FUND UNCHAINED JOURNALISM OF EMPTYWHEEL: IT'S ALL BECAUSE OF YOU

[Note from Jim: There have some issues with the PayPal buttons taking you to PayPal's main page instead of the page set up for Emptywheel donations. Please use the link below and it will give a functioning button. On my machine and browser, though, you have to click the button and stay in the same browser tab for it to work. If you do "cntrl-click" to open in a new tab, you get the main PayPal home page. If there are any issues, please let us know. If you prefer snail mail, checks made out to "Emptywheel, LLC" can be mailed to this address:Emptywheel, LLC
P.O. Box 1673
Grand Rapids, Michigan 49501-1673Thank you one and all, you are the best readers an supports on the web!]

Okay, the Emptywheel blog has run a fundraiser for a week now. For the most insightful, deep weed analyzing, cutting edge and kick ass journalism on the web.We continue to need your support.

We started this ask a week ago, and I should know because I agreed for it to start just ahead of my Trash Talk post at the open of the NFL football season a week ago last night.

But I am going to extend the ask for a short time; such as through the weekend, because it is a more than worthy effort. And it will stay on

top of this blog until some time Monday with the hope that the Emptywheel model is kickstarted, so to speak, further into success. Please, help us make it so by going to this page and donating.

If there is a more neutral, deep fact based, deeply analytic, independent and proven insightful blog, or voice than Ms. Marcy T. Wheeler, better serving the relevant niche, than this one, I would like to see it. Whether you are on the right or the left, this blog is incredibly valuable for its depth and consistency of analysis.

The lioness share of this history is by Marcy Wheeler and she alone deserves the support; but you also get the cogent analysis of Jim White, Rayne and, every now and then, me. I won't speak for my own, but the rest is damn good work. And worthy of your support as a critical voice, whether you agree or disagree with us politically, legally, and/or policy wise.

We need your support as independent journalistic voices in the mass media milieu. Make no mistake, your support of all of our work here helps establish all of us as protected and respected journalists, and we are thankful for the same.

If you are reading this, you either know, or should know, precisely what level of outstanding journalism goes down daily on, and at, the Emptywheel blog.

As they say in my business, there is a certified record. And it stands up. Help us keep up that record, and add to it, with all that is going on in the world every day.

It is not about us. It is about you, and all of us, and what we should and can be. Support this journalism. From me, to Marcy, to Jim, to Rayne, to everything that is, and always has been, the Emptywheel blog, thank you.

> Some people get squashed crossing the tracks

> Some people got high rises on their backs
> I’m not broke but you can see the cracks
> You can make me perfect again
> All because of you

We can help check the government in its tracks, help fill the gaping cracks. The Emptywheel blog is indeed all because of you. True independent journalism, not bought off by anybody in the main; not subject to any corporate ball and chain. Real independent deep analysis, reportage and journalism.

Help us continue the tradition.

You can donate here.
Thank you!

NBC NEWS HIRES EDISON CARTER AND BLANK REG FOR BIG TIME TV

NBC News, showing it can move 20 minutes into the future, has made a new and exciting digital acquisition. From Brian Stelter (who was a great replacement for Howard Kurtz today on CNN’s “Reliable Sources”. Seriously) at the New York Times:

> When a plane crashes or a protest turns violent, television crews speed to the scene. But they typically do not arrive for minutes or even hours, so these days photos and videos by amateurs — what the news industry calls “user-generated content” — fill the void.
>
> Those images, usually found by frantic producers on Twitter and Facebook,

> represented “the first generation of user-generated content for news,” said Vivian Schiller, the chief digital officer for NBC News. The network is betting that the next generation involves live video, streamed straight to its control rooms in New York from the cellphones of witnesses.
>
> On Monday, NBC News, a unit of Comcast’s NBCUniversal, will announce its acquisition of Stringwire, an early stage Web service that enables just that. Ms. Schiller imagined using Stringwire for coverage of all-consuming protests like those that occurred in Tahrir Square in Cairo.
>
> “You could get 30 people all feeding video, holding up their smartphones, and then we could look at that,” she said in an interview by phone. “We’ll be able to publish and broadcast some of them.”
>
> Such a vision fits neatly into the future many academics predict. That future has fewer professional news-gatherers but many more unpaid eyes and ears contributing to news coverage.

Before we delve too far into the analogies with the once dystopian future we are now quickly inhabiting, it should be acknowledged that, while new and exciting, this is really just a big incremental step ahead of what CNN has been doing for a while with its “iReport” function.

But the Stringwire capability would look to provide even greater immediacy than CNN’s iReport and, perhaps, even streaming coverage. There is, of course, a very negative side to this potential should unfortunately slanted or particularly grotesque coverage be presented. Also a very real concern is the potential for interference in law enforcement investigations and trauma to people effected and/or prejudiced, including witnesses, defendants and future jury

pools, by publication before news is ripe and edited.

The above being said, for my part, I find Groman's Stringwire concept to be pretty exciting and think it a pretty smart move by Vivian Schiller and NBC News. But, boy howdy, does it bring to mind the once and, apparently future, dystopian information landscape of Max Headroom. From Wiki:

> The series is set in a futuristic dystopia ruled by an oligarchy of television networks. Even the government functions primarily as a puppet state of the network executives, serving mainly to pass laws – such as banning off switches on televisions – that protect and consolidate the networks' power. Television technology has advanced to the point that viewers' physical movements and thoughts can be monitored through their television sets; however, almost all non-television technology has been discontinued or destroyed. The only real check on the power of the networks is Edison Carter, a crusading investigative journalist who regularly exposes the unethical practices of his own employer, and the team of allies both inside and outside the system who assist him in getting his reports to air and protecting him from the forces that wish to silence or kill him.

To elaborate a little, Edison Carter of "Network 23" is one of several journalists, including another character by the name of "Blank Reg" of "Big Time TV", who scour the landscape as one man newscrews, just them and their own videocam, for breaking news that will live feed instantaneously to their national networks to drive ratings. So, you can see the analogy to NBC's Stringwire concept.

