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A couple of Thoughts around the Cybertheft Allegations

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In “[Russian and Chinese Assertiveness Poses New Foreign Policy Challenges](#)” from the *HBO History Makers Series*, former US Defense Secretary Robert M. Gates makes an astonishing and, for the Obama administration, the following unhelpful claim:

“What -- what we have accused the Chinese of doing, stealing American companies' secrets and technology is not new, nor is it done only by the Chinese. There are probably a dozen or 15 countries that steal our technology in this way.

“In terms of the next capable next to the Chinese are probably the French. And they've been doing it a long time.

“I often tell business audiences, ‘How many of you go to Paris on business.’ Hands go up. ‘How many of you take your laptops?’ Hands goes up. ‘How many of you take your laptops to dinner?’ Not very many hands. I said for years, the French Intelligence Services have been breaking into the hotel rooms of American businessmen and surreptitiously downloading their laptops, if they felt those laptops had technological information, or competitive information that would be useful to French countries -- French companies.

“.....We nearly are alone in the world in not using our intelligence services for competitive advantage of our businesses.”

Now this may be helpful in selling [his book](#), but it surely cannot be helpful to the US government in the execution of what will likely be concerted efforts to convince US allies and fence-sitters to join its

years-long fight against China's government-sponsored cybertheft following its criminal charges against five PLA officers. I will not hazard a guess as to the eventual success of the US endeavor—for that, I need to be compensated for the time and effort it would take—but there are a couple of points that I've looked at that may be of interest to you as you think forward.

First, is the US being hypocritical in charging PLA officers with cybertheft for commercial gain while overlooking France, to use Gates' stark example? There's obviously too little information here to be sure one way or another, but I will say this: It is not difficult to assume that the US government is going easier on its allies than on China, but if we go by Gate's allegations alone, the differentiation in their treatment appears to be warranted, indeed, demanded by rule of law. Note that the French theft occurred on French soil. In Japan, overseas theft is punishable under the Penal Code only if the criminal is Japanese. How about the United States? A cursory search turns up this [CRS Report](#), which strongly suggests that simple overseas theft where the only US connection is the victim is unlikely to be prosecuted under US law (although the existence of state laws muddies the situation somewhat), and [this FBI advisory](#), which makes it clear that the Economic Espionage Act, under which the French actions obviously falls, only protects against "theft that occurs ...outside of the United States" when "(a) an act in furtherance of the offense" has "been committed in the United States or (b) the violator is a U.S. person or organization." By contrast, a "federal grand jury in Pittsburg...found that [the] five Chinese military officers conspired together, and with others, to hack into the computers of organizations *in Western Pennsylvania and elsewhere in the United States*," according to [this announcement](#) by US Attorney General Eric Holder.

Leaving aside that fact that you need to identify suspects and connect them to the crime with evidence to bring an indictment, prosecuting the French agents was never an option as far as the facts alleged by Gates were concerned, at least if the term "rule of law" means anything.

Second, are US hands as clean as Gates claims they are? Well, many Japanese trade officials and diplomats would dispute his expansive statement that "[w]e nearly are alone in the world in not using our intelligence services for competitive advantage of our businesses." During the trade friction years when US trade negotiators forcefully pushed their Japanese counterparts for concessions, Japanese officials directly engaged in the negotiations were convinced that the US government was wiretapping the Japanese embassy and hotel rooms in Washington where Japanese negotiators were staying. They pointed to what they believed were telltale signs of wiretapping, and routinely used payphones for sensitive communication. It could not be proved then, it cannot be proved now, but you will be hard put to find any of the negotiators at the time that would be willing to even seriously doubt the allegation. And given how the US government was working hand-in-glove at the time with US textile, steel, auto, electric and electronic appliances, and computer industries (to name those that immediately come to mind), it requires no stretch of the imagination to consider those allegations, if true, to be "using [US] intelligence services for competitive advantage of [US] businesses."

Obviously, a distinction needs to be made between allegations of a government acting as the mastermind of an economic crime ring and a government attempting to gain a negotiating edge, respectively. That said, the US government must be mindful that the Snowden revelations will not be the only on the mind of its

allies when it comes to them to seek their cooperation in putting pressure on the Chinese authorities regarding its (alleged) cybertheft activities.