AH, BUT ARE YOU LIKE GEORGE W. BUSH?

I've been in an car dealer service waiting room all morning, so I'm late to the story about Barack Obama telling Jello Jay Rockefeller he's not as bad as Dick Cheney.

> Sen. Jay Rockefeller (D-W.Va.) confronted the president over the administration's refusal for two years to show congressional intelligence committees Justice Department Office of Legal Counsel memos justifying the use of lethal force against American terror suspects abroad.
>
> [snip]
>
> In response to Rockefeller's critique, Obama said he's not involved in drafting such memos, the senators told POLITICO. He also tried to assure his former colleagues that his administration is more open to oversight than that of President George W. Bush, whom many Democratic senators attacked for secrecy and for expanding executive power in the national security realm.
>
> "This is not Dick Cheney we're talking about here," he said, according to Democratic senators who asked not to be named discussing the private meeting.

Aside from the fact that — as I've pointed out — Obama is actually worse than the last year of the Bush Administration, when Acting OLC head Steven Bradbury was sharing OLC memos with Congress, I'm struck that Obama seems to forget he is the President, not the Vice President.

The comparison still is inapt. George Bush didn't write any Executive Orders pretending to be transparent and his classification Executive Order effective empowered Dick Cheney to

classify and instadeclassify at will (an authority that John Brennan seemed to use while he was in the White House).

But like Bush, Obama has people working for him who are as allergic to oversight as Dick Cheney. I pointed out yesterday, for example, that Obama's Director of National Intelligence, James Clapper, thinks he shouldn't even answer questions in open session and tried to stop publishing the number of people with security clearances.

Under Bush, DOD hid pictures of coffins; under Obama DOD just started hiding numbers of drone strikes.

Cheney went to the mat to hide who he had met with on his Energy Task Force. Obama's National Security Council went to the mat to hide any mention that the President had authorized the torture program — and they hid it, they explained, because they were still using that very same authorization (though to do thinks like engage in targeted killings).

Obama seems to be hiding behind his own stated good intention (even while he admitted to Democratic Senators he would feel the way they do now if he were still in the Senate) just like Bush hid by his stated good intention that no one would leak the name of a CIA officer. Both, meanwhile, were either ignoring or pretending to ignore the sheer paranoia about secrecy of the men that work for them.

THE AUTHOR OF THE WHITE PAPER, STUART DELERY, ARGUES

SELECTIVE, MISLEADING DISCLOSURES SHOULD NOT BE CHECKED BY FOIA

As I noted in this post, Daniel Klaidman has identified the author of the targeted killing white paper as Stuart Delery.

At the time he wrote the white paper, Delery was Senior Counselor to Attorney General Eric Holder. Last March, he became Principal Deputy Assistant Attorney General in the Civil Division of DOJ and, in the absence of an Assistant AG (or, as far as I can tell, even a nominee, in which case this feels a lot like what George Bush did with Steven Bradbury when he left the Acting head in charge for years on end), the Acting head of the Civil Division.

As I also noted, Delery actually argued the government's case in the ACLU's Drone FOIA on September 20, 2012. Now, that's the ACLU's other drone FOIA, not the one specifically requesting information that should have included the unclassified white paper Delery wrote if DOJ had answered the FOIA in good faith.

Nevertheless, it asked for closely related information:

> The Request seeks a variety of records relating to the use of unmanned aerial vehicles to conduct targeted killings, including the legal basis for the strikes and any legal limits on who may be targeted; where targeted drone strikes can occur; civilian casualties; which agencies or other non-governmental entities may be involved in conducting targeted killings; how the results of individual drone strikes are assessed after the fact; who may operate and direct targeted killing strikes; and how those involved in operating the program

> are supervised, overseen or disciplined.

At the time ACLU submitted the request on January 13, 2010, Delery was in the Deputy Attorney General's Office. DOJ responded to its part of the FOIA on February 3, 2010 — 16 days after DOJ worked on a briefing on targeted killing Eric Holder would make to President Obama and 15 days after he delivered that briefing — by claiming only FBI would have responsive records. When FBI searched its records it found none. DOJ made that initial response 6 days before someone in DAG — Delery's office — wrote an email to OLC about the Holder briefing.

