

NO PROTECTION FOR INTERNATIONAL COMMUNICATIONS: RUSS FEINGOLD TOLD US SO

Both the ACLU's Jameel Jaffer and EFF have reviews of the government's latest claims about Section 702. In response to challenges by two defendants, Mohamed Osman Mohamud and Jamshid Muhtorov, to the use of 702-collected information, the government claims our international communications have no Fourth Amendment protection.

Here's how Jaffer summarizes it:

It's hardly surprising that the government believes the 2008 law is constitutional – government officials advocated for its passage six years ago, and they have been vigorously defending the law ever since. Documents made public over the last eleven-and-a-half months [by the Guardian](#) and others show that the NSA has been using the law aggressively.

What's surprising – even remarkable – is what the government says on the way to its conclusion. It says, in essence, that the Constitution is utterly indifferent to the NSA's large-scale surveillance of Americans' international telephone calls and emails:

The privacy rights of US persons in international communications are significantly diminished, if not completely eliminated, when those communications have been transmitted to or obtained from non-US persons located outside

the United States.

That phrase – “if not completely eliminated” – is unusually revealing. Think of it as the Justice Department’s twin to the NSA’s “collect it all”.

[snip]

In support of the law, the government contends that Americans who make phone calls or sends emails to people abroad have a diminished expectation of privacy because the people with whom they are communicating – non-Americans abroad, that is – are not protected by the Constitution.

The government also argues that Americans’ privacy rights are further diminished in this context because the NSA has a “paramount” interest in examining information that crosses international borders.

And, apparently contemplating a kind of race to the bottom in global privacy rights, the government even argues that Americans can’t reasonably expect that their international communications will be private from the NSA when the intelligence services of so many other countries – the government doesn’t name them – might be monitoring those communications, too.

The government’s argument is not simply that the NSA has broad authority to monitor Americans’ international communications. The US government is arguing that the NSA’s authority is *unlimited* in this respect. If the government is right, nothing in the Constitution bars the NSA from monitoring a phone call between a journalist in New York City and his source in London. For that matter, nothing bars the NSA from monitoring

every call and email between Americans in the United States and their non-American friends, relatives, and colleagues overseas.

I tracked Feingold's warnings about Section 702 closely in 2008. That's where I first figured out the risk of what we now call back door searches, for example. But I thought his comment here was a bit alarmist.

As I've learned to never doubt Ron Wyden's claims about surveillance, I long ago learned never to doubt Feingold's.