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THE NATIONAL SECURITY INSTITUTE
At George Mason University's Antonin Scalia Law School



SECTION 702 REAUTHORIZATION: VIEWS FROM ACROSS THE SPECTRUM

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Last week, the National Security Institute (NSI) brought together leading experts to weigh in on the balance between national security interests and privacy concerns implicated with the reauthorization of Foreign Intelligence Surveillance Act (FISA) Section 702.

FISA Section 702, which is set to expire at the end of 2017, authorizes the U.S. Intelligence Community to target non-U.S. persons reasonably believed to be located outside the U.S. in order to collect foreign intelligence.

DISCUSSION WRAP UP

Background on Surveillance Authorities. Panelists discussed various authorities for government surveillance, including:

- Executive Order 12333: authorizing foreign intelligence collection;
- FISA 1978: establishing procedures for the conduct of foreign intelligence surveillance, creating the Foreign Intelligence Surveillance Court (FISC) and requiring FISC authorization when U.S. targets are surveilled for national security purposes;
- FISA Amendments Act of 2008: authorizing targeting of non-U.S. persons located overseas; and
- Title III of The Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act): establishing procedures for obtaining warrants to authorize wiretapping by government officials.

The discussion then focused on (1) incidental collection, (2) “about” collection, and (3) warrant requirements for querying collected data.

SPEAKERS

ELIZABETH GOITEIN
Co-Director, Liberty &
National Security
Program, Brennan
Center for Justice

BENJAMIN POWELL
Former General Counsel,
Office of the Director of
National Intelligence

**MICHELLE
RICHARDSON**
Deputy Director,
Freedom, Security, and
Technology Project,
Center for Democracy &
Technology

KENNETH WAINSTEIN
Former Assistant
Attorney General for
National Security, U.S.
Department of Justice

Moderator:
DARREN DICK
Director of Programs, National
Security Institute

Incidental Collection. Although, Section 702 targets non-U.S. persons, “incidental” collection of Americans’ communications does occur. Mr. Powell and Mr. Wainstein noted, however, that all surveillance tools under the myriad of legal authorities result in incidental collections. Mr. Powell also noted that when the FISA Amendments Act was first adopted, Congress did not intend to preclude the possibility of discovering US persons who were in communication with foreign targets of national security investigations, as evidenced by the fact that the Act requires the adoption of minimization procedures. He did note that notwithstanding long standing understandings and practices related to incidental collection, there currently is bipartisan recognition of the concerns associated with such collection.

In response, Ms. Goitein emphasized that the incidental collection that is occurring in association with Section 702 is considerable and that 702’s incidental collection is far greater than the incidental collection associated with Title III wiretapping. She added that while Section 702 requires agencies to “minimize” the retention and sharing of Americans’ information, the limitations afforded under Section 702 minimization procedures are not as stringent as those afforded by Title III, under which warrants typically include time and location limitations.

“About” Collection. Ms. Richardson argued “about” collection; that is, the targeting of communications that are not to or from a targeted selector but about a targeted selector. Ms. Richardson noted “about” collection falls outside the original meaning of 702 communications collection and may entail the collection of wholly non-relevant domestic communications. She added that the May 2017 decision by the National Security Agency (NSA) to end its “about” collection under Section 702 demonstrates her concern with the practice. Ms. Richardson also urged Congress to codify a prohibition on “about” collection.

Querying Collected Data and Warrant Requirements. Panelists also discussed the issue of whether the FBI should be required to gain judicial approval for queries of Section 702 information related to U.S. persons. Ms. Goitein characterized the ability to query the data for U.S. person information as a “bait and switch” from the government’s certifications that it is not targeting U.S. persons through Section 702. Ms. Goitein also pointed out that such queries are not expressly authorized by the text of the FISA Amendments Act and she predicts constitutional challenges to the program in the future.

Regarding querying of collected 702 communications, Mr. Wainstein pointed out that a probable cause warrant requirement is not constitutionally required and without legal precedent. Ms. Goitein stressed there is not a significant number of cases addressing the issue and that in addition to the judicial branch, Congress has a role in protecting U.S. citizen rights.

Mr. Wainstein added that from an operational standpoint, a warrant requirement would create an unnecessary procedural delay that would handicap national security investigations. For example, the FBI may have to coordinate with a local U.S. Attorney’s Office in order to appear before a federal judge. Mr. Wainstein also cautioned that a warrant requirement would be resurrecting the pre-9/11 wall that separated criminal and foreign intelligence investigations and which led to serious breaches in national security. Ms. Goitein responded to this claim by arguing that none of the reform bills being considered by Congress imposes restrictions on sharing between law enforcement and intelligence agencies.

Mr. Wainstein argued that if Congress is concerned with privacy, there are other practices, besides a warrant requirement, that could strengthen privacy protections, including adopting additional internal rules for querying and using Section 702 information and expanding internal oversight of the query and use of such information

Mr. Wainstein and Mr. Powell also stressed that because Congress understood Section 702 would be a powerful tool, the program has the most extensive oversight of any of the intelligence community’s surveillance tools. The Department of Justice, the Office of the Director of National Intelligence, the inspectors general of the agencies with access to the Section 702 information, the Privacy and Civil Liberties Oversight Board, the Congress, and the FISC all exercise oversight of the collection program. Mr. Powell also underscored how seriously the agencies conducting Section 702 programs take their self-compliance obligations, knowing that non-compliance incidents will be reported to the FISC, and possibly the White House.