that, we have the sanctions that are put in place because of Russian activity in Ukraine.

Our government is engaged on an interagency level, where we are talking with one another and we are putting forth actions, activities related to Russians’ malign activity as it pertains to our 2016 election. So please, this is not just CAATSA. It’s a whole lot of other things that people tend to forget about.²³

²² See Indictment, *United States v. Internet Research Agency LLC et al.*, No. 1:18-cr-00032-DLF, 2018 WL 914777 (D.D.C. filed Feb. 16, 2018), available at <https://assets.documentcloud.org/documents/4380504/The-Special-Counsel-s-Indictment-of-the-Internet.pdf> [<https://perma.cc/V6J6-GH7M>]. The special counsel is mostly independent from the Trump administration, as part of his mandate is to investigate “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump.” Rod J. Rosenstein, Acting Attorney General, Order No 3915-2017 re Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), at <https://www.justice.gov/opa/press-release/file/967231/download> [<https://perma.cc/6M9E-T4ZV>].

²³ U.S. Dep’t of State Press Release, Department Press Briefing (Feb. 20, 2018), at <https://www.state.gov/r/pa/prs/dpb/2018/02/278501.htm> [<https://perma.cc/9W4E-PXD9>].

Until recently, the Trump administration had also not imposed any sanctions under Section 224,²⁴ notwithstanding its subsection calling for sanctions “on and after” sixty days from CAATSA’s enactment.²⁵ But on March 15, 2018—the same day the governments of the United Kingdom, France, Germany, and the United States issued a joint statement condemning the poisoning of a former Russian double agent living in the United Kingdom²⁶—the Treasury Department imposed sanctions on five entities and nineteen individuals.²⁷ These sanctions block access to all property subject to U.S. jurisdiction of the targeted individuals and bar U.S. persons from engaging in transactions with these individuals.²⁸ Three of the entities and thirteen of the individuals were the same actors who had previously been indicted by Special Counsel Mueller, and the sanctions on them were imposed pursuant to Executive Order 13694, “Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities” (as amended and codified by CAATSA).²⁹ The remaining two entities and six individuals were sanctioned pursuant to Section 224.³⁰

In announcing these sanctions, Treasury Secretary Steven Mnuchin said:

The Administration is confronting and countering malign Russian cyber activity, including their attempted interference in U.S. elections, destructive cyber-attacks, and intrusions targeting critical infrastructure. . . . These targeted sanctions are a part of a broader effort to address the ongoing nefarious attacks emanating from Russia. Treasury intends to impose additional CAATSA sanctions, informed by our intelligence community, to hold Russian government officials and oligarchs accountable for their destabilizing activities by severing their access to the U.S. financial system.³¹

The Treasury press release further identifies specific cyber-attacks that the administration has attributed to the Russian government and made references to other areas of concern:

Today’s action counters Russia’s continuing destabilizing activities, ranging from interference in the 2016 U.S. election to conducting destructive cyber-attacks, including the NotPetya attack, a cyber-attack attributed to the Russian military on February 15, 2018 in statements released by the White House and the British Government. This cyber-attack was the most destructive and costly cyber-attack in history. The attack resulted

²⁴ See Letter from Robert Menendez, U.S. Senator, to Rex Tillerson, U.S. Sec’y of State, and Steven Mnuchin, U.S. Sec’y of Treasury (Feb. 28, 2018) (noting that the Trump administration has “failed to impose any sanctions against Russia for its cyber activity, even though Section 224 of CAATSA requires sanctions against anyone who knowingly undermines the cyber security of an individual or a democratic institution on behalf of the Russian government”).

²⁵ Countering America’s Adversaries Through Sanctions Act, *supra* note 1, at § 224(a), 131 Stat. at 908; see also Chesney, *supra* note 21 (remarking that there is “no sign that the [Section 224(c) waiver] provision has been invoked, and . . . it seems that it could not be invoked in good faith given that certification requirement”).

