THE NSA MAY NOT "TARGET" LAWYERS, BUT IT DOES "SPY" ON THEM

Congratulations to Ben Wittes who, with this post, demonstrates how the NSA can "spy" on Americans without "targeting" them.

His piece consists of several steps. First, Wittes goes to great effort to show that Laura Poitras and James Risen have not shown that the American law firm representing the Indonesian government, Mayer Brown, was "targeted" (though he seems to think that means they weren't spied on).

> For starters, it is important to emphasize that the *Times* story does not involve NSA spying. It doesn't involve any remotely-plausible suggestion of illegality. It doesn't involve any targeting of Americans. And it doesn't involve any targeting of lawyers either.
>
> The facts the story reports are these:
>
> - *The surveillance in question was conducted by the Australian Signals Directorate (ASD), not NSA.*
> - *The surveillance targeted Indonesian government officials engaged in trade talks with the United States.*
> - *The surveillance apparently took place overseas. (There is no suggestion in the story*

> *that the surveillance took place inside the United States.)*
>
> In other words, a foreign intelligence service was conducting surveillance against another foreign government, which was in communication with a U.S. law firm. [my emphasis]

This is a flimsy use of NSA's own euphemism, "targeting," given that NYT never uses the word in the context of the law firm (they do use it to discuss the law and make it clear ASD discovered they were spying on an American who was working for the USG). The verbs they use include "entangled," "caught up," "monitored," "ensnared," and "compromised." All verbs that describe what happens when someone talks to a targeted entity.

From there, Wittes takes a hypothetical quote offered by the NSA spokesperson, explaining that NSA sometimes does ask Five Eyes partners to take special precautions, to suggest the NSA did ask Australia's ASD to protect the US lawyers involved.

> An N.S.A. spokeswoman said the agency's Office of the General Counsel was consulted when issues of potential attorney-client privilege arose and could recommend steps to protect such information.
>
> "Such steps could include requesting that collection or reporting by a foreign partner be limited, that intelligence reports be written so as to limit the inclusion of privileged material and to exclude U.S. identities, and that dissemination of such reports be limited and subject to appropriate warnings or restrictions on their use," said Vanee M. Vines, the spokeswoman.

But doesn't quote the bit that makes it clear NSA would not — and was not — commenting on this case.

> The N.S.A. declined to answer questions about the reported surveillance, including whether information involving the American law firm was shared with United States trade officials or negotiators.

Then Wittes shows the ambiguity about what happened when the ASD told the US an American law firm had gotten caught in its surveillance, quoting from the text.

Here's the direct quote from the document in question.

> (TS//SI//REL) SUSLOC Facilitates Sensitive DSD Reporting on Trade Talks: According to SIGINT information obtained by DSD, the Indonesian Government has employed a US law firm to represent its interests in trade talks with the US. On DSD's behalf, SUSLOC sought NSA OGC guidance regarding continued reporting on the Indonesian government communications, taking into account that information covered by attorney-client privilege may be included. OGC provided clear guidance and DSD has been able to continue to cover the talks, providing highly useful intelligence for interested US customers.

Now, I agree this passage is not crystal clear (though it is less ambiguous than the text itself). What is clear is DSD (the name of which has subsequently been changed to ASD) continued spying on the Indonesian government — and sharing that spying with US "customers" — after SUSLOC consulted (on its behalf) with NSA's lawyers.

Wittes then points to how Section 702 minimization procedures (he admits the

minimization under EO 12333 in this case would be weaker) would "protect" these conversations — and after almost 300 words, admits that even the more stringent Section 702 procedures offer no specific protections for attorneys in a civil matter.

> NSA cannot target anyone for Section 702 collection—not even foreign persons overseas—without a valid foreign intelligence purpose. Section 702 categorically forbids intentionally targeting any U.S. person—or any other person believed to be inside the U.S. And it requires NSA to follow procedures to minimize any information acquired in the course of targeting non-U.S. persons reasonably believed to be located outside the United States. So it would be legal to target Indonesian officials engaged in trade talks with the United States, but NSA would have to discard any communications they might have with US persons—lawyers or not—to the extent there was no foreign intelligence value in those communications. And NSA would have to discard and mask the US persons' identities except to the extent that those identities themselves had foreign intelligence value.
>
> According to section 4 of the declassified 2011 guidelines governing minimization, moreover, additional protections kick in when it becomes apparent that acquired communications are taking place between any person known to be under criminal indictment in the United States and an attorney representing that individual in the matter. Monitoring of that communication must halt, the communication must be segregated from other acquired information and special precautions must be taken through the DOJ's National Security Division to ensure the communications play no part in any

> criminal prosecution. As an added precaution, the NSA Office of General Counsel is also required to review all proposed disseminations of U.S. person attorney-client privileged communications prior to dissemination.
>
> The 2011 minimization guidelines aren't airtight; critics have pointed out that calls that fall under attorney-client privilege need not be minimized if the target has not been criminally charged under U.S. law. And they thus would not protect attorney-client communications in a civil matter like a trade negotiation at all.

