Statement to the Privacy & Civil Liberties Oversight Board
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You have asked me for my views on U.S. data collection efforts under Section 702 of the FISA Amendments Act, 50 U.S.C. § 1881a (the "702 program"). I understand that under PRISM and possibly other programs under section 702, the U.S. government collects data on foreign citizens in foreign countries by intercepting Internet communications or obtaining access to private databases.

I have been asked to provide my opinion as to whether the 702 program violates international law, and if the United States should afford all persons, regardless of nationality, a common baseline level of privacy protection. For reasons I provide below, I do not believe that the 702 program violates international law. Nor do I believe that the United States should unilaterally recognize privacy rights for all persons regardless of nationality or location.

I. Does International Law Prohibit the U.S. Government from Monitoring Foreign Citizens in Foreign Countries?

I will limit my discussion to general principles of international law and human rights treaties. I will not discuss any specific agreements between the United States and other countries that prohibit or limit U.S. surveillance of citizens of those countries.[1] Given constraints on time, my discussion should be regarded as preliminary.

General principles of sovereignty

All nations enjoy "sovereignty," roughly, the right to control their own territory without interference from foreign governments. One could argue that surveillance of foreign citizens in a foreign country violates that country's sovereignty because it interferes with those citizens' ability to conduct their day-to-day activities.

However, while this surveillance violates sovereignty in a colloquial sense, it does not violate sovereignty in a legal sense. The legal concept of sovereignty is ambiguous and hotly contested, and it is best understood as a principle of international law rather than a specific rule. Countries protect their sovereignty by negotiating treaties and recognizing specific norms of customary international law.

Human rights treaties

Some commentators have suggested that foreign surveillance may violate international human rights law. Article 12 of the Universal Declaration of Human Rights provides that

[1] For example, it has been suggested that the parties to the Five Eyes agreements (http://www.nsa.gov/public_info/declass/ukusa.shtml) have agreed not to engage in espionage on each other.

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Similarly, article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

Other treaties use similar language. The European Convention on Human Rights makes clear that the right to privacy is limited, according to article 8, "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Among these instruments, only the ICCPR binds the United States. (The Universal Declaration does not have status as binding international law.) The longstanding U.S. view is that the ICCPR protects people from abuses by their own governments, not from actions by foreign governments with respect to individuals outside the territory over which the government has jurisdiction.[2] Thus, the 702 program, which is directed at foreigners in foreign territory, is not governed by the ICCPR.

Moreover, the ICCPR does not define "privacy," a notoriously ambiguous term. Privacy refers to the extent to which information about a person's activities, characteristics, and possessions are generally known, or known by the government. Governments routinely collect huge amounts of information about people—where they live, how much they earn, medical conditions if they use government facilities or insurance, and so on. People's activities in the workplace and in public can be monitored and recorded. Governments can pursue investigations of people who act suspiciously or are thought responsible for a crime; their powers to collect information increases as the level of suspicion increases.

All countries balance social interests in obtaining information about people and individual interests in maintaining privacy in different ways. The ICCPR did not try to settle these disagreements, or provide for a minimum level that all countries agreed to. Nor has the term been given definition in subsequent government declarations, judicial decisions, or authoritative judgments that have garnered the consensus of all states. Most states engage in

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[2] This position is based on article 2(1), which provides that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant" (emphasis added). Even if the provision could be interpreted to apply to U.S. government actions outside U.S. territory, as some commentators argue, the "jurisdiction" language implies that the relevant individuals must be in the control of U.S. officials (for example, in a U.S.-controlled facilities), which is rarely the case for surveillance.

surveillance of foreign citizens; thus, state practice suggests that states do not believe that Article 17 bans foreign surveillance.

Some international law scholars argue that human rights norms have been embodied in customary international law. Customary international law comprises norms that states recognize even though they do not incorporate them into treaties. Thus, an argument could be made that the United States and other countries are bound to norms that prohibit surveillance or that limit surveillance to certain conditions—for example, when an urgent interest is at stake, or if procedural requirements (like a judicial warrant) have been satisfied.

To establish a norm of customary international law, one must usually show that states both recognize the norm and act consistently with it. However, there is no evidence that states believe that governments are prohibited from engaging in surveillance of foreign citizens. Indeed, as far as I understand, nearly all states with the capacity to do so engage in some form of surveillance. To quote one commentator:

> The NYT, based on a Le Monde story, reports that "France has its own large program of data collection, which sweeps up nearly all the data transmissions, including telephone calls, e-mails and social media activity, that come in and out of France." French officials claim there is "a difference between data collection in the name of security and spying on allied nations." Yes, there is a difference. But France does the latter as well. France is a well-known leader in industrial espionage. Ellen Nakashima reported earlier this year that a recent National Intelligence Estimate named France in the second tier of countries behind China that "engaged in hacking for economic intelligence." WikiLeaks had earlier revealed American cables indicating that "France is the country that conducts the most industrial espionage on other European countries, even ahead of China and Russia." And there are many other examples, as Adam Rawnsley at FP details. France might nonetheless claim a difference between (a) its practice or comprehensive surveillance at home and economic surveillance abroad, and (b) espionage against allied governments. But its industrial espionage often targets defense contractors closely tied to governments. And in any event, there is every reason to think that France engages in espionage against foreign governments, including, sometimes, allies. In response to French claims "that they do not spy on the American Embassy in France," today's NYT notes that American officials – speaking to reporters in polite diplomatese in order to not reveal what the USG surely knows for certain – "are skeptical of those reassurances, and have pointed out that France has an aggressive and amply financed espionage system of its own."[3]

As do countless other countries.

In response to revelations about PRISM, the German government proposed that a new international treaty, an Optional Protocol to Article 17 of the ICCPR, be drafted to address the problem of data privacy.[4] The proposal implicitly acknowledges that no such data protections exist in international law. The German government has not yet proposed a draft, which further

[3] Jack Goldsmith, On French Espionage, Lawfare, July 5, 2013.
[4] Measures for Better Privacy Protection (2013), http://www.scribd.com/doc/171155043/Measures-for-Better-Privacy-Protection.

underlines the fact that significant disagreement exists about the scope of such protections, and that this disagreement will need to be resolved before an Optional Protocol can be approved.

II. Should the United States Afford All Persons, Regardless of Nationality, a Common Baseline Level of Privacy Protection?

The United States engages in surveillance of foreign citizens in order to protect itself from foreign threats, broadly defined. From the standpoint of the national interest, the major reason to limit surveillance is that other countries may retaliate by spying on American citizens, or the populations of other countries or their governments will, when they find out about surveillance (as they have, and inevitably will again), be offended and engage in actions that harm American interests, like reducing intelligence cooperation.

However, these considerations do not seem strong. First, as noted in Part I, other countries already engage in surveillance of Americans. If we object to this practice, then we should negotiate with other countries and come to agreements under which we limit surveillance of their citizens and they limit surveillance of our citizens. It may well be that such agreements are in the national interest, but until such agreements are negotiated, there is no reason for the United States to extend protections unilaterally. If it did, other countries would gain nothing by restricting their own behavior.

Moreover, the United States very likely has much stronger espionage capacities than other countries, and so it is not clear that the benefits for the United States from these hypothetical agreements exceed these costs. Most other countries cannot afford to break off intelligence cooperation with the United States because they rely on U.S. intelligence assistance to protect themselves from national security threats.

Second, while the Snowden revelations provoked public outrage in foreign countries, it does not seem that concrete examples of significant retaliation have taken place, or that long-term harm to relationships with foreign countries have occurred. But even if they have, the remedy is to afford privacy protections only to citizens in countries with which the United States has good relations (Germany, France) or other countries where popular opinion is important for U.S. interests. There is no reason to extend privacy protections to North Koreans or Iranians. Thus, considerations of national interest suggest that the United States should not afford all persons, regardless of nationality, a baseline level of privacy protection.

A final argument in favor of such protections is that the United States should set global standards for political morality, and spying on foreign citizens violates political morality. Many philosophers argue that governments are obligated to protect human dignity and that this obligation transcends borders. Spying on people violates their dignity; therefore, it should be prohibited.

But it is far from clear that espionage harms people's dignity; everything depends on context. Suppose that the NSA collects the emails of foreigners and conducts searches of them for keywords. Occasionally a false positive turns up, and an analyst reads someone's email to his

lover, therapist, or doctor, ascertains that the email contains no information that identifies terrorists or other security threats, and deletes it. The writer of the email never finds out, and the analyst of course has no idea who this person is. Has a human right been violated? It is hard to identify an affront to human dignity, or even a harm, any more than if a police officer overhears a snatch of personal conversation on the bus.

The case for requiring the U.S. government to respect the privacy of Americans is greater than the case for requiring it to respect the privacy of foreigners because the U.S. government has coercive power over Americans, while it almost never does over foreigners. Thus, the U.S. government could misuse private information in order to inflict harm against Americans, but not against foreigners, who benefit from the protection of their own governments.