So while DOJ's non-responsiveness in the drone FOIA is not as egregious as it was in the Awlaki FOIA, it's still clear that the department Delery worked in, if not (as in the Awlaki FOIA) Delery's work itself, was shielded from FOIA by a disingenuous FOIA response.

Yet Delery, the Acting head of the Civil Division, nevertheless decided he should argue the government's case. Technically, Delery was arguing for CIA's right to pretend it hadn't confirmed its role in drone strikes in spite of repeated public statements doing just that, so he wasn't defending the non-disclosure of his Department's work, per se. Still, it's not generally considered good form for a lawyer to argue a matter in which he has been so closely involved. He did so, however, at a time before we knew just how centrally involved he was in this matter.

With all that in mind, I thought I'd look at what Delery said to the DC Circuit.

> MR. DELERY: May it please the Court, Stuart Delery for the Appellee, CIA.
>
> This Court in several cases has identified two important interests that the strict test for official confirmation serves. It protects the Government's vital interest in

> information related to national security and foreign affairs, and it advances FOIA's interest in disclosure by not punishing officials for attempting to educate the public on matters of public concern because otherwise officials would be reluctant to speak on important national security matters.
>
> Here, the Government has acknowledged that the United States makes efforts to target specific terrorists as part of its counter-terrorism operations, that as part of those operations or, in some cases, those operations involve the use of remotely piloted aircraft or drones, and it's also described the legal framework and standards that apply in this context in a series of speeches and interviews including by the President's counter-terrorism advisor, John Brennan, but also the Attorney General, the legal advisor to the State Department, the General Council of DOD, and as has been referenced in yesterday's or the recent exchange of 28J letters including a recent interview by the President. But, there's been no official acknowledgment one way or the other about whether the CIA is involved in these particular operations. [my emphasis]

Delery suggests that a series of Leon Panetta comments (both before and after he moved from CIA to DOD) making the CIA's role in drone killing clear should not amount to confirmation that the CIA is involved in drone killing because, he says, FOIA's interest in disclosure should not punish public officials for attempting to educate the public.

Or, to put it another way, the Administration giving a bunch of self-serving speeches should not then make the topic of those speeches subject to FOIA because, in Delery's mind, that would work contrary to FOIA's support for disclosure because it would punish officials for

giving self-serving speeches.

He then proceeds to name the speeches in question. Or most of them. While he mentions the speeches John Brennan, Eric Holder, Harold Koh, and Jeh Johnson gave, he neglects to mention the speech Stephen Preston — the General Counsel of the Agency Delery technically represented in this hearing — gave.

That's utterly consistent with the CIA's apparent Glomaring of the speech in the Awlaki FOIA. Except in this case, it is even more egregious because Preston's speech clearly spoke about both hypothetical lethal force covert ops (the Awlaki killing) and the non-hypothetical Osama bin Laden targeted killing. In this suit, the CIA should not be able to Glomar this speech. Effectively, the government maintains the CIA can make a public speech about a topic, but not acknowledge it in FOIA because then we could connect the speech up with the topic it was about. Or something like that.

All that said, remember how misleading the speeches Delery did name were. None of them mention signature strikes; John Brennan's in particular suggests the strikes are limited to targeted strikes.

> Yes, in full accordance with the law—and in order to prevent terrorist attacks on the United States and to save American lives—the United States Government conducts targeted strikes against specific al-Qa'ida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones. And I'm here today because President Obama has instructed us to be more open with the American people about these efforts.

Furthermore, we now know what Delery, better than almost anyone else, has known for some time: Eric Holder's public speech resembles the white paper (and therefore presumably the underlying OLC memo authorizing targeted killing

of Awlaki) in most respects. Except that Holder,

- Hid one of the biggest concerns about targeted killing, the possibility it would constitute murder
- Hid concerns that targeted killing would constitute a war crime
- Hid a claim that a broadly defined interpretation of imminent threat would limit the application of the Fourth Amendment in a targeted killing of an American
- Claimed the program was subject to a great deal of oversight that it appears not to have been

In other words, Delery argued to the DC Circuit that the government should be able to make deceptive speeches to the public — in the name of educating the public! — without having those speeches trigger FOIA requirements that might allow citizens to fact check those speeches.