Which is a long-winded way of saying that even if the NSA followed more stringent Section 702 minimization procedures, even if it were conducting the collection directly rather than through a Five Eyes agreement, even if it were collecting data in the US, it could continue to collect these conversations and disseminate the content of them so long as it didn't disseminate the identities of the US persons involved.

Of course, that the NYT was able, with very little evidence, to identify with a high degree of certainty the firm and lawyers involved shows what that's worth.

So upon consultation, the ASD would have been told that even US rules on domestic spying would not prevent the NSA from spying on Mayer Brown off targeting directed at the Indonesian government. And all that's all ignoring that US persons get less protection under EO 12333.

So however you want to fetishize the word "target," what seems clear from the story is that a Five Eyes partner shared information with US customers, almost certainly including what should be the content of privileged attorney-client communications, on a matter in which the US was the legal adversary. That NSA did not push the button does not alter the clear

implication that the US was collecting, via its partner relationships, legally protected information on a party they were in a legal dispute with.

But this is not news!!!!

After all — in a case that has become central to the current legal understanding of FISA — the NSA not only spied on Wendell Belew's conversations when he was representing the Muslim charity al-Haramain (conversations he engaged in from the US), but they sent him a log of the conversations they spied on! There, like here, you could say the US didn't "target" the lawyer (they almost certainly targeted his client, Soliman al-Buthi), but the effect is still the same, listening in on privileged conversations in which the US is the adversary.

And if you think all that ended with the Bush administration, consider the case of Robert Gottlieb, all of whose pre-indictment calls with his client Adis Medunjanin (Najibullah Zazi's co-conspirator), were recorded.

> The first time Adis Medunjanin tried to call Robert C. Gottlieb in mid-2009, Gottlieb was out of the office. Medunjanin was agitated. He had to speak to an attorney. Gottlieb's assistant told him Gottlieb would be back soon. When Medunjanin spoke to the lawyer a little later, he was told he might need legal representation. He thought he might be under investigation.
>
> Over the next six months and in forty-two phone calls, Medunjanin sought legal advice from Gottlieb. When he was arrested in January 2010 on charges that he tried to bomb the New York subway, it was Gottlieb who defended him, receiving security clearance to review government documents pertinent to the case in the process.
>
> Gottlieb was preparing Medunjanin's defense when a federal officer in charge

> of information distribution e-mailed him that there was new classified information he needed to review at the US Eastern District Court in Brooklyn. "I went over to the Brooklyn Federal courthouse, went up to the secured room, gained entry with the secret security codes, opened the file cabinet that is also secure and in the second drawer was a CD," Gottlieb told me. On that CD were recordings of every single one of his forty-two phone calls with Medunjanin before he was taken into custody and indicted on January 7, 2010.

In this case, we know the government had a FISA warrant for Medunjanin (Enemies Within even tells us the FISA warrants were filed in NY). So we know that Gottlieb was not "targeted." But that didn't stop the government from collecting and listening to 42 privileged phone conversations between two American citizens taking place entirely within the US.

And all of these — the presumed case of Mayer Brown, the proven case of al-Haramain, and the proven case of Medunjanin — would have adhered to the Section 702 minimization procedures NSA apologists point to as some great protection for legally privileged conversations (though the surveillance of all of them took place under different authorities).

That should not lead anyone to believe — much less claim — that this means the US government doesn't spy on lawyers. On the contrary, it should demonstrate that no matter how many times someone wields the words "target" and "minimization procedures," it still permits the NSA to spy on privileged conversations between lawyers and their clients, with the only marginally meaningful protections offered to indicted defendants. Indeed, it should demonstrate how the NSA's special carve out for attorney client conversations doesn't amount to anything for the great majority of legally privileged conversations.

The entire point of spying — whether directly or via a partner, whether in the US or overseas — is getting the substance of communications. And NSA's minimization procedures allows them to do that in the case of a great deal of attorney-client conversations. We should not be surprised they've used that permission on multiple occasions.

Update: "So upon consultation" sentenced added for clarity.