THERE'S A PLACE FOR RESOLVING DISPUTES, AND THE ADMINISTRATION CHOSE NOT TO USE IT

As I was writing my flurry of posts on the AP call record seizure yesterday, former National Security Council Spokesperson Tommy Vietor and I were chatting about the facts of the case on Twitter. He disputes two of the AP's claims: that they held the story as long as the Administration wanted them to, and that the White House had planned an announcement.

Now, as I have said in the past, I'm somewhat skeptical of the White House's claims, given that their story changed as the story was blowing up. Furthermore, the White House had done a big dog-and-pony show on a similar operation — the thwarting of the Toner Cartridge plot in 2010, which was also tipped by a Saudi infiltrator. So it is reasonable to believe they planned to do another one in 2012.

That said, note that the AP's latest version of this is rather vague about whom they were discussing the story with, referring only to "federal government officials," whereas previously they had referred to "White House and CIA" requests.

So there may well be some confusion about what happened, or it may be that David Petraeus' CIA was planning a dog-and-pony show that the White House didn't know about. No one seems to dispute, however, that the AP did consult with the White House and CIA, and did hold the story

long enough to allow the government to kill Fahd al-Quso, all of which the Administration seems to have forgotten.

In short, behind the broad call record grab, there's a legitimate dispute about key details regarding how extensively the AP ceded to White House wishes before publishing a story the Attorney General now claims was the worst leak ever.

But there's a place where people go to resolve such disputes. It's called a court.

And as this great piece by the New Yorker's counsel, Lynn Oberlander on the issue notes, one of the worst parts of the way DOJ seized the AP records is that it prevented the AP from challenging the subpoena — and the details that are now being disputed — in court.

> The cowardly move by the Justice Department to subpoena two months of the A.P.'s phone records, both of its office lines and of the home phones of individual reporters, is potentially a breach of the Justice Department's own guidelines. Even more important, it prevented the A.P. from seeking a judicial review of the action. Some months ago, apparently, the government sent a subpoena (or subpoenas) for the records to the phone companies that serve those offices and individuals, and the companies provided the records without any notice to the A.P. If subpoenas had been served directly on the A.P. or its individual reporters, they would have had an opportunity to go to court to file a motion to quash the subpoenas. What would have happened in court is anybody's guess—there is no federal shield law that would protect reporters from having to testify before a criminal grand jury—but the Justice Department avoided the issue altogether by not notifying the A.P. that it even wanted this information. Even beyond the

> outrageous and overreaching action against the journalists, this is a blatant attempt to avoid the oversight function of the courts.

I obviously don't know better than Oberlander what would have happened. But I do suspect the subpoena would have been — at a minimum —sharply curtailed so as to shield the records of the 94 journalists whose contacts got sucked up along with the 6 journalists who worked on the story.

Moreover, I think these underlying disputed facts — as well as the evidence that the gripe about the AP story (as opposed to the later stories that exposed MI5's role in the plot) has everything to do with the AP scooping the White House — may well have led a judge to throw out the entire subpoena.

If the AP had been able to present proof, after all, that the White House (or even the CIA) had told them the story wouldn't damage national security, then it would have had a very compelling argument that the public interest in finding out their source is less urgent than the damage this subpoena would do to the free press.

So I don't know what would have happened. But I do know it is a real dispute that may well have a significant impact on the subpoena.

And that's why we have courts, after all, to review competing claims.

Of course, the Obama Administration has an extensive history of choosing not to use the courts as an opportunity to present their case. Most importantly (and intimately connected to this story), the government has chosen not to present their case against Anwar al-Awlaki on four different occasions: the Nasser al-Awlaki suit, the Umar Farouk Abdulmutallab trial, the ACLU/NYT FOIAs, and now the wrongful death suit. This serial refusal to try to prove the claims they make about their counterterrorism efforts in Yemen doesn't suggest they're very confident that the facts are on their side.

Which may well be why DOJ chose to just go seize the phone contacts rather than trusting their claims to a judge.