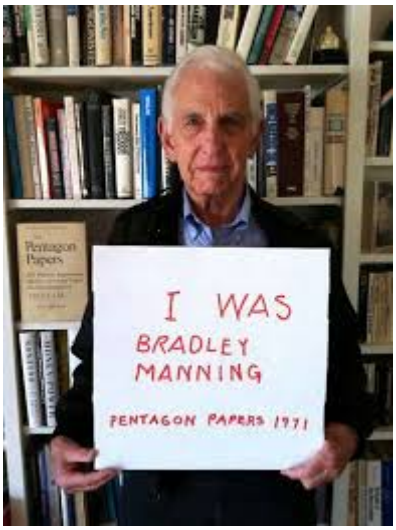
One difference between Max Headroom and the current television news existence is that, in

Max Headroom, the television broadcasters wholly consumed and dictated to a puppet state government. The current existence of television news seems more tilted to the profit centered, shallow mass consumption oriented, stenography of government issued and manipulated propaganda. One need only look back at the coverage of the Iraq war, Afghanistan, Guantanamo, torture, the rise of the surveillance state or any report from Barbara Starr at CNN (thank you Michael Hastings) to see the problem.

So, while there is certainly potential for some concerns, maybe a function like Phil Groman's Stringwire at NBC News can not just bring an immediacy to television news, but eradicate some of the governmentally issued bullshit that results from "Breaking News" from the likes of Barbara Starr.

All hail the future. Big Time Television, "All day every day, making tomorrow seem like yesterday."

NEGATIVE MANNING DECISION AND THE FUTURE OF INVESTIGATIVE JOURNALISM



Little more than few hours ago, a critical ruling was handed down by Judge Denise Lind in the Bradley Manning UCMJ prosecution ongoing at Fort Meade. The decision was on based on this motion by the defense seeking dismissal of the "Aiding the Enemy" charge, among others in the prosecution.

To make a long, even if sadly predictable, story short, the motion was denied by Judge Lind and the charge will proceed to determination on the merits. This is, to be sure, a nod to the prosecution (which is actually the standard in such motions for directed verdicts during trials; that is the facts are taken in the light most favorable to the non-moving party, the government). It is also, obviously, a blow to the defense, although undoubtedly an expected one for defense attorney David Coombs. There is a very outside chance of a silver lining I will discuss below.

Julie Tate at the Washington Post sets the table:

> The motion to dismiss the charge was filed July 4 by Manning's civilian defense attorney. He argued that the government had failed to show that Manning "had 'actual knowledge' that by giving information to WikiLeaks, he was giving information to an enemy of the United States." He said the government did introduce evidence "which might establish that PFC Manning 'inadvertently, accidentally, or negligently' gave intelligence to the enemy," but that this was not enough to prove the most serious charge against him, known as an Article 104 offense.

> On two separate occasions, Lind, an Army colonel, had questioned military prosecutors about whether they would be pursuing the charge if the information had been leaked directly to The Washington Post or the New York Times. Each time, the prosecution said it would. That troubles advocates for whistleblowers, who fear that the leaking of national defense information that appears online, as it inevitably does, can be construed as assisting the enemy.
>
> If convicted of aiding the enemy, Manning, an intelligence analyst who served in Iraq, could face life in prison.

That describes the motion and the stakes as to Manning. Julie's article also gives more particulars on the denial this morning, and is worth a read. For a tick tock, please see the continuously good coverage by Kevin Gosztola of Firedoglake.

But as enormous as the stakes are for Bradley Manning, the enterprise of investigative journalism is also on trial, even if in an indirect manner.

Yet another journalist who has tirelessly, and superbly, covered the Manning prosecution, Alexis O'Brien, has written at the Daily Beast, the stakes for investigative journalism are also life and/or death in the face of the security/surveillance state. Citing the in court, and on the trial record, compelling testimony of Professor Yochai Benkler of Harvard Law School, Alexis related:

> In a historic elocution in court last week, Prof. Yochai Benkler, co-director of the Berkman Center for Internet and Society at Harvard Law School, told Lind that "the cost of finding Pfc. Manning guilty of aiding the enemy would impose"

> too great a burden on the "willingness of people of good conscience but not infinite courage to come forward," and "would severely undermine the way in which leak-based investigative journalism has worked in the tradition of [the] free press in the United States."
>
> "[I]f handing materials over to an organization that can be read by anyone with an internet connection, means that you are handing [it] over to the enemy—that essentially means that any leak to a media organization that can be read by any enemy anywhere in the world, becomes automatically aiding the enemy," said Benkler. "[T]hat can't possibly be the claim," he added.
>
> Benkler testified that WikiLeaks was a new mode of digital journalism that fit into a distributed model of emergent newsgathering and dissemination in the Internet age, what he termed the "networked Fourth Estate." When asked by the prosecution if "mass document leaking is somewhat inconsistent with journalism," Benkler responded that analysis of large data sets like the Iraq War Logs provides insight not found in one or two documents containing a "smoking gun." The Iraq War Logs, he said, provided an alternative, independent count of casualties "based on formal documents that allowed for an analysis that was uncorrelated with the analysis that already came with an understanding of its political consequences."

Those really are the stakes in the, now, not all that new age of digital journalism. When the prosecutors in the Manning trial, upon direct questioning by Judge Lind as to whether they would still prosecute Manning if his leaks had been delivered straight to the New York Times or

Washington Post, it had to be a wake up call for traditional media. Or so you would think. But, really, the outrage has been far greater over the James Rosen/Fox subpoena that could, and arguably should, be considered relative peanuts.

But, Yochai Benkler is right as to the import of the consideration as to Wikileaks in the Manning case.

In closing, the one slim and thin ray of limited hope from today's ruling by Denise Lind: If I were Lind and cared at all about the ultimate verdict on Pvt. Bradley Manning, I too would have made this ruling. Why, you ask? Well, because a dismissal on the motion would have been the equivalent of a directed verdict on the law and would be far easier to overturn on appeal than a decision on the merits that the government has not met its burden of proof. Is this possible; sure, it certainly is. Is this likely; no, I would not make any substantial bets on it.

ON "BULLSHIT BY OMISSION"

Apparently, Walter Katz – who tweets as "lawscribe / Wieland" – believes he succeeded in "calling me out" on "bullshit by omission" with this post on Saturday.

After he pointed me to it in apparent good faith on Saturday, I pointed out his own omissions, as well as two errors.

The errors were two-fold. First, he originally identified me as a lawyer, which I noted here I am not. He just updated his post to correct that and one other error (though seems not to have noted that I corrected him, as bmaz has in the past).

