



U.S. Eavesdropping Program Goes Silent

It's long been considered one of the most important ways American spies gather information overseas. But in 2016, it apparently went dark.

Betsy Woodruff

April 21, 2017

Something a little funny might be going on in America's most secretive court. According to the annual report for the Foreign Intelligence Surveillance Court (FISC), released April 20, the court didn't authorize any surveillance last year under Section 702 of the Foreign Intelligence Surveillance Act—a controversial provision of the 1978 spy law.

Section 702 lets the U.S. intelligence community work with telecom companies to secretly gather the content of phone and electronic communications that happen outside the United States. In the process, the eavesdroppers often inadvertently gather emails and phone calls that U.S. citizens make to people overseas—which civil liberties advocates say can violate Americans' Constitutional rights. But the court didn't authorize U.S. spies to use Section 702 to gather information in 2016.

Marcy Wheeler [noted this on her blog, Empty Wheel](#), and a spokesman for the court [confirmed to *New York Times* reporter Charlie Savage](#) that the court didn't authorize any Section 702 surveillance last year.

Julian Sanchez, an expert on privacy and surveillance at the libertarian Cato Institute, told The Daily Beast this change is unusual.

"It's absolutely a big deal," he said. "I'm just not at all sure what it means."

"One plausible option is that they've asked to do something novel: that they asked for approval to do 702 tasking on some new categories of targets beyond what we know they've done previously, and that it was contentious enough to throw a wrench into the process," he said.

Courts have found that people within the U.S. have Constitutional rights that would prohibit 702 surveillance without probable cause, but that non-citizens outside the country don't, and can be subject to this kind of surveillance. Constitutional problems can arise, however, when the

intelligence community inadvertently surveils innocent Americans as part of its surveillance of foreigners—for example, when an American calls a foreigner being monitored under the Section 702 authorization and someone in the intel community listens in on that conversation. So every year, the attorney general and the director of national intelligence formally ask the FISC to let them use Section 702 to surveil certain foreigners. Those requests also say what steps they plan to take to minimize potential violations of Americans' Constitutional rights. If the FISC grants those requests, then intelligence community is good to go.

In 2016, the court didn't grant any of those requests. The number of requests made was redacted, as in the previous year's report. As Sanchez noted, that could be because the AG and DNI asked for new powers the court didn't want to grant. However, it could also be for less interesting reasons. But the court's procedures are highly secretive, so we don't know. Anything involving Section 702 can have major political implications. President Donald Trump has alleged that he and his associates were "wiretapped" by the Obama administration for purely political reasons. There's no publicly available evidence the Obama administration did anything wrong, but we know U.S. spies listened in on conversations between Gen. Michael Flynn and the Russian ambassador—surveillance that was could have been authorized under Section 702.

This matters for Congress as well. The Section 702 authorities will expire at the end of 2017, so Congress will debate reauthorizing them. Securing their reauthorization is the single biggest legislative priority for the intelligence community, as Reuters' Dustin Volz has noted, but civil liberties advocates hope Congress will rein in some of those broad powers. When Trump was first elected, people in the civil liberties community were pessimistic about what his presidency might mean for privacy rights. But then his early-morning wiretapping tweetstorm gave them a weird ray of hope—maybe he would be surprisingly helpful on the issue? It remains to be seen—and Trump's ultra-hawkish CIA director, Mike Pompeo, is likely to be an enthusiastic opponent of any Congressional curtailing of Section 702 authorities.

Regardless, all things related to Section 702 will have major repercussions at the White House and on the Hill this year—and America's most secretive court could also be its most politically impactful.