²⁶ See Off. of the Brit. Prime Minister Press Release, Salisbury Attack: Joint Statement From the Leaders of France, Germany, the United States and the United Kingdom (Mar. 15, 2018), at <https://www.gov.uk/government/news/salisbury-attack-joint-statement-from-the-leaders-of-france-germany-the-united-states-and-the-united-kingdom> (commenting that “it was highly likely that Russia was responsible for the attack”).

²⁷ U.S. Dep’t of Treasury Press Release, *supra* note 4.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

in billions of dollars in damage across Europe, Asia, and the United States, and significantly disrupted global shipping, trade, and the production of medicines. Additionally, several hospitals in the United States were unable to create electronic records for more than a week.

Since at least March 2016, Russian government cyber actors have also targeted U.S. government entities and multiple U.S. critical infrastructure sectors, including the energy, nuclear, commercial facilities, water, aviation, and critical manufacturing sectors. Indicators of compromise, and technical details on the tactics, techniques, and procedures, are provided in the recent technical alert issued by the Department of Homeland Security and Federal Bureau of Investigation.

In addition to countering Russia's malign cyber activity, Treasury continues to pressure Russia for its ongoing efforts to destabilize Ukraine, occupy Crimea, meddle in elections, as well as for its endemic corruption and human rights abuses. The recent use of a military-grade nerve agent in an attempt to murder two UK citizens further demonstrates the reckless and irresponsible conduct of its government These sanctions are in addition to other ongoing efforts by Treasury to address destabilizing activity emanating from within Russia, including our sanctioning of Russians targeted for activities related to the North Korea sanctions program, the Global Magnitsky program, and the Sergei Magnitsky Act.³²

In addition to eventually imposing some sanctions pursuant to Section 224 of CAATSA, the Trump administration complied in a timely manner with a reporting requirement provided for in Section 241. That section requires the secretary of the Treasury, in consultation with the director of national intelligence and the secretary of State, to submit a report within 180 calendar days of the enactment of CAATSA—or by January 29, 2018—regarding:

- (1) Senior foreign political figures and oligarchs in the Russian Federation, including the following:
 - (A) An identification of the most significant senior foreign political figures and oligarchs in the Russian Federation, as determined by their closeness to the Russian regime and their net worth.
 - (B) An assessment of the relationship between individuals identified under subparagraph (A) and President Vladimir Putin or other members of the Russian ruling elite.
 - (C) An identification of any indices of corruption with respect to those individuals.
 - (D) The estimated net worth and known sources of income of those individuals and their family members (including spouses, children, parents, and siblings), including assets, investments, other business interests, and relevant beneficial ownership information.
 - (E) An identification of the non-Russian business affiliations of those individuals.³³

³² *Id.*

³³ Countering America's Adversaries Through Sanctions Act, *supra* note 1, at § 241(a)(1)(A)–(E), 131 Stat. at 922–23.

Pursuant to Section 241, the Treasury Department published a list of 114 senior Russian political figures and ninety-six oligarchs worth more than \$1 billion on January 29, 2018.³⁴ It also included a classified index of “additional information . . . in order to avoid potential asset flight from the named individuals and entities, as well as to prevent disclosure of sensitive information.”³⁵ In testimony before the Senate Banking and Finance Committee, Mnuchin said the classified annex would be used to inform future targeted sanctions, which he pledged would be forthcoming.³⁶ The same day the list was published, a Russian SU-27 plane buzzed an American EP-3 spy plane in international airspace over the Black Sea, a maneuver which the State Department called a flagrant violation of the bilateral 1972 Agreement for the Prevention of Incidents On and Over the High Seas.³⁷ Russian President Vladimir Putin reportedly considered retaliating against the United States for publishing the list of Russian politicians and oligarchs, but said that Russia would “refrain from such steps for the time being.”³⁸ The Russian government has, nevertheless, promised to protect individuals and businesses named in the Treasury Department list and has suggested that the publication of the list was itself an attempt to interfere with Russia’s own presidential election in March.³⁹

Although appearing on the list does not entail the imposition of any penalties,⁴⁰ fear that the list could be used by the U.S. government to impose future sanctions or cause banks to stop serving them led many wealthy Russians to engage in a flurry of lobbying activity to prevent their inclusion immediately prior to the publication of the list.⁴¹ The list has been criticized for being hastily constructed, however, as the names of the listed individuals appear to have been copied from publically available sources such as the *Forbes* list of Russian billionaires as well as a list of senior Russian officials on the Kremlin’s English language website.⁴² Treasury

³⁴ See U.S. DEP’T OF TREASURY, REPORT TO CONGRESS PURSUANT TO SECTION 241 OF THE COUNTERING AMERICA’S ADVERSARIES THROUGH SANCTIONS ACT OF 2017 REGARDING SENIOR FOREIGN POLITICAL FIGURES AND OLIGARCHS IN THE RUSSIAN FEDERATION AND RUSSIAN PARASTATAL ENTITIES (2018) [hereinafter TREASURY REPORT], available at https://s0.rbk.ru/v6_top_pics/media/file/8/78/755172907012788.pdf; Neil MacFarquhar & Peter Baker, *Trump’s Stance on Russia Sanctions Angers Both Moscow and Washington*, N.Y. TIMES (Jan. 30, 2018), at <https://www.nytimes.com/2018/01/30/world/europe/kremlin-russia-trump-list.html>.

³⁵ US. Dep’t of Treas. Press Release, Treasury Information on CAATSA Report and Russian Sanctions (Feb. 1, 2018), at <https://home.treasury.gov/news/press-releases/sm0276> [<https://perma.cc/B6M2-U7JS>].

³⁶ *Id.*

³⁷ U.S. Dep’t of State Press Release, Unsafe Russian Military Practices (Jan. 29, 2018), at <https://www.state.gov/t/pa/prs/ps/2018/01/277753.htm> [<https://perma.cc/CVQ7-9SWL>].

³⁸ MacFarquhar & Baker, *supra* note 34 (further quoting Putin as saying, “We were prepared to undertake retaliatory steps, and quite serious ones too, which would cut our relations to zero.”).

³⁹ Morello, *supra* note 2.

⁴⁰ See Gardiner Harris, *Coming U.S. List of Oligarchs Linked to Putin Alarms Russia’s Rich*, N.Y. TIMES (Jan. 26, 2018), at <https://www.nytimes.com/2018/01/26/us/politics/russia-oligarchs-list-sanctions.html?action=click&contentCollection=Europe&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>; TREASURY REPORT, *supra* note 34.

⁴¹ Harris, *supra* note 40.

⁴² See Julian Borger, *US “Name-and-Shame” List of Russian Oligarchs Binned by Top Trump Official-Expert*, GUARDIAN (Jan. 30, 2018), at <https://www.theguardian.com/world/2018/jan/30/russia-kremlin-list-trump-administration-forbes>; Adam Taylor, *“The Kremlin List”: Why Russian Oligarchs Shrugged*, WASH. POST (Jan. 30, 2018), at https://www.washingtonpost.com/news/worldviews/wp/2018/01/30/the-kremlin-list-why-russian-oligarchs-shrugged/?utm_term=.91cf9383dcf1.

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

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Time-Limited Provisions of the Foreign Intelligence Surveillance Act Reauthorized Through 2023
doi:10.1017/ajil.2018.33

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, 2023.¹ 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.² 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."³

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.⁴ It was subsequently amended several times, including by the USA PATRIOT Act following the September 11, 2001 terrorist attacks.⁵ 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.⁶

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.⁷ Instead, the specialized court created by FISA approves "annual

⁴³ 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.")

¹ 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].

² 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].

³ Trump Signing Statement, *supra* note 1.

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

⁵ 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).

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

⁷ *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