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Schrems and the FAA's "Foreign Affairs" Prong: The Costs of Reform

By **Peter Margulies** Monday, October 12, 2015, 9:53 AM

While the ECJ's decision in *Schrems v. Data Commissioner* suggests that reforms will be necessary to save the US-EU safe harbor framework, both EU officials and U.S. privacy advocates have sometimes urged reforms without a full accounting of costs and benefits. Tim Edgar's insights and his appreciation of the real need for reform are most valuable. However Tim's suggestion that Congress drop the "conduct of the foreign affairs of the United States" prong of the FISA Amendments Act (FAA) doesn't reckon with that proposed reform's costs.

EU negotiators who have long cited this language (in 50 U.S.C. sec. 1801(e)(2)(B)) have argued, with Tim, that the subsection licenses indiscriminate collection of data abroad, since virtually anything could relate in some fashion to U.S. foreign affairs. For example, the November 2013 "Report on the Findings by the EU Co-Chairs of the ad hoc EU-US Working Group on Data Protection" (EU Report) (p. 4), cited by the ECJ in *Schrems* (para. 11) takes this tack.

U.S. officials have a ready response rooted in the text of the statute. The foreign affairs prong of the FAA is not a catch-all. Instead, it pertains only to information "with respect to a foreign power or foreign territory." See 50 U.S.C. 1801(e)(2). A foreign power is a state or a nonstate actor such as Al Qaeda. Under established principles of statutory construction, the indefinite article, "a," used in the statute modifies both "power" and "territory." A "foreign territory" under the statute is therefore a specific territory, not any area physically located abroad. If "foreign territory" had a broader meaning, the term "foreign power" would be superfluous. Courts typically view Congress as intending to have each term in a statute serve a distinct meaning; they therefore reject statutory constructions that render particular statutory terms superfluous or duplicative of other terms.

U.S. officials have repeatedly informed EU officials of this textual backdrop to the FAA's foreign affairs authority. EU Report, pp. 4-5. However, EU officials have continued to maintain, despite this evidence from statutory text, that the U.S. could use this authority to spy on the "political activities of individuals or groups." EU Report at 5. One cost of Tim's reform would be encouraging EU negotiators to cite only the portions of U.S. statutes that serve their arguments. That is one tendency that the EU officials already exhibit. Real reform, however, should have a basis in the entire relevant body of law.

More tangibly, jettisoning the FAA's foreign affairs prong would impair the United States' ability to detect and deter foreign governments' collusion with foreign firms in conduct that violates international and bilateral trade agreements. (See the 2000 briefing by ex-CIA director James Woolsey [here](#).) James Dempsey of the Privacy and Civil Liberties Oversight Board (PCLOB), a long-time privacy advocate, referred to the foreign affairs prong at the PCLOB's hearing on the FAA, arguing that this subsection wisely authorized collection about the "intent of foreign governments." (p. 286). Without this authority, the U.S. will have fewer legal means available to combat foreign trade abuses. That loss of capacity may relieve officials abroad who wish to give foreign firms an unfair trade advantage, but it will do little to enhance global privacy.

A more effective reform might be to expressly authorize collection of information relating to foreign trade abuses. However, this change would also have costs. The current wording of the foreign affairs prong allows the U.S. to collect information regarding this legitimate foreign intelligence concern, without complicating its diplomatic efforts, which may involve cooperation with officials of the same government that has triggered U.S. intelligence collection. If the U.S. is seeking cooperation from a foreign government regarding sanctions on Iran or another vital matter, public acknowledgment of a U.S. fair trade investigation might throw a monkey wrench into the negotiations.

Flexibility is a crucial ingredient in foreign affairs, as the Framers appreciated. Public acknowledgment of U.S. capabilities in this area would deprive the U.S. of this diplomatic tool. A reform with such costs may not be worth the candle.

Topics: [Surveillance](#)

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