

DID THE GOVERNMENT “KNOW WHO JOURNALISTS ARE TALKING TO” IN THE KIRIAKOU INVESTIGATION?

As I laid out in this post, the complaint in the Jon Kiriakou case shows that the Patrick Fitzgerald-led investigative team could have found Kiriakou as the ultimate source for some Gitmo detainee lawyers' information on two people associated with the torture program without accessing journalists' communications directly (though the FBI has the contents two of Kiriakou's email accounts, which likely contain a great deal of communication with journalists).

The sole possible exceptions are two emails between Journalist A and the Gitmo detainee lawyers' investigator:

At 11:31 a.m. on August 19, 2008, approximately two hours after KIRIAKOU disclosed Covert Officer A's last name to Journalist A, Journalist A sent an email to the defense investigator referenced above that contained Covert Officer A's full name in the subject line. The email further stated: "His name is [first and last name of Covert Officer A]." At 1:35 p.m., Journalist A sent a final email to the defense investigator in which he stated: "my guy came through with his memory." Neither Journalist A nor any other journalist to my knowledge has published the name of Covert Officer A.

[snip]

For example, in an email dated April 10,

2008, Journalist A provided the defense investigator with Officer B's home phone number.

The implication in the complaint is that the FBI got these emails from the investigator. But unlike Kiriakou's emails, which it explains were, "recovered from search warrants served on two email accounts associated" with Kiriakou, the complaint doesn't explain how and from whom the FBI obtained the emails between Journalist A and the defense team investigator.

Nevertheless, the complaint provides fairly innocuous possible explanations for how the FBI got a whole lot of emails involving journalists for this investigation. So maybe we have nothing to worry about.

Or maybe we do. It is also possible the government collected all communications within two degrees of separation from the defense investigator—thereby exposing a wide range of journalists' sources—and we'd never know it.

That's true for two reasons.

First, because this investigation is the first known leak investigation that has extended into the period—post October 15, 2011—during which the new Domestic Investigation and Operations Guide was in effect. The new DIOG made it a lot easier to use National Security Letters to get the contact information of journalists in investigations, like this one, with a national security nexus.

[T]he new DIOG seems to make it a lot easier to get news media contact records in national security investigations. A heavily-redacted section (PDF 166) suggests that in investigations with a national security nexus (so international terrorism or espionage, as many leak cases have been treated) DOJ need not comply with existing restrictions requiring Attorney General approval before getting the phone

records of a journalist. The reason? Because NSLs aren't subpoenas, and that restriction only applies to subpoenas.

Department of Justice policy with regard to the issuances of subpoenas for telephone toll records of members of the news media is found at 28 C.F.R. § 50.10. The regulation concerns only grand jury subpoenas, not National Security Letters (NSLs) or administrative subpoenas. (The regulation requires Attorney General approval prior to the issuance of a grand jury subpoena for telephone toll records of a member of the news media, and when such a subpoena is issued, notice must be given to the news media either before or soon after such records are obtained.) The following approval requirements and specific procedures apply for the issuance of an NSL for telephone toll records of members of the news media or news organizations. [my emphasis]

So DOJ can use NSLs—with no court oversight—to get journalists' call (and email) records rather than actually getting a subpoena.

The section includes four different approval requirement scenarios for issuing such NSLs, almost all of which are redacted. Though one only partly redacted passage makes it clear there are some circumstances where the approval process is the same as for anyone else DOJ wants to get an NSL on:

If the NSL is seeking telephone toll records of an individual

who is a member of the news media or news organization [2 lines redacted] there are no additional approval requirements other than those set out in DIOG Section 18.6.6.1.3 [half line redacted]

The authority to get NSLs is troubling for a number of reasons. DOJ Inspector General Glen Fine caught FBI using NSLs to get at least two journalists' contacts in the past (as well as another journalists' contacts via subpoena; that journalist has never been informed). As James Risen noted in his Jeffrey Sterling subpoena affidavit, there is reason to believe the government, at some point, got Risen's contacts.

Around the same time that the Government was making public statements about potentially prosecuting journalists, Brian Ross and Richard Esposito of ABC News reported on May 15, 2006, that senior federal law enforcement officials had informed them that the government was tracking the phone numbers of journalists without the journalists' knowledge as part of an effort to root out the journalists' confidential sources. According to the article, the journalists' phones were not being "tapped," but the government was tracking the incoming and outgoing numbers called and received on the journalists' phones. The story stated that the government was examining the phone calls and contacts of journalists from ABC News, The New York Times, and the Washington Post as part of a "widespread CIA leak investigation." I was mentioned by name as one of the reporters whose work the government was looking into.

[snip]

I have reason to believe that the story by Brian Ross and Richard Esposito is true. Since that story was published, I have learned from an individual who testified before a grand jury in this District that was examining my reporting about the domestic wiretapping program that the Government had shown this individual copies of telephone records relating to calls made to and from me.

Also note: Ross and Esposito are, themselves, very possible candidates to be Journalist A in the Kiriakou complaint, given that Kiriakou had a contract with ABC during the period he is alleged to have leaked to Journalist A.

There is plenty of reason to believe the government has collected key national security reporters' contacts in the past; the new DIOG allows them to do so much more freely.

Then there's the other detail I noted yesterday. The Air Force Office of Special Investigations played some "significant" role in this investigation.

Mr. Fitzgerald announced the charges with James W. McJunkin, Assistant Director in Charge of the Washington Field Office of the FBI, and they thanked the CIA for its very substantial assistance in the investigation, as well as the Air Force Office of Special Investigations for its significant assistance. [my emphasis]

While AFOSI's involvement might be that, simply, of a counterintelligence function tied to a Special Access Program—the torture program—they also have the cyber capabilities to track communications in ways that may exist entirely outside of quaint guidelines like phone toll records and NSLs.

Last summer, not long after James Risen successfully limited the subpoena in the Jeffrey

Sterling case, Lucy Dalglish described an Aspen Institute meeting between national security reporters, lawyers, congressional staffers, and national security officials. As Dalglish describes, a national security representative at the meeting boasted that the government no longer needs subpoenas.

After reading Mayer's article, I was not surprised when one national security representative at Wye River told us (rather gloatingly) on our last day: "We're not going to subpoena reporters in the future. We don't need to. We know who you're talking to."

Some national security rep bragged, last summer, that the government already knew who national security journalists were talking to. Since then, the FBI has gotten more formal authority to find out, without telling journalists.

Did the government use the CIA's attempt to intimidate now-exonerated detainee lawyers as an excuse to find out who national security reporters are talking to?