More problematic for his argument, he believes he caught me in an error in this passage:

> But with its revised "News Media Policies," DOJ gets us closer to having just that, an official press.
>
> That's because all the changes laid out in the new policy (some of which are good, some of which are obviously flawed) apply only to "members of the news media." They repeat over and over and over and over, "news media." I'm not sure they once utter the word "journalist" or "reporter."

The "I'm not sure they once utter" comment clearly referred, in context, to DOJ in the News Media Policies. And, in point of fact, I've since done a search of the document, and DOJ does not once use the term "journalist" or "reporter" in it. It was a correct statement.

But Katz cites the FBI's Domestic Investigations and Operations Guide — not the News Media Policies — and notes that it mentions "journalist."

> > A freelance journalist may be considered to work for a news organization if the journalist has a contract with the news entity or has a history of publishing content.
>
> Not only does the DOJ refer to "journalists" as Emptywheel said she was

> not “sure” if it ever did, it specifically provides for independent journalists who are either under contract with a publication or have published before.

Of course DOJ, in its history, has uttered the word “journalist” before, plenty of times. They have an entire department that deals with journalists! But I made no claim that DOJ, generally, had never used the word “journalist,” which would be an absurd claim. In spite of the fact that I noted this clear error in his piece, Katz did not correct his own piece when he took out his erroneous reference to me as a lawyer.

As to Katz’ omissions, he makes two, one substantive, and one of equal weight to one he complains I’ve made. First, he quotes my entire 2011 discussion on what the DIOG says about news media I included in my post except for this last bit:

> The definition does warn that if there is any doubt, the person should be treated as media. Nevertheless, the definition seems to exclude a whole bunch of people (including, probably, me), who are engaged in journalism.

Now, it’s especially odd that he doesn’t quote that passage, because immediately after that blockquote, he paraphrases (arguably mis-paraphrases, since my argument is that I engage in journalism that should clearly be protected) the last part of the passage.

> Emptywheel argues that she, as a blogger, is not included in the definition of “news media” even though she may be disseminating information to the public as defined in the Privacy Protection Act of 1980.

Not only would it have been useful for Katz to convey to his readers that I made that assertion

in 2011 (when I had no regular affiliation with a news media organization and therefore it was a much clearer case). But by leaving out my note that "The definition does warn that if there is any doubt, the person should be treated as media," he leaves out a key caveat I made. I noted that omission here.

Then he complains that I didn't (in 2011, when I had no regular ties to news media) continue my citation from DIOG one sentence further. He introduced the "freelance journalist" passage, above, with this language:

> Emptywheel neglected to include what it states in the DIOG definition of "news media" on page 157 directly after it notes that a national reporter with a personal blog is covered by the guidelines:

But curiously, Katz chose to stop his own citation there, leaving out the sentence that immediately followed:

> Publishing a newsletter or operating a website does not by itself qualify an individual as a member of the news media.

The passage certainly reinforces my point (as do a few other lines in the definition), and was part of what might have disqualified me — in 2011, when I made the statement about not qualifying — as a member of the news media. I noted that Katz omission here.

Of course, these mutual "gotchas" would be mooted had Katz simply not clipped my own quote and instead (mis)paraphrased my 2011 comment so as to skip my caveat. Nevertheless it is that omission — the sentence that my caveat would have incorporated — that he thinks demonstrates my "bullshit by omission."

Incidentally, Katz also chose to clip my sentence that said some of these changes were

good. I guess that would have harmed his claim that I "do[] not see the new guidelines as much progress."

Finally, Katz fails, according to his own terms, in one other way. He embraces the term "news media" because it allows DOJ to be consistent across its document.

> Emptywheel continutes:
>
> > They repeat over and over and over and over, "news media." I'm not sure they once utter the word "journalist" or "reporter." And according to DOJ's Domestic Investigation and Operations Guide, a whole slew of journalists are not included in their definition of "news media."
>
> Since I consult with law enforcement agencies on writing policy, the fact the DOJ generally uses one term, "news media," is of no moment and, in fact, is desirable for clarity purposes.

But, of course, a key part of these policies (indeed, the one Katz focuses on in his post) is in addressing the Privacy Protection Act. And as I noted in my post, the PPA uses an entirely different standard than "news media" — it applies to "individuals who have a purpose to disseminate information to the public."

> The Privacy Protection Act of 1980 (PPA), 42 U.S.C. § 2000aa, generally prohibits the search or seizure of work product and documentary materials held by individuals who have a purpose to disseminate information to the public. The PPA, however, contains a number of exceptions to its general prohibition, including the "suspect exception" which applies when there is "probable cause to believe that the person possessing such

> materials has committed or is committing a criminal offense to which the materials relate," including the "receipt, possession, or communication of information relating to the national defense, classified information, or restricted data "under enumerated provisions. See 42 U.S.C. §§ 2000aa(a)(1) and (b)(1). Under current Department policy, a Deputy Assistant Attorney General may authorize an application for a search warrant that is covered by the PPA, and no higher level reviews or approvals are required.
>
> First, the Department will modify its policy concerning search warrants covered by the PPA involving members of the news media to provide that work product materials and other documents may be sought under the "suspect exception" of the PPA only when the member of the news media is the focus of a criminal investigation for conduct not connected to ordinary newsgathering activities. Under the reviews policy, the Department would not seek search warrants under the PPA's suspect exception if the sole purpose is the investigation of a person other than the member of the news media. [my emphasis]

So by using "news media," DOJ has actually shifted from one definition to another in the course of two paragraphs in discussing the topic that Katz focuses on as the reason for the new guidelines. I noted that here.

Now, to be fair to Katz, when I linked to my 2011 analysis of DIOG, I didn't obviously identify it (beyond the link) as 18 month old analysis, so he may have been confused about that (though he appears to have clicked through, at least using my link to DIOG). So perhaps when he was bragging about having called out my "bullshit by omission" he may not have understood the errors such claims introduced in

his own writing. My apologies if that's the case.

But none of that explains why Katz went into his post and made corrections, yet didn't correct the clear error about my reference to "journalist."

WHY "MEMBERS OF THE NEWS MEDIA" SHOULD WELCOME A SHIELD FOR THE ACT OF JOURNALISM

As I noted in this piece, the new policies DOJ rolled out in the wake of the AP and James Rosen revelations applies explicitly to "members of the news media," not journalists per se. The definition might permit the exclusion of bloggers and book writers, not to mention publishers like WikiLeaks.

