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Privacy and Civil Liberties Oversight Board
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Thank you for inviting me to appear before the Board today to discuss whether international law imposes limits on electronic surveillance of foreign nationals outside the United States. While there are many reasons, both moral and political, for the United States to respect the privacy rights of non-citizens, international law does not establish a universal right to privacy that limits the electronic surveillance by one country of nationals of another country. I will focus in particular on the International Covenant on Civil and Political Rights (ICCPR), the treaty some argue establishes such a right. As the Obama Administration confirmed last week, the ICCPR does not apply outside the territory of the United States or obligate the United States as a legal matter to respect privacy rights overseas.

My testimony is informed by my experience as a senior legal official for the U.S. Government. From 2005 to 2009, I served as The Legal Adviser for the Department of State under Condoleezza Rice. In this capacity, I was the senior international lawyer for the U.S. Government, with responsibility for coordinating the negotiation, Senate approval, Presidential ratification, and interpretation of all treaties. I have extensive experience with human rights treaties, including the ICCPR. During the first term of the Bush Administration, I served in the White House as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001-2005. I previously served as Counsel for National Security Matters in the Criminal Division of the Department of Justice during the second term of the Clinton Administration, as Counsel to the Senate Select Committee on Intelligence, and as Special Assistant to Director of Central Intelligence William Webster.

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In recent months, some scholars and human rights advocates have argued that NSA surveillance of foreign nationals violates a so-called "universal right to privacy" recognized by international law. They base their argument on Article 17 of the ICCPR, which provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."[1] The United States ratified the ICCPR in 1992.

[1] ICCPR, Art. 17(1), www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

For the past 64 years, the United States has taken the consistent position that the ICCPR does not apply extraterritorially. The United States advanced this view when the treaty was negotiated in 1950[2] and re-articulated it 1995,[3] when the Clinton Administration submitted its first report to the U.N. Human Rights Committee, the group that monitors compliance by states party with the ICCPR. My predecessor, the then-State Department Legal Adviser Conrad Harper, explained to the Committee that the United States' position that the ICCPR imposes obligations on the United States only inside the United States was based both on the text of the treaty and the negotiating history.

The textual argument relies on a jurisdictional provision in Article 2 that sets out the ICCPR's scope: it binds a party state "to respect and to ensure" the rights recognized in the treaty "to all individuals within its territory and subject to its jurisdiction." As Conrad Harper observed, this is a "dual requirement" that establishes that treaty obligations apply only if both conditions are satisfied: an individual is "under United States jurisdiction *and* within United States territory" (emphasis added).[4] Had the treaty been intended to apply if either condition was satisfied – and regardless of whether a State was acting within its own territory -- the drafters would have used the word "or" rather than the word "and."

The negotiating history confirms the United States' interpretation. The phrase "within its territory" was added to the then-draft treaty in 1950 at the United States' suggestion.[5] Eleanor Roosevelt, who led the United States' delegation, explained that the United States was "particularly anxious" to forestall any "obligation to ensure the rights recognized in [the treaty] to citizens of countries under United States occupation," i.e., persons potentially within the United States' jurisdiction, but not within its territory.[6] The "purpose of the proposed addition," she explained, is "to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states."[7] The addition was adopted by an 8-2 vote in 1950, and subsequent proposals to delete the phrase failed, in 1952 and 1963.[8] In his statement to the U.N. Human Rights Committee, Conrad Harper explained that the words were added "with the clear understanding that such wording would limit the obligations to within a Party's territory."[9]

It is true that the U.N. Human Rights Committee and many other countries do not agree with the longstanding U.S. interpretation. For example, in its General Comment 31 in 2004, the Human Rights Committee took the position that the ICCPR requires states to "respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State

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[2] United States' Third Periodic Report to the Human Rights Committee, CCPR/C/USA/328 (November 2005), Annex 1.
[3] Statement of Conrad Harper, Human Rights Committee, CCPR/C/SR.1405 (April 24, 1995), para. 20.
[4] *Id.*
[5] United States' Third Periodic Report to the Human Rights Committee, *supra* note 2.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] Statement of Conrad Harper, *supra* note 3, para. 20.

Party."[10] But the Committee's statement did not engage with the actual language of the treaty. In essence, the Committee simply asserted without explanation that "and" is best read as "or." In any event, General Comment 31 and other statements made by the Human Rights Committee do not have binding legal effect on the United States or other parties to the ICCPR.

Both the Bush and Obama Administrations have formally confirmed the Clinton Administration position in statements to the Human Rights Committee. The Bush Administration did so in 2005 in its second and third periodic report to the Committee,[11] and the Obama Administration did so just last week. On March 13, 2014, Mary McLeod, the State Department's Principal Deputy Legal Adviser, told the Committee that "the United States continues to believe that its interpretation — that the covenant applies only to individuals both within its territory and within its jurisdiction — is the most consistent with the covenant's language and negotiating history."[12]

Even if the ICCPR did apply to persons subject to U.S. jurisdiction but outside U.S. territory, the treaty would still not establish a universal right to privacy applicable to persons overseas. In General Comment 31, the Human Rights Committee defined the phrase "subject to" a party's "jurisdiction" to include people "within the power or effective control power or effective control of the forces of a State Party acting outside its territory" – for example, because one state is occupying another.[13] Thus, not even the Human Rights Committee argues that everyone in the world is subject to United States "jurisdiction" merely by virtue of communicating over a telephone line. Accordingly, the ICCPR does not impose limits on NSA surveillance of non-U.S. nationals in, for example, China or Germany or Russia or France, because the citizens of those countries are not subject to United States jurisdiction.

While many foreign governments have objected to NSA surveillance, none (so far as I am aware) believes that the ICCPR or any other provision of international law imposes an obligation to respect the privacy rights of non-citizens. Countless nations conduct signals intelligence activities that involve spying on the citizens of other nations, including citizens of the United States. Germany, which is now leading an effort to update the ICCPR to cover digital surveillance,[14] is an example. Germany has previously taken the position that the European Convention on Human Rights, which is even more privacy-protective than the ICCPR, does not impose extraterritorial limits on surveillance. In the *Weber* case in 2006, Germany told the European Court of Human

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[10] Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (2004), para. 5.

[11] United States' Third Periodic Report to the Human Rights Committee, Annex 1, CCPR/C/USA/328 (November 2005). The second report was combined with the third.

[12] Charlie Savage, *U.S., Rebuffing U.N., Maintains Stance That Rights Treaty Does Not Apply Abroad*, N.Y. Times, March 13, 2014.

[13] General Comment No. 31, para. 10.

[14] Ryan Gallagher, *After Snowden Leaks, Countries Want Digital Privacy Enshrined in Human Rights Treaty*, Slate, Sept. 26, 2013, 2:16 pm, http://www.slate.com/blogs/future_tense/2013/09/26/article_17_surveillance_update_countries_want_digital_privacy_in_the_iccpr.html.

Rights that the Convention did not apply to Germany's interceptions of the communication of Uruguayan citizens in Uruguay, because the Uruguayans were not within Germany's jurisdiction.[15]

Finally, even if the ICCPR did impose certain obligations on the United States' extraterritorial conduct, that is a far cry from stating that NSA surveillance violates the ICCPR. Article 17 of the ICCPR only bans "arbitrary and unlawful interference" with privacy. U.S. intelligence officials have emphasized that NSA conducts electronic surveillance of foreign nationals only for valid national security purposes, not for arbitrary reasons.[16] There is no generally accepted framework -- either in the ICCPR or elsewhere in international law -- for evaluating when surveillance of the citizens of one state by another state is arbitrary or unlawful -- whether for reasons of national security or for any other reason. The proposition that there is universal recognition that a state may not unlawfully intrude on the privacy rights of non-citizens overseas is dubious if no one can articulate when such an intrusion would in fact be unlawful.

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I want to close by emphasizing that international law is only one relevant consideration here. My view that international law does not recognize a universal right to privacy does not imply that the United States should be insensitive to the privacy of non-U.S. citizens. Though not required by international law, President Obama's recent Presidential Policy Directive on signals intelligence states that "signals intelligence activities must take into account that all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside, and that all persons have legitimate privacy interests in the handling of their personal information."[17] It is perfectly appropriate for the United States, as a matter of policy, to impose privacy-based limits on surveillance activities where doing so is consistent with our need to collect foreign intelligence and protect the national security.

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[15] *Weber v. Germany*, No. 54934/00, para. 66, ECHR 2006.

[16] Remarks of Robert Litt, ODNI General Counsel, Brookings Institution, July 19, 2013 http://www.brookings.edu/~/media/events/2013/7/19%20privacy%20security%20intelligence/20130719_intelligence_security_privacy_transcript.pdf

[17] Presidential Policy Directive/PPD-28, Signals Intelligence Activities (Jan. 17, 2014).