



Fourth Amendment and Foreigners: Does it Apply?

The National Security Agency's (NSA) surveillance of foreign leaders has been [well publicized](#). The phones of politicians from Germany to Brazil, from France to Spain, were tapped and the conversations were monitored and recorded by agents of the government of the United States.

Although President Obama has committed to "[curbing](#)" the spooks' unwarranted and out of control surveillance of ostensibly friendly leaders, no such order has to date been issued.

None of the president's promised "reforms," however, addresses the problem of the "vacuuming up" of international data from a Fourth Amendment perspective. When it comes to the surveillance of non-Americans and the protections provided by law against such action, relevant provisions of the Foreign Intelligence Surveillance Act (FISA) are most often cited, not the Fourth Amendment or any other part of the Constitution.

One can assume, therefore, that neither the president nor the heads of the U.S. intelligence agencies believe that the Bill of Rights covers targets residing outside the borders of the United States.

In an [opinion piece published in the Washington Post](#), David Ignatius puts a finer point on the official denial of fundamental rights — in this case, the Fourth Amendment — to foreigners. He writes:

Just considering this question unsettles U.S. intelligence officials, who for years have responded to queries about privacy issues with a bland dismissal. "The Fourth Amendment doesn't apply to foreigners," officials will say. The dirty little secret (not so secret anymore) is that the job of spy agencies is to violate other countries' borders and laws to collect information.

Later, Ignatius draws on the research of a legal scholar regarding the real repercussion of dividing people into various classes: those with rights and those without.

"Are there to be two classes of people in society — those who 'deserve' rights, and have them, and those who do not?" asks my friend Garrett Epps, a professor of constitutional law at the University of Baltimore, in discussing the Fourth Amendment in his new book, "American Epic," which examines line by line what the Constitution actually says.

Ignoring this strictly constitutional approach, other writers who have raised the issue of the Fourth Amendment in the context of the NSA's foreign surveillance typically arrive at a prohibition on such from a decidedly unconstitutional source.

For example, in a blog post he calls "[We are all Foreigners: NSA Spying and the Rights of Others](#)," Georgetown Law School professor David Cole argues for an end to the overseas monitoring based on the following rationales:

First, "The right to privacy, protected in human rights treaties that the US has signed, such as the International Covenant on Civil and Political Rights, is not limited to the people's leaders, but is said to





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be a right of all human beings.”

The agreement Cole cites is a multinational United Nations treaty ratified by the U.S. Senate in 1992, albeit with five reservations. Although the United States is a signatory to the covenant, the UN has expressed concern with the United States’ failure to comply with the terms of the treaty.

Regardless of the explicit unconstitutionality of the [International Covenant on Civil and Political Rights](#), Cole’s reliance on UN treaties is unnecessary.

Unlike the [United Nations Declaration of Human Rights](#) referenced in that article, the U.S. Constitution was not written to set out the scope of the rights of citizens. In fact, rights are neither granted nor protected, strictly speaking, by the Constitution. The sole purpose of the Constitution is to limit the powers of government, marking the metes and bounds of the authority of the federal government.

With this understanding, then, one comes to see that the Constitution applies only to actions of officers of the federal government and as such, not only does not “apply” to American citizens, but also does not apply to any individual anywhere not serving in a federal government capacity.

Cole’s second reason for denying to the NSA the power to monitor foreign telephone and Internet traffic is based on what one commentator called a “a global view of government, by which governments are accountable to all humans worldwide.” Cole argues:

The reality is that we are all foreigners from the standpoint of every other nation. And while at the moment the NSA may be at the forefront of technological surveillance capacity, other nations are not likely to be far behind. How would we feel if we had recently learned that France — or China — was collecting data on millions of Americans’ communications, or directly monitoring President Obama’s cell phone? If we extend no protection to other countries’ nationals, why should we expect them to respect our privacy rights? Thus, it’s in our own interest to identify some reciprocal principles to preserve privacy in the digital age.

This could be called Cole’s “Golden Rule” of surveillance (Americans shouldn’t accept their own government spying on foreigners unless they would likewise accept being spied on in the same way by the governments of those foreigners). In response to [an opposing blog post](#) written by George Washington University law professor Orin Kerr, Cole likens the possible effect of such unilateral spying to “blowback.” He writes:

If we engage in practices that incur the ire of large swaths of the public in foreign countries, we are much less likely to find the cooperation we need from their governments, or from the people themselves. The people themselves are often the best sources of intelligence. But if the people come to resent the US because it is spying on them without just cause, they are much less likely to provide intelligence. And they are much more likely to object to their governments sharing information with us as well.

While these “do unto others as you would have them do unto you” arguments are worthwhile, the point of this article is whether the specific types of searching and seizing forbidden by the Fourth Amendment are applicable to citizens of other countries.

In deciding whether to make room for all people — not just Americans — under the Constitution’s umbrella of civil liberties, one need look no further than the text of the Fourth Amendment itself for the identity of those whom the Founders intended to shield from the eye and ear of an all-powerful government. [The Fourth Amendment declares:](#)



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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The *people* are protected, not just the *American* people. For the sake of reference, one need recall the statement in the Declaration of Independence that “all men are created equal.” Furthermore, all men are endowed by their Creator with rights, rights they enjoy as offspring of the Almighty. Thus, as there is no man, woman, or child that is not the creation of God, there is none of them that is not a beneficiary of the rights He bestowed upon them.

Finally, in his dissenting opinion in the case of [U.S. v. Verdugo-Urquidez](#) 494 U.S. 259 (1990), Supreme Court Justice William Brennan wrote:

What the majority ignores, however, is the most obvious connection between Verdugo-Urquidez and the United States: he was investigated and is being prosecuted for violations of United States law and may well spend the rest of his life in a United States prison. The “sufficient connection” is supplied not by Verdugo-Urquidez, but by the Government. Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed.

Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose “societal obligations,” such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.

By concluding that respondent is not one of “the people” protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them. We have recognized this fundamental principle of mutuality since the time of the Framers.

In nearly every instance of NSA surveillance that has come to light since the first leak of documents by former subcontractor Edward Snowden, it is apparent that the federal government has not obeyed the Constitution in its treatment of either American citizens or those of another country.

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