I've been asked what I think a better solution is. My answer is to define — and then protect — the act of journalism, not the news media per se.

That approach would have several advantages over protecting "the news media." First, by protecting the act of journalism, you include those independent reporters who are unquestioningly engaging in journalism (overcoming the blogger question I laid out, but also those working independently on book projects, and potentially — though this would be a contentious though much needed debate — publishers like WikiLeaks), but also exclude those news personalities who are engaging in entertainment, corporate propaganda, or government disinformation.

But protecting the act of journalism rather than

"news media" would also serve to exclude another group that should have limited protection. Included within DOJ's definition of those it is protecting here are not just the reporters who work for the news media, but also the managers.

> "News media" includes persons and organizations that gather, report or publish news, whether through traditional means (e.g., newspapers, radio, magazines, news service) or the on-line or wireless equivalent. A "member of the media" is a person who gathers, reports, or publishes news through the news media.

While I absolutely agree that, say, AP's editors should have had their phone records protected as they contemplated withholding the UndieBomb 2.0 story after the White House request (those records were included in the subpoena) — that is, as they engaged in a journalistic role. That would protect any discussions they had with sources or other experts to challenge the government's claim about damage, for example. But the communications of a Tim Russert being pressured after the fact about a critical story by the Vice President's Chief of Staff should not be protected. Nor should WaPo CEO Katharine Weymouth's discussions with huge donors like Pete Peterson or potential salon sponsors. While I suspect DOJ sees real benefit in protecting these cocktail weenie means of pressure on news media (as do, undoubtedly, some of the executives involved), I see no journalistic reason to do so.

Moreover, in an era where WaPo is really a testing firm with a journalistic rump and NBC is really the TV content wing of a cable supplier, should we really be protecting the "news media" with no limits? (Bloomberg, I think, presents the most fascinating question here, particularly given their recent spying on users of Bloomberg terminals; where does the journalistic protection for companies that primarily provide privatized information begin and end?)

But even within the scope of Friday's guidelines, there's a reason the members of the news media should favor protecting the act of journalism rather than membership in news media.

That's because two of the most important passages in the new News Media Policies refer to newsgathering activities as a further modification to its otherwise consistent discussion of members of the news media. The phrase appears in what amounts to a mission statement describing why this issue is important.

> As an initial matter, it bears emphasis that it has been and remains the Department's policy that members of the news media will not be subject to prosecution based solely on newsgathering activities. Furthermore, in light of the importance of the constitutionally protected newsgathering process, the Department views the use of tools to seek evidence from or involving the news media as an extraordinary measure. The Department's policy is to utilize such tools only as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecution.

This is a weird passage, in that it both admits the "newsgathering process" is constitutionally protected, presumably for all, but then suggests the protections within this policy will only apply to members of the news media (one limitation) who cannot be prosecuted exclusively for their newsgathering activities (a second limitation).

Note the parallel limitation in a number of DOJ's surveillance and investigative guidelines — which say people cannot be investigated solely for their First Amendment protected activities — has not provided adequate protection to Muslims

engaging in speech and religion.

The policies again invoke "newsgathering activities" in the passage describing the news media protections in DOJ's treatment of the Privacy Protection Act.

> First, the Department will modify its policy concerning search warrants covered by the PPA involving members of the news media to provide that work product materials and other documents may be sought under the "suspect exception" of the PPA only when the member of the news media is the focus of a criminal investigation for conduct not connected to ordinary newsgathering activities. Under the reviews policy, the Department would not seek search warrants under the PPA's suspect exception if the sole purpose is the investigation of a person other than the member of the news media.

By limiting protections offered to members of the news media to "ordinary newsgathering activities," DOJ has just punted one of the crucial issues underlying the James Rosen affidavit (and, along with it, DOJ's efforts to prosecute WikiLeaks). Because it still permits DOJ to decide, potentially in secret (though, as a laudable part of the new policy, with the input of the Public Affairs Director and the Privacy and Civil Liberties Officer), what constitutes "ordinary newsgathering activities." And some of the things the FBI officer apparently decided in that case did not constitute ordinary newsgathering activities, but instead provided evidence that Rosen was part of a conspiracy to commit espionage, include:

- Soliciting disclosure of intelligence information, including documents, on North Korea

- Using (in the FBI officer's description) "covert email communications as a means of compartmentalizing the information" — this includes use of a pseudonym and a code for facilitating non-email communication
- Exploiting a source "like a rag doll" and the source's vanity (according to defendant Stephen Jin-Woo Kim's descriptions); employing flattery (according to the FBI officer's description)
- Providing other news articles in advance of their publication to a source not used on that story

While there are other protections for news media in these new policies (including protections from non-NSL Administrative orders, review before using such investigative methods, reporting on how much investigation of news media occurs, and what amount to increased minimization procedures for news media contact information), this is one of the critical new protections in this policy.

If DOJ decides that protecting sources and methods, soliciting information, and sucking up to sources do not constitute "ordinary newsgathering activities," then how useful are the protections?

DOJ has announced its intention to respect ordinary newsgathering activities and even recognized constitutional protections for them, sort of (I look forward to the legal cases that cite that language, anyway). But until there's a

common understanding about when such activities constitute journalism and when they constitute spying, the protection has limited value.

If the ultimate idea is to protect newsgathering activities, then why not establish what those activities are and then actually protect them, regardless of whether they are tied to a certain kind of institution?

IN BID TO PLACATE LEGACY MEDIA, DOJ MOVES CLOSER TO INSTITUTING OFFICIAL PRESS

The First Amendment was written, in part, to eliminate the kind of official press that parrots only the King's sanctioned views. But with its revised "News Media Policies," DOJ gets us closer to having just that, an official press.

That's because all the changes laid out in the new policy (some of which are good, some of which are obviously flawed) apply only to "members of the news media." They repeat over and over and over and over, "news media." I'm not sure they once utter the word "journalist" or "reporter." And according to DOJ's Domestic Investigation and Operations Guide, a whole slew of journalists are not included in their definition of "news media."

> DIOG does include online news in its definition of media (PDF 157).
>
> > "News media" includes persons and organizations that gather, report or publish news, whether

> > through traditional means (e.g., newspapers, radio, magazines, news service) or the on-line or wireless equivalent. A “member of the media” is a person who gathers, reports, or publishes news through the news media.

But then it goes on to exclude bloggers from those included in the term “news media.”

> > The definition does not, however, include a person or entity who posts information or opinion on the Internet in blogs, chat rooms or social networking sites, such as YouTube, Facebook, or MySpace, unless that person or entity falls within the definition of a member of the media or a news organization under the other provisions within this section (e.g., a national news reporter who posts on his/her personal blog).

Then it goes onto lay out what I will call the “WikiLeaks exception.”

> > As the term is used in the DIOG, “news media” is not intended to include persons and entities that simply make information available. Instead, it is intended to apply to a person or entity that gathers information of potential interest to a segment of the general public, uses editorial skills to turn raw materials into a distinct work, and distributes that work to an audience, as a journalism professional.

> The definition does warn that if there is any doubt, the person should be treated as media. Nevertheless, the definition seems to exclude a whole bunch of people (including, probably, me), who are engaged in journalism.

The limitation of all these changes to the "news media" is most obvious when it treats the Privacy Protection Act — which should have prevented DOJ from treating James Rosen as a suspect. They say,

> The Privacy Protection Act of 1980 (PPA), 42 U.S.C. § 2000aa, generally prohibits the search or seizure of work product and documentary materials held by individuals who have a purpose to disseminate information to the public. The PPA, however, contains a number of exceptions to its general prohibition, including the "suspect exception" which applies when there is "probable cause to believe that the person possessing such materials has committed or is committing a criminal offense to which the materials relate," including the "receipt, possession, or communication of information relating to the national defense, classified information, or restricted data "under enumerated provisions. See 42 U.S.C. §§ 2000aa(a)(1) and (b)(1). Under current Department policy, a Deputy Assistant Attorney General may authorize an application for a search warrant that is covered by the PPA, and no higher level reviews or approvals are required.
>
> First, the Department will modify its policy concerning search warrants covered by the PPA involving members of the news media to provide that work product materials and other documents may be sought under the "suspect exception" of the PPA only when the member of the news media is the focus of

> a criminal investigation for conduct not connected to ordinary newsgathering activities. Under the reviews policy, the Department would not seek search warrants under the PPA's suspect exception if the sole purpose is the investigation of a person other than the member of the news media.
>
> Second, the Department would revise current policy to elevate the current approval requirements and require the approval of the Attorney General for all search warrants and court orders issued pursuant to 18 U.S.C. § 2703(d) directed at members of the news media. [my emphasis]

The PPA, however, applies to all persons "reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."

> Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce;

I'm clearly covered by the PPA. But the FBI could easily decide to exclude me from this "news media" protection so as to be able to snoop into my work product.

Congratulations to the "members of the news media" who have been deemed the President's official press. I hope you use your privileges wisely.

Update: I've learned that the issue of whom this applied to did come up in background meetings at DOJ; in fact, DOJ raised the issue. The problem is, there is no credentialing system that could define who gets this protection and DOJ didn't want to lay it out (and most of the people invited have never been anything but a member of the news media, making it hard for them to understand how to differentiate a journalist).

Ultimately, I think DOJ is so anxious for Congress to pass a shield law (which they say elsewhere in their report) because it'll mean Congress will do the dirty work of defining who is and who is not a journalist.

THE INTERNET DIDN'T KILL THE MIDDLE CLASS; LAXITY AND APATHY DID

In tandem with the release of his book, Who Owns the Future?, Jaron Lanier's interview with Salon generated a lot of hand-wringing across social media. It seems Lanier, one of our so-called intellectual visionaries, believes that the collapse of Kodak and its 140,000 jobs, and the rise of Instagram and its 13 jobs, exemplifies the killing field of the internet. Lanier theorizes good paying jobs that once supported a thriving middle class have disappeared as internet-enabled firms replaced them. As these jobs vaporized, so did necessary benefits. Here's a key excerpt from

the interview:

> “Here’s a current example of the challenge we face,” he writes in the book’s prelude: “At the height of its power, the photography company Kodak employed more than 140,000 people and was worth $28 billion. They even invented the first digital camera. But today Kodak is bankrupt, and the new face of digital photography has become Instagram. When Instagram was sold to Facebook for a billion dollars in 2012, it employed only 13 people. Where did all those jobs disappear? And what happened to the wealth that all those middle-class jobs created?”

What a crock of decade-late shit.

Where the hell was Lanier in the late 1990s and early 2000s, when the U.S. manufacturing sector nose-dived due to government policies created by corporate-acquired elected officials and appointees?

It wasn’t the internet that killed the middle class. The apathy of intellectuals and the technology elite did; too few bothered to point out the potential repercussions of NAFTA and other domestic job-depleting policies. In the absence of thought leaders, corporatists sold the public and their electeds on job creation anticipated from globalizing policies; they just didn’t tell us the jobs created wouldn’t be ours.

It wasn’t the rise of digitization that killed the middle class. It was the insufficiency of protests among U.S. brain power, including publicly-funded academics, failing to advocate for labor and home-grown innovation; their ignorance about the nature of blue collar jobs and the creative output they help realize compounded the problem.

Manufacturing has increasingly reduced man hours in tandem with productivity-increasing

technological improvements. It wasn't the internet that killed these jobs, though technology reduced some of them. The inability to plan for the necessary shift of jobs to other fields revealed the lack of comprehensive, forward-thinking manufacturing and labor policies.

It all smells of Not-My-Problem, i.e., "I'm educated, technology-enabled, white collar; those stupid low-tech blue collar folks' jobs aren't my problem."

Until suddenly it is.

I remember having an argument with an academic in 2006 about the oncoming paradigm shift in in education where intellectual property and its transference became the core product and key competency in the business model. Universities, for example, would be at risk; if information was digitized and commodified, what would happen to the brick-and-mortar campuses? Eventually they would have to rationalize their existence and differentiate themselves if everybody and anybody could obtain the same education online, no matter where students were located. The cost of education could collapse in a commodified environment.

At the time I was told that wasn't realistic, it would never happen – the academic's approach to telling me I was full of shit.

Hello, MOOCs (massive open online classes).

Now academics can finally see the threat to their careers. They couldn't give a rat's butt when blue collar workers at dirty, dangerous jobs were threatened. They're worried now, though, when the jobs of white collar folks supporting cultural creatives like themselves are threatened.

A decade-plus later, an intellectual with a background in technology, suddenly realizes that the paradigm shift is rolling onto and over his his world – oh, and there's a gaping maw where government policy should be to prevent the

destruction of the world as he knows it. Nice latency you've got there, bub, the very definition of lax.

Another industry suffering from collapse is construction – see this active timeline and note the location of job growth up to 2008 and the corresponding collapse after the fact. This was another opportunity for visionaries a decade ago to discuss the repercussions of cheap money and inadequate protections against predatory banking. While the construction industry itself didn't suffer from a shift in technology, it was the increasing use of technology combined with lax regulation and oversight in mortgages, financing, and related derivatives that caused the collapse.

Again, intellectuals and technology folks were mute as middle class jobs bound up in real estate, construction, finance industries were dramatically impacted by the economic meltdown. Safety nets were attacked when they weren't squashed altogether.

Lanier's mourning for Kodak is pathetic not only for its narrow comprehension, but its blindness. Kodak's film business model is non-competitive and obsolete, given current policies combined with globalization. The present is digital; Kodak should have seen this and been looking for an Instagram future of its own years ago. It should have envisioned a new economic ecosystem developed around digital images. Or it should have lobbied harder for policies that would have encouraged on-shoring versus offshoring of manufacturing facilities, jobs, and profits, in order to save its film-based business.

I suggest rapid development of time travel technology so that reactive eulogists like Lanier can beam themselves back to the end of the Clinton and early Bush administrations to fix the roots of these problems.

In the meantime, we should be encouraging pro-active visionaries – true intellectuals who can see the big picture and imagine establishment of

government policies preserving pay and benefits while encouraging innovation.

Otherwise we would do well to imagine and plan for a near-term future in which all manufacturing and most construction around the world is replaced by 3D printers. Our kids and grandkids may be reduced to futures in direct competition with a global employment pool of poorly compensated printer designers, printer operators, and printer repairmen, where lowest cost energy as a factor in production reigns supreme.

Perhaps Lanier will write about the horror of such a future a decade later.

SCOTT BLOCH SENTENCING BLOCKED BY THE COURT

I have been a bit busy lately, so this is a tad late; but I should probably give the update on the Scott Bloch criminal sentencing that was scheduled for 9:30 am Monday morning May 13 in DC District Court in front of Judge Robert L. Wilkins. As you will recall, this blog has covered the Bloch case closely over the years due to its symbolism for government accountability and/or lack thereof.

The most recent coverage was immediately prior to the sentencing, and was in the form of a comprehensive post entitled “Former Bush Special Counsel Scott Bloch Bullies Journalists and Threatens 1st Amend Speech Before Criminal Sentencing”. As promised, a copy of said post was mailed to the court and it was entered on the docket. Several others sent letters as well, such as here for example.

The upshot is that Judge Robert L. Wilkins heard

the voices. In what I can only describe as truly commendable, yet still refreshingly surprising, this is what happened at sentencing as described by Ann Marimow of the Washington Post:

> The legal odyssey of Scott J. Bloch, the former head of the federal agency that protects government whistleblowers, continued Monday when a federal judge balked at proceeding with sentencing because of what he called an “improperly sanitized version of events.”
> ….
> But U.S. District Judge Robert L. Wilkins chastised attorneys on both sides for presenting a narrow account of Bloch’s actions that the judge said doesn’t fully describe the conduct at issue. Wilkins said he was uncomfortable issuing a sentence until a fuller description of Bloch’s actions was in the record.
>
> Sentencing documents, Wilkins noted, make little mention of Bloch’s previous deal with the U.S. Attorney’s Office in which he pleaded guilty to a misdemeanor charge of contempt of Congress.
> ….
> In the current case, federal guidelines call for a sentence from zero to six months in prison. But prosecutors have agreed not to oppose a period of probation and want Bloch to pay a $5,000 fine and complete 200 hours of community service.
>
> Wilkins suggested Monday, however, that he intends to consider Bloch’s conduct related to the previous case, which could expose him to jail time. The judge pointed specifically to Bloch’s position as a presidential appointee, a “position of public trust, operating with little oversight.”
>
> Bloch’s sentencing hearing has been rescheduled for June 24.

We will try to do another update on status again before the next sentencing date on June 24. But, for now, hat's off to Judge Robert L. Wilkins for hearing the voices of the public who object to the whitewash that was being applied to the misconduct in high office by Scott Bloch. Maybe there is hope for this Rule of Law thing after all.

FORMER BUSH SPECIAL COUNSEL SCOTT BLOCH BULLIES JOURNALISTS AND THREATENS 1ST AMEND SPEECH BEFORE CRIMINAL SENTENCING

When this blog last substantively left the continuing saga of Bush/Cheney Special Counsel Scott Bloch, it was with these words:

> So, between August 2, 2011 and December 21, 2012, a period of nearly a year and a half's time, the DOJ has done nothing whatsoever in furtherance of prosecuting Scott Bloch. Until today. And the vaunted Department of Justice has, on the Friday before the Christmas holiday…..filed a Motion to Dismiss. However, that is not the end of the story, as clause 5 of the Motion to

> Dismiss contains this language:
>
> > Concurrent with this Motion to Dismiss, the government is filing a new information.
>
> Well, not quite concurrent, as the Motion to Dismiss was filed mid to late morning, and the new information was just now made public. The new charge, a misdemeanor, is pursuant to 18 USC 1361 Depredation of Government Property or Contracts. The factual basis is made out from the "seven level wiping" Bloch caused to be done. Here is the new information just filed.

Yes, that is the "Reader's Digest" version of how Scott Bloch came to be where he is now….awaiting sentencing in the United States District Court for the District of Columbia. For a crime that barely even references, much less is indicative of, the actual acts he committed against the United States Government, and the citizens it represents.

But, Bloch is indeed now facing sentencing on the latest cushy plea he has been afforded by the Department of Justice; sentencing scheduled for Monday May 13, 2013, less than one week from today. Here is Defendant Bloch's sentencing memorandum, and here is the curiously collusive memorandum from the DOJ, who simply cannot stand for any Article II Executive Branch attorney being sent to jail/prison for lying to Congress because, seriously, many more might be in jeopardy if that was the case and precedent.

So, what is Mr. Scott Bloch doing? Taking his medicine quietly for having been given the gift plea by the DOJ to a misdemeanor after he actually committed such acts that appear by all legal rights to warrant felony allegations? Allegations as were described the last time Bloch was tried to be handed such a gift horse plea by the DOJ as:

> …felony crimes Bloch could have been, and should have been, charged with are staggering; including obstruction of justice, false statements, perjury, willful destruction of government property and Federal Records Act violations. But Defendant Bloch made a deal to plead to one little misdemeanor with the guarantee he would be considered under the most favorable sentencing guideline conditions imaginable.

Nothing has changed; not a single underlying fact has changed in the least, and Bloch still stands imperious and unrepentant. Scott Bloch has never disputed the report of the sworn statement of facts he previously submitted to the court that clearly supports charges of far more serious conduct. Indeed, at this point, Mr. Bloch could not dispute said statement of facts without committing even more false statements and/or perjury.

What is truly shocking about Scott Bloch is not just that he is colluding with the Department of Justice to skate, as he is, because no Article II branch wants to set a contrary precedent, but what is really shocking is that Scott Bloch has had the hubris to threaten and bully independent bloggers who have spoken the truth about his misconduct.

It has come to this blog's attention that Scott Bloch has authored one or more threatening and bullying letters, ahead of his criminal sentencing, to internet journalists reporting facts on his previous professional misconduct*. Letter(s) threatening the very root First Amendment freedoms of the press and free speech. A copy of one such letter is attached here, and spelled out in relevant form as follows:

> I have been the subject of articles and blogs on your [redacted] website and blog site. The content and intent of these blogs/articles is to defame me by

> casting aspersions on my professional standing and ability to represent contractors.
>
> ….
>
> I write to demand that you remove these articles and blogs about me and my time as Special Counsel immediately. This is harmful to my professional reputation as a lawyer and you are not commenting on any public matters that are current. The prior legal defense fund is defunct and has not been active for over two years. Your demeaning and personal attacks impute to me qualities that tend to injure me in my business of representing contractors. Your website is dedicate [sic] to them and therefore you are targeting my business in Washington, D.C. intentionally, and my residence in Virginia, from where I draw some of my clients.
>
> If you choose to ignore this and not remove the materials from your internet site and blogs and all caches, I will be forced to sue for an injunction and to seek damages. As long as the article remains on your website, you are publishing it. In addition, you are publishing it in various fora, including in Virginia and Washington D.C. where I represent employees and federal employees [sic] Continuing publication also subjects you to Virginia jurisdiction as long as the article remains on the web. I will institute an action in Virginia and in Washington D.C. against you for defamation and actual malice, together with damages and punitive damages.1 I will also seek damages for civil conspiracy to harm my business, and Virginia courts and juries have proved to be very protective of one’s business reputation when gratuitously harmed by publications.2 If I determine through discovery that you have worked with others to do this, I

> will join them as well. (emphasis added)

Threatening not only freedom of speech and press, but the right to speak the truth. Mr. Bloch has hubris beyond description to think that discussion of the misconduct and facts he has admitted to, as factually depicted by his own sworn statement of facts, are beyond "commenting on any public matters that are current". When HE IS PENDING CRIMINAL SENTENCING on those *very* same facts. The name and contact information of the recipient of this letter were redacted at the request of the recipient, who indeed fears the wrath of Bloch and his threats.

When Bloch could have been, and should have been, charged with FAR more serious federal crimes, Scott Bloch is out threatening citizen journalists reporting on his conduct. By the way, upon information and belief, the "legal defense fund" Mr. Bloch and/or his friends had set up for him was still up and on the internet as of the time the blog posts he complained of were written; it was just conveniently taken down before Bloch threatened the innocent bloggers for discussing it.

Threatening internet journalists who have reported facts about Mr. Bloch, and who object to what he has done in the name of the American people. Journalists who object to the skating kid gloves treatment curiously afforded Mr. Bloch by the DOJ despite his egregious, and admitted, acts.

Massive prosecutorial effort was expended by the DOJ on Roger Clemens, a man who, at worst, was accused of lying to Congress about taking a few shots of steroids while playing the game of baseball. The DOJ pursued another player of games, Barry Bonds every bit as relentlessly for years before getting a single count of obstruction of justice that is very likely to be thrown out on appeal.

The Department of Justice pursued these crimes, all for lying to Congress, far, far more

aggressively compared to the silk hands treatment they have afforded their own former fellow Executive Branch attorney, Scott Bloch.

Roger Clemens and Barry Bonds lied about, at worst, whether they enhanced their ability to play a silly game (and none of that was proved). Scott Bloch ADMITTED to facts that, on their face, appear to constitute obstruction of justice, false statements, perjury, willful destruction of government property and Federal Records Act violations. There is a qualitative difference here, and it is hard to envision how it runs in favor of Mr. Bloch.

The dangerous and constitutionally subversive apparent (and admitted) acts of Scott Bloch, a man entrusted with representing, shepherding and protecting the lifeblood of honest government – whistleblowers meant to keep the government honest and forthright – betrayed every ounce of that trust. Bloch's own stipulated facts described the office he was entrusted with as:

> The United States Office of Special Counsel ("OSC") is an independent federal agency charged with safeguarding the merit-based employment system by protecting federal employees and applicants from prohibited personnel practices ("PPP"). As such, OSC receives, investigates and prosecutes allegations of PPPs, with an emphasis on protecting federal government whistleblowers.

Bloch himself was accused of violating the very tenets of good government he was charged with protecting. Bloch scrubbed the very digital records of his federal agency that could, at least partially, document what he had done and perhaps substantiate the claims of whistleblowers in his own agency. And Bloch did it via a completely outside of the government, "Best Buy Geek Squad" self described "seven level wipe" of pertinent computers. Computers that belonged to the government, to the people

of the United States. Computers and records subject to the the Federal Records Act. Then Bloch gave misleading and false information about his conduct to Congress.

The man, Scott Bloch, charged with protecting the watchers of the government, turned out to be the very man who violated and betrayed all three branches of Constitutional government at the same time. The effects are still being felt right now in the court Bloch is before. Yet, oddly, the DOJ seems to think Scott Bloch is infinitely *less* harmful than the likes of common ballplayers like Clemens and Bonds. How can that be?

It can only be if one is to be so absurd as to consider corruption of the very foundation of all three branches of government to be less important that cheating in a baseball game. When the Scott Bloch corruption of all three branches of government is ADMITTED and the ball field allegations are unproven. Yet, that is exactly where the record is with respect to Mr. Bloch and the DOJ.

And, so, sentencing is set for Scott Bloch on 5/13/2013 at 9:30 AM in Courtroom 27A before Judge Robert L. Wilkins. What should the court do with Mr. Bloch? The position here has not changed one iota since the sentencing letter we sent that stated before the last attempted sentencing of Bloch on a cushy plea deal from the DOJ:

> The number and quality of felony crimes Bloch could have been, and should have been, charged with are staggering; including obstruction of justice, false statements, perjury, willful destruction of government property and Federal Records Act violations. But Defendant Bloch made a deal to plead to one little misdemeanor with the guarantee he would be considered under the most favorable sentencing guideline conditions imaginable. … It is scandalous and should not be permitted by the Court.

> There is, however, much more to this case than just that.
>
> It is the duty of the federal court system to provide fair and impartial justice to those before it and to stand as one of the three co-equal branches of government with a solemn duty to protect the sanctity of the government and see that justice is done not just for the powerful and privileged, but for all. For a misdemeanor plea case, there are powerful and critical factors involved in the instant case which warrant consideration by the Court. Central is the question of whether there is now, and will be in the future, meaningful accountability for Executive Branch officials as to the crimes they commit in office and in the name of the United States citizenry.
>
> As described at the start of this letter, our government and constitutional rule of law fails if Executive Branch officials can lie and destroy material evidence, not only to shield themselves from accountability, but to mask their efforts to deny legitimate governmental whistleblowers the light of day with which to inform and protect the public. It is truly that fundamental. And when you then compound the problem with fellow Executive Branch attorneys and officials colluding to minimize the crimes and frustrate even the minimum statutory punishment, the issue, and thus the case of Mr. Bloch, becomes of immense importance.
> …
> This Court should fulfill that duty, stand for the people and rule of law, and send a message to Mr. Bloch and subsequent Executive Branch officials that there is a penalty for criminal behavior in obstruction and contempt of Congress, and that it will be enforced.

And this, like the sentencing recommendation we made, is being formally sent to the United States District Court for the District of Columbia, care of Judge Robert L. Wilkens.

But, let this not be the only word on Mr. Bloch and his appropriate disposition; let us also consider the valid words of long time attorney John W. Cochrane, disciple of one of the greatest voices of the United States Circuit Court of Appeals for the District of Columbia, Judge Spottswood W. Robinson III:

> Thirty-three years ago, it was my great honor to be selected by Hon. Spottswood W. Robinson III to serve as a Judicial Extern for three months. For a young man from the UCLA Law School, the opportunity to work with such a luminous and inspirational jurist, at such a phenomenal court, was something I have never stopped appreciating.
>
> Judge Robinson instilled in me a deep respect for the Rule of Law, a reverence for the Constitution, and an abiding recognition that the courts of this country exist to assure and mete out Justice on an equal basis to all who come before them. I have gone on to become a partner in large American law firms and counsel to respected American companies; but it was the time I spent with Spottswood Robinson III, his clerks, and in the presence of his fellow judges, that I treasure most about my exposure to the Law in America. I am sure you understand exactly what I mean, and that you have the same feelings toward the position you are honored to hold in the courthouse you are able to work while overseeing a legal system dedicated to Equal Justice Under Law.
>
> Please do not dishonor the memory of Judge Robinson, the sanctity of your Oath, and the preeminence of your Court

> – not to mention the romantic notions of a California lawyer who believes in the American system of justice – by allowing the present efforts of the Department of Justice to whitewash the despicable actions of Scott Bloch. Please, please, PLEASE send at least Scott Bloch to PRISON for the violations of law to which he has already pleaded guilty, and do NOT facilitate the cowardly and despicable efforts of the Justice Department to establish a principle that governmental criminals should be exempted from the Rule of Law when it comes to sentencing.
>
> You know the arguments. You know you are being played by the DOJ, who are counting on you to rubber-stamp a pernicious end run around Justice, and you know that the DOJ wants nothing more than for you to do so quietly so as to not "cause a stir".
>
> Please have the courage of America's convictions. Send Scott Bloch to prison.

Whether it is Judge Spottswood Robinson III, or Judge Deborah Robinson, the previous judge in this sorry case, the result should be the same. The DOJ and Mr. Bloch should NOT be allowed to skate with this level of sheer impunity. It is flat out a violation of the interest of the American people, the officials they deem to elect, and the trust they are entitled to preserve. The same trust this court is obligated to protect by protecting and imposing the Rule of Law.

Scott Bloch must not be allowed to walk from this egregious conduct, and this court, "scott free". What is being pitched by both parties to this court is an affront to both justice and the Constitution of the United States and the court should sentence accordingly, both to bring accountability here, and to deter such conduct in the future.

Let the record so reflect.

[* = Mr. Bloch has not now, nor has he ever, threatened this blog; instead, he has preyed on smaller blogs (whose proprietors were, in fact, chilled by the First Amendment icing of Scott Bloch)]

CABLES, CONFIRMED

I've long traced the severance and disconnection of various parts of the world from telecommunication cables on this blog, most recently in the wake of Syria losing Toobz access after it purportedly mixed some chemical weapons.

> Danger Room's sources aren't even asserting that both events—the mixing of the CW on Wednesday and the Intertoobz blackout on Thursday—are both signs of Bashar al-Assad's panic.
>
> Which would sort of be the default unless intelligence sources had reason to know that the Intertoobz blackout had nothing to do with the CW mixing.
>
> We've long traced interesting Intertoobz blackouts caused by cut cables on this blog: the recent blackout in Djibouti. to a cable in the Bay Area, to a number of cut cables in the Middle East back in 2008.
>
> It appears to be an increasingly common tactic, one difficult to attribute to a specific actor.
>
> But if one of those actors comes out a few days after an outage and says they have no reason to find that outage as suspicious as the mixing of CW, maybe it's not so hard to attribute after all.

One of the interesting revelations in this profile on the guy who shot Osama bin Laden is that sending Seal Team Six to do something with underwater cables is apparently routine enough that's what they were told the mission would be before they were read into the real target.

> There was so much going on — the Libya thing, the Arab Spring. We knew something good was going to go down. We didn't know how good.
>
> The first day's briefing, they actually kind of lied to us, being very vague. They mentioned underwater cables because of the earthquake in Japan or some craziness.

Consider me thoroughly unsurprised.