



Vereinigung Deutscher Wissenschaftler



TRANSPARENCY
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Die Koalition gegen Korruption.

Berlin, July 24, 2013

Statement of grounds of the jury

To award the Whistleblower Award 2013 to the whistleblower Edward J. Snowden

The Whistleblower Award 2013 goes to Edward J. Snowden. As an employee of the National Security Agency (NSA) he made public the widespread, and independent of grounds for suspicion, surveillance and storage of email correspondence, IP addresses as well as telephone and other communication data by US and other western intelligence services. He meets the criteria of the jury, consisting of the German section of International Lawyers against Nuclear Arms (IALANA) and of the Federation of German Scientists (FGS).

I. Establishment and revelation of wrongdoings as an insider (“revealing wrongdoing”)

Edward J. Snowden worked for a subcontractor of the US-American foreign intelligence service NSA until his escape to Hong Kong in spring 2013. As such he possessed a clearance certificate for a high security level and hence had access to strictly confidential information on the surveillance practices of the NSA and other western intelligence services.

In the opinion of the jury, the revelations of Edward J. Snowden allow, and make it inevitable, for governments, parliaments, courts, and the critical public thoroughly to examine the currently known facts and existing evidence. On the grounds of these facts it is then possible to verify whether and in what respect the behavior and proceedings of domestic and foreign intelligence services revealed by Snowden has violated existing law.

Even if the result should be that the surveillance practices of intelligence services are in part or mostly based on existing law, Snowden’s whistleblowing could have revealed dangerous conditions that are unacceptable in democratic societies.

1. Facts currently known

Whistleblower Snowden revealed the following wrongdoing or at least the pressing question of its existence:

a) The US military intelligence service NSA monitors comprehensively, apparently without grounds for suspicion, worldwide, but especially in Germany, using its surveillance program PRISM among others, mobile communication, internet traffic, PCs, and telephone data. It does so inter alia by extorting cooperation from IT companies such as Google, Apple, Facebook, Microsoft; perhaps even outside the USA by tapping into underwater glass fiber cords and/or illegal breach of IT interfaces. To

date, it is not clear which kind of data (meta data or data contents) were and are screened, saved and analyzed.

b) James R. Clapper, since 2010 Director of National Intelligence (USA) was caught lying by whistleblower Edward Snowden when Clapper said that there was no retention of data of US citizens by the NSA in a congressional hearing on March 12, 2013.

c) The British intelligence service GCHQ (Government Communication Headquarters) apparently taps without grounds for suspicion into connections of underwater glass fiber cords landing in the United Kingdom to save and analyze the entire telephone and internet traffic (meta data and data contents) with top performance IT programs too.

d) The foreign intelligence services of NSA (USA), GCHQ (UK) as well as from Canada, Australia and New Zealand exchange data compiled by the surveillance programs on national and foreign citizens; by doing this, the respective foreign intelligence services de facto circumvent and violate the existing bans on domestic spying.

e) It has been reported that offices of the European Union in Washington, New York and Brussels have been bugged by the NSA and/or GCHQ especially to spy on decision makers from EU-states. The same happened at the G20 summit in 2009, when NSA or GCHQ spied on high ranking politicians and their entourage in violation of existing international law.

f) It has to be clarified whether units of the German intelligence services have teamed up with the NSA under the revealed tapping practices, as Snowden claims. To what extent are the German Federal Intelligence Service (Bundesnachrichtendienst) and the German Domestic Intelligence Service (Verfassungsschutz) participating in, for instance, gathering, analyzing and exchanging protected data by using the analyzing program XKeyscore? The public has a right to know what role the Federal Office for Information Security (Bundesamt für die Sicherheit in der Informationstechnik) plays in these instances. The agency, located in Frankfurt, is said to be a key partner for the NSA in Germany. Another US whistleblower, former NSA employee Thomas Drake, recently supported Snowden's verdict: "Germany is regarded as a third party. But the NSA has had confidential agreements with the BND for years. And the BND has its own agreements with different telecommunication corporations" (TAZ, 07/18/2013).

2. Existing evidence

a) The intensive global US manhunt for whistleblower Snowden, condemning him as a "highly criminal traitor", with all its accompanying side effects (massive warnings to states potentially granting asylum; calls for extradition; pressures applied to states to deny over-flight rights; thereby forcing an emergency landing of the Bolivian President Morales) and justifications offered by US President Obama can only be understood as showing that Snowden revealed sensitive and, for the US government, embarrassing truths.

b) In the meantime, NSA Director Keith Alexander has acknowledged in the discussion about the collaboration with German services that: "We do not tell them everything we do or how we do it. ... But now they know it" (FAZ, 07/20/2013).

c) Even if the German federal government and the German authorities in charge have doubts about the facts or evidence, it is not clear why they do not take all the necessary steps to question Edward J. Snowden as a witness by German prosecutors to clear existing doubts. Why are they not willing to put him in a witness protection program (as has been done a short while ago with a handler of Swiss banking account data exposing German tax criminals), grant him a safe residence permit status in

Germany (e.g. according to § 22 AufenthaltG), and provide adequate protection against extradition so that he can serve as a witness for the necessary investigation here?

II. Alerting the public by blowing the whistle (“going outside”)

“There are times when it becomes clear how the world really spins, what its true inner laws are. The curtains fall, and the world suddenly looks differently. Now, we witness such times,” writes the Spiegel on June 8, 2013.

The man who tore apart the curtains is Edward J. Snowden. Since the beginning of June 2013 he has been providing selected information to the British Guardian, then the Washington Post and the Spiegel and thereby to the public. The media has reported on the issue since then, to great public interest. Moreover, he gave a much noticed interview to the Guardian and announced further revelations. This distinguishes his behavior aiming at the creation of transparency from traitors and agents who are cooperating with foreign intelligence services and deliberately hide their actions from the public.

III. Whistleblowing primarily oriented on the common interest (“serving the public interest”)

a) According to his own statements, whistleblower Snowden has not acted for personal gain, but in the public interest. He had publicized the information on the surveillance programs, because he is firmly convinced that such wide-ranging interventions into the privacy of citizens must be directly approved by them. In the interview with the Guardian he said: “This is something that’s not our place to decide, the public needs to decide whether these programs and policies are right or wrong. And I’m willing to go on the record to defend the authenticity of them and say, ‘I didn’t change these, I didn’t modify the story. This is the truth; this is what’s happening. You should decide whether we need to be doing this.’”

Concrete proof for him trying to gain personal benefit from whistleblowing is not evident. Even his opponents have not been able to prove the contrary. Whether he applied at the NSA subcontractor Booz Allen, with his years of experience as an employee in the intelligence realm, to reveal wrongdoing at the NSA, as he apparently stated in an interview, is irrelevant in this context. It does not diminish the importance of the revelations or the probity of the whistleblower when he – like Günter Wallraff in his time – actively tries to reveal grave wrongdoing in the way he deems appropriate, without revealing his plan beforehand.

b) Public interest in Snowden’s whistleblowing

The revelation of surveillance and spy programs, independent of grounds for suspicion, on a scale politically and technically hardly thought possible – despite the Echelon experience – triggered important political and societal debates about the activities of the NSA and other intelligence services especially in Germany and the EU.

1) Rightly and finally now questions about the legal grounds and political responsibilities for these apparently ubiquitous surveillances are being asked. It has become clear that in Germany, after the end of the occupation, former Allied reservation rights (for example Art. 3 of the Supplementary Agreement to the NATO Status of Forces Agreement) were replaced by international treaties and apparently also secret administrative and agency agreements, which provide unacceptably far-reaching freedom of action for US forces and their intelligence activities in Germany.

2) Now, questions relating to whether these intelligence practices of “friends” in Germany were approved by parliamentary control committees and whether the implementing act for Art. 10 German Basic Law (“G10-Gesetz”) enabled or even supported the spy practices if the NSA – possibly in cooperation between German and other intelligence services - move into the center of the public debate. Additionally, intelligence services that are granted more and more rights and, experience shows, provided with more and more personnel after almost every – suspected or real – new threat, reveal themselves structurally as increasingly hard to control by democratic institutions.

3) Snowden’s whistleblowing also raises the question whether German criminal laws provide sufficient protection for businesses against industrial espionage of their business secrets by intelligence sources. It has obviously become doubtful whether the existing German criminal codes (o.a. §201 StGB violation of the confidentiality of the written word, § 202 StGB violation of the privacy of correspondence, § 203a monitoring of data, § 202b interception of data and 202c StGB preparation of monitoring and interception of data) are effective enough to protect citizens from grave violations of their basic right to informational self-determination.

Herewith, inter alia, regulations in the supplementary agreement to the NATO status of forces agreement are criticized, since they exclude US forces and their civilian component in important areas from the German penal jurisdiction. According to Art. 18 of this supplementary agreement, for crimes committed “in line of duty” by a member of the US forces or their civilian component in Germany the law of the USA is applicable. Furthermore, a special rule in Art. 17 of this supplementary agreement provides that in making decisions as to whether an offense committed by members of the troops of the sending state or its civilian component is to be dealt with by the German or US justice system, the US agency is authorized to inform the German prosecutors, whether the act was criminal or not according to US law.

4) It has become increasingly clear: The fundamental right to secrecy of postal and telecommunication (Art. 10 GG) apparently exists de facto only on paper in Germany today. Violations of rights can only be met partially. This is very much due to the fact that under the 1968 amendments to Article 10 GG, made under the emergency legislation, control of infringements of basic rights by independent courts has been almost completely abolished. And this in a situation where control agencies limited to the national territory have only rudimentary capabilities to meet the challenges arising from the globalization of today’s communication, storage and monitoring capabilities.

5) Due to Snowden’s whistleblowing a wider public has also become more aware that not only in Germany but Europe-wide and globally effective international agreements and standards for the protection of internet and mobile communication as well as the right to privacy of citizens especially against intelligence surveillance, are missing.

Thus domestic and internal law, in the light of human rights, have to be reformed according to the new technological and political developments of the IT-era.

The goal has to be that all citizens can rely on effective legal protection against intelligence interventions, for instance from the NSA or the BND before independent courts in the US as well as in EU-member states.

Additionally, all states have to subject themselves unconditionally to the jurisdiction of the International Court of Justice in Den Haag (Art. 36 ICJ statute), so that states that violate international law can be brought to justice in front of this primary judicial body of the UN. Germany, too, has not yet made such an unconditional declaration.

6) Informing citizens in this situation that they are responsible for their own protection against digital surveillance and other dangers is cynical. People who just argue for the right to privacy may be able

to disconnect themselves from the societal debate by encryption or digital abstinence. But those interested in participation and representation in principally all societal issues have to make sure that their voice is being heard and finds its way into the communication exchange. People who keep their voice to themselves become nonparticipants in the digital democracy. Democracy demands that citizens do not become invisible. Furthermore it is of crucial importance is that they, the democratic sovereign, remain invisible to the agencies they are to control.

7) Finally, what has become clear by the revelations of Snowden is: For the survival of democracy, civil societal vigilance and effective control of the intelligence services and other institutions of state power are indispensable. For this, whistleblowers are centrally important. This is why effective legal protection of whistleblowers as well as the development and preservation of a societal "culture of whistleblowing" is necessary, especially in Germany, which shows particular deficiencies in this area.

IV. Accepting considerable risks by whistleblowing("risking retaliation")

The FBI has pressed criminal charges against Snowden on June 14, 2013. Up to now, he is being accused of stealing government property and illegal transmission of secret information as well as espionage. A sentence of 30 years is possible. The US has requested his extradition first from the Chinese, then the Russian, governments. He is on the run. His freedom and his civic existence are permanently threatened.

Who could be better suited to offer asylum, or at least save residency, to a hard-pressed US citizen against political state persecution by its home country than Germany, which apparently is especially affected by the NSA surveillance practices. However, the EU as a whole has to act, too.

The US citizen Edward Snowden has rendered a great service to Germany and the other EU member states by blowing the whistle. This is why the EU states, such as Germany and others should compete for his accommodation and protection: out of conviction but also out of gratitude.

The jury of VDW and IALANA for the Whistleblower Award consists of: Dr. Peter Becker, Dr. Dieter Deiseroth, Dipl.-Pol. Annegret Falter, Prof. Dr. Hartmut Grassl, RA Otto Jäckel.