

# DENSITY WITHIN LEGAL DENSITY

Ben Wittes has a long post trying to explain the NSA's job in such a way as to "tell a young student what intelligence collection under the rule of law looks like" without inducing "a sense of betrayal."

I have no problem with Wittes' attempt to develop such an explanation, nor any great gripe with his effort. I'm not going to accuse Wittes of being naked this time.

But I want to raise three details that show the problem behind the effort.

First, Wittes' entire statement reads,

NSA does not, except in emergencies, intentionally target for collection the communications of specific Americans without seeking a court order first, and it does not intentionally target for collection the communications of individuals known to be in the United States. It does, however, routinely acquire and store the communications of US persons and some domestic communications as a necessary incident to its broad collection directed at targets overseas—and it then has rules restricting the retention and use of this material to the extent it does not have foreign intelligence value. What's more, NSA routinely acquires in bulk the records, but not the contents, of domestic telephone communications, which it uses for narrow counterterrorism purposes.

With the caveat that most people's definition of "target" is not as specific as NSA's is, I don't have a big issue with this statement.

Except that it is false to say the phone dragnet

is only used “for narrow counterterrorism purposes.” As Dianne Feinstein stated and Keith Alexander confirmed back in June, the dragnet is used with al Qaeda related groups **and** with Iran.

It can only look at that data after a showing that there is a reasonable, articulable that a specific individual is involved in terrorism, actually related to al Qaeda or Iran.

Now, perhaps in reality the dragnet is used against Hizballah, which the US, at least, treats as a terrorist organization. But to the extent that the dragnet is used against specific individuals from Iran “involved in terrorism,” then the entire notion of “narrow counterterrorism purposes” goes out the window, because accusing Iran of engaging in terrorism, even in the context of Iraq (where I suspect such usage derives from) is problematic. That’s true not just because Iran has been the target of what might count as terrorist acts, including assassinations of civilians, but also because those whom we’ve listed as terrorists (including members of the Republican Guard and its bank) are engaged in what ought to be considered legitimate defense of a sovereign nation.

So even if you agree with the approach the US has adopted with Iran, including it among the terrorists you can use the phone dragnet against moves beyond “narrow” counterterrorism into counterterrorism as a tactical tool wielded against a state adversary. And that such definitions can happen in secret (Iran’s listings on Treasury’s terrorism list are not secret, but the choice to include it among the two general targets of the dragnet was secret until June) means there’s no reason to trust that the phone dragnet will remain narrowly targeted.

Then there’s the notion our targets are all overseas. They’re not. Hacking targets are in the US, and there’s good reason to believe the upstream collection is used against them (we do

know there's a cybersecurity certification for Section 702). NSA presumably manages to conduct this domestic spying in the guise of foreign intelligence by noting how difficult it is to attribute hacks (that's also presumably how it justifies holding all encrypted communications indefinitely). In other words, what we're seeing is a redefinition of "foreign" to incorporate more and more that is domestic, which in part amounts to using intelligence rather than law enforcement tools against criminal activity because some but not all of that criminal activity is propagated by states. (Note, in yesterday's hearing Peter Swire suggested NSA's info assurance function is where it serves as a domestic security agency.)

Then there's this statement from Wittes:

We want a robust foreign intelligence capability. We don't want our domestic relations between citizens and government conditioned by an intelligence agency—which necessarily uses secrecy, deceit and trade-craft that has no part in domestic governance.

This is why I harp constantly about the use of the dragnet to identify potential informants. Because it is precisely through that application of the dragnet where NSA's activities lead directly to the the interjection of secrecy, deceit, and trade-craft in domestic governance. Sure, FBI (that hybrid intelligence/law enforcement agency) carries out that secrecy, deceit, and trade-craft, not NSA. But the power of the dragnet makes all that deceit potentially far worse (because it provides a way to exploit the secrets of innocent citizens to coerce them to become informants). That NSA is one step removed from this troubling approach does not mean it is not party to it.

Again, these are details, details which don't necessarily invalidate Wittes' larger point, but show that even within the larger framework, NSA has secretly violated those principles Wittes

would like to believe.