

TORQUEMADA PURSUED SUSPECTED MUSLIMS, NOT JOURNALISTS

In an article flattering Eric Holder's sense of remorse once he realized how inappropriate it was to claim a journalist engaging in flattery might be a co-conspirator in a leak, Daniel Klaidman quotes a Holder friend explaining that the Attorney General doesn't see himself as some kind of Torquemada figure pursuing journalists.

But for Attorney General Eric Holder, the gravity of the situation didn't fully sink in until Monday morning when he read the *Post's* front-page story, sitting at his kitchen table. Quoting from the affidavit, the story detailed how agents had tracked Rosen's movements in and out of the State Department, perused his private emails, and traced the timing of his calls to the State Department security adviser suspected of leaking to him. Then the story, quoting the stark, clinical language of the affidavit, described Rosen as "at the very least ... an aider, abettor and/or co-conspirator" in the crime. Holder knew that Justice would be besieged by the twin leak probes; but, according to aides, he was also beginning to feel a creeping sense of personal remorse.

[snip]

As attorney general, a position at the intersection of law, politics, and investigations, Holder has been at the center of partisan controversy almost since taking office. But sources close to the attorney general says he has been particularly stung by the leak controversy, in large part because his department's—and his own—actions are at odds with his image of himself as a

pragmatic lawyer with liberal instincts and a well-honed sense of balance—not unlike the president he serves. “Look, Eric sees himself fundamentally as a progressive, not some Torquemada out to silence the press,” says a friend who asked not to be identified. [my emphasis]

Granted, the Torquemada metaphor was Holder’s friend’s, not his own. And granted, Holder’s DOJ has worked to avoid the kind of Muslim-bashing people like Peter King have called for (though his DOJ has also slow-walked its investigation into NYPD’s profiling of Muslims and allowed FBI to engage in similar behavior).

But the reference to Torquemada highlighted how limited this remorse is – just to investigations involving journalists, not Muslims, for example – and how thin Holder’s apparent understanding of the problem remains.

This passage, on how DOJ’s prosecutorial zeal led it to interpret actions that might have a completely innocent explanation, could apply to individuals well beyond journalists, including especially Muslims and whistleblowers, but also hackers and protestors.

Prosecutors tend to have a somewhat insular mindset, not always able to see clearly beyond the walls of their cases. They are often dogged investigators, trained to vacuum up as much evidence as possible to sustain convictions in courts of law. That sometimes means taking maximum advantage of every law and procedural rule. It also can mean seeing every activity of those in their sights through a more sinister lens than may be justified.

Rosen had set up fairly elaborate methods to try to obscure his relationship with his source. He used pseudonyms to communicate with him and

simple coded messages to indicate when they should talk. As Rosen's activities were scrutinized in the department's National Security Division, his behavior may have looked more to prosecutors like an espionage case than what it truly was: a journalist reporting on sensitive national-security matters, while trying to protect the identity of his source. Prosecutors even seized on Rosen's use of "flattery" and his playing to the "ego and vanity" of his source as a reason for suspicion, a stunning conflation of basic reporting guile with spycraft.

The government's pursuit of "national security," after all, has criminalized just about any behavior aiming to reclaim some measure of privacy. And under Holder, DOJ has expanded its ability to use First Amendment protected activities as a predicate to investigate someone.

Prosecutorial zeal affects not just journalists, but potentially all Americans.

So, too, does Holder apparently misunderstand where the zeal for leak prosecutions comes from.

As an explanation, if not a justification, Justice officials say that the department's leadership had come under withering pressure to investigate leaks from both within the intelligence community and Congress. On multiple occasions, Holder fielded calls from the CIA director and other top officials demanding leak investigations. Meanwhile, Congress was also on Holder's case to staunch the leaks in national-security cases. On December 3, 2009—just a few months before he approved the affidavit in the Fox case—Holder, FBI director Robert Mueller, and director of national intelligence Dennis Blair were hauled before a secret session of the

Senate Intelligence Committee to explain why they weren't punishing more leakers. For its part, the White House never discouraged aggressive probes to find and punish leakers.

On the political front, at least, the zeal comes from the degree to which the Administration engages in sanctioned leaks which effectively institutionalize an information tyranny that corrupts democracy.

As for the demands from unnamed CIA Director(s) to investigate leaks? Obama's CIA Directors have included the guy who outed Shakeel Afridi, the guy who as of a few weeks ago still under investigation for leaking classified information to his mistress, and the guy who played a key role in outing a mole into AQAP.

Ultimately, Holder's remorse should be about prosecutorial overreach generally, not just overreach ensnaring journalists. Sadly, most targets of prosecutorial overreach don't have the ability to cause political problems like press organizations do.