And the treatment of the unclassified white paper — it was provided to four committees in Congress only after the government's response to the other ACLU FOIA was complete, so the government hid how Holder's speech differed from the underlying memo even from Congress for months (in the case of Committees with oversight) and years (in the case of the rest of Congress). Then, when it became convenient, it was leaked, after two FOIAs requesting it had been stalled or denied. The White House Press Secretary then told reporters to go read the white paper that had been withheld in FOIA but then conveniently leaked. Thus, the white paper serves as Exhibit A in the government's self-

serving dribbling out of information, in violation of the spirit of FOIA.

Which is interesting, because here's how Delery responded to questions about the Administration's rampant leaking.

> JUDGE GRIFFITH: I'm interested in the leaks question. Could you address that? What are we to make of these allegations of a serious pattern in strategy of leaks at the highest levels of the CIA and the Government as being a selective disclosure and it, in fact, works as an sources in media reports.
>
> JUDGE GRIFFITH: Are you aware of any case in which we have been confronted with allegations of such widespread –
>
> MR. DELERY: Right.
>
> JUDGE GRIFFITH: – and strategic leaking at such a high level? Are you aware of any case that's like this? I'm not.
>
> MR. DELERY: I think there certainly are other cases.
>
> JUDGE GRIFFITH: Like this.
>
> MR. DELERY: Other cases involve widespread alleged leaking. I don't think that this particular allegation necessarily is the same. I also emphasize that it's an allegation. The Court when discussing the part of the official confirmation test that suggests that some evidence of bad faith might lead to a different result has never looked at this question. It was also made clear that that inquiry goes to whether there's a basis to believe the national security judgment reflected in the declarations has not been met, and has emphasized that speculation isn't enough, that the plaintiff seeking the information in FOIA needs to come forward with some evidence.

> JUDGE GRIFFITH: These are allegations. But, the allegations are that senior CIA officials leaked information about a CIA drone program to the New York Times, the Wall Street Journal, a number of other major media sources. So, the common sense of this is we'd have to be left to believe that all of those outlets are, in fact, misinformed or lying.
>
> MR. DELERY: Right. Well, I think a few additional points. One is these, well, as a factual matter, for example, when asked about this allegation directly, the President made a statement back in June saying that that was not the case. And so, you're confronted here with unsupported allegations in connection with litigation. You have a record and declaration from the CIA saying that the information being sought here, whether these documents exist, remains a classified fact, and I don't think there's any support in the Court's cases to find that fact pattern sufficient to justify a further inquiry. In effect, it turned FOIA litigation into a leak investigation, and the question I would have is what's the rule that would be articulated about what threshold would trigger that kind of inquiry, and beyond that, how would it proceed? It doesn't seem like a workable result. The Court has never conceived –
>
> JUDGE GRIFFITH: But, on the other hand, aren't we, if we're to apply FOIA, aren't we to work to resolve, to work to prevent efforts to get around FOIA through strategic leaks. Right?
>
> MR. DELERY: I think what the Court has said is that the purpose of FOIA litigation is to determine whether a particular document should or shouldn't be released not to identify whether a certain fact is or isn't true. [my

> emphasis]

Delery totally ignores Thomas Griffith's point, that FOIA was enacted to avoid precisely what has happened in this case, the self-interested dribbling out of information that serves as much to confuse as to "educate" the public. He invokes Obama's comment — exactly parallel to some Bush made during the Valerie Plame leak case — assuring that no sanctioned leaks had happened; it turns out they had. And then Delery again asserts that the sole role of Courts in FOIAs is to determine whether documents can be withheld, not to allow citizens to use FOIAs to test the Executive Branch's truth claims. (In a case argued in February, a lawyer reporting to Delery went even further, arguing that Courts should only rubber-stamp every Executive claim that a document can't be released.)

Stuart Delery, a man whose own work product on this issue was shielded by DOJ's egregious non-response to an ACLU FOIA, says citizens shouldn't be able to use FOIA to check the veracity of public claims the Executive Branch makes.

Happy Transparency Week: This guy is one of the most senior officials in the Department of Justice.

GENