The Moscow Times
30 YEARS
INDEPENDENT NEWS FROM RUSSIA

The U.S. Should Be Sued for Spying on Europe

By John Bruton

July 17, 2013



The recent revelations by the former U.S. intelligence contractor Edward Snowden suggest, among other things, that surveillance devices were placed by the US National Security Agency in the European Union's mission in Washington. Many Europeans, including me, find it difficult to understand why the debate about Snowden in the U.S. has devoted so little attention to discovering whether his allegations are true, and, if they are, what that means for international law, U.S. diplomacy and U.S. national security.

The U.S. must respond to the allegations — first leveled in a report published by the German magazine Der Spiegel — and give a proper accounting of its actions. If it does not, the EU should take the U.S. to court.

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The 1961 Vienna Convention, which the U.S. ratified, codifies the international law of diplomacy and diplomatic missions. The U.S. itself relied on this convention in the case against Iran that it brought in 1980 before the International Court of Justice in The Hague, a year after Iranian students and others, with the revolutionary regime's evident blessing, breached the U.S. embassy in Tehran and abducted its diplomats.

According to Article 22 of the Vienna Convention, "the premises of [a diplomatic] mission shall be inviolable," and a "receiving state may not enter them, except with the consent of the head of the mission." Indeed, "[t]he receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion." Likewise, Article 24 stipulates that the "archives and documents of the mission shall be inviolable," and Article 27 extends similar protection to the mission's correspondence.

In other words, a host state that enters a foreign mission without consent — none was given in my time as EU Ambassador in Washington from 2004 to 2009 — or hacks into its computer system, would be acting in blatant violation of the Vienna Convention.

Reacting to Snowden's allegations, U.S. top officials, such as former CIA and NSA Director Michael Hayden, made no reference at all to U.S. obligations under international law, to its interest in protecting diplomacy or even to the unfairness and bad faith involved in spying on partners with whom one is supposedly negotiating in a transparent way. Nor did Hayden suggest any national security concern that might justify spying on the EU. (There is none.) Instead, he sought to dismiss the entire issue by hinting vaguely about intelligence-gathering by some EU member states.

But what is alleged to have happened was not a case of the U.S. reciprocally countering supposed illegal activities by other states. It was hostile and illegal activity by the U.S. directed against the EU itself. The EU has neither the capacity nor the authority to conduct any reciprocal surveillance of U.S. missions in Europe, and it does not do so. Hayden knows that perfectly well.

So far, U.S. authorities have focused on bringing Snowden home to face espionage charges. But it is in U.S. national interest to ensure that the Vienna Convention is respected — without question and as a matter of routine — to ensure the safety and inviolability of its own missions abroad.

Fundamental values are also at stake for the EU, whose members, ironically, have in some cases actively supported the U.S. in its quest to extradite Snowden, despite being victims of U.S. alleged breaches of international law. The founding idea of the EU was that relations between states should be governed by rules, not raw power.

Indeed, the EU continues to exist precisely because its members respect treaties. Take away respect for international law, and the EU would cease to exist — almost overnight. There is no

other force holding it together.

For these reasons, and in light of the Vienna Convention's specific terms, I believe that the EU cannot just move on and hope that the media furor over Snowden's allegations will die down. It must uphold international law.

One way for the EU to proceed would be to submit the dispute to independent arbitration so that it does not adversely affect day-to-day relations with the U.S., which are crucial to economic recovery on both sides of the Atlantic. This approach has been adopted to address other issues — for example, bilateral trade disputes, with cases submitted to the World Trade Organization so that they do not interfere with other business between the EU and the U.S.

The EU — or member states acting on its behalf — should thus consider following the example set by the U.S. itself in 1980. This assumes that it can obtain sufficient documentary evidence of the allegations from, say, Snowden or Der Spiegel. Pursuing a legal route would depoliticize the issue in the short term and allow time for tensions to ease.

If EU member states believe that taking the U.S. to court is too confrontational, they have the lesser option of asking the United Nations to seek an advisory opinion from the International Court of Justice on the compatibility of the NSA's alleged activities with the Vienna Convention. In any event, the matter cannot rest where it is.

Surveillance technology has advanced a great deal since 1961, when the Vienna Convention was concluded. A new judgment from the International Court of Justice in this case would be helpful. It would re-establish and modernize the norms of behavior that both the U.S. and Europe would want all countries ⊠ notably, emerging powers like China ⊠ to respect in the future.

U.S. President Barack Obama understands ⊠ probably better than any previous president ⊠ the significance of international law, which is why he wants to bring countries like China fully within its strictures. For that reason, he should welcome a robust reaffirmation of the principles of the Vienna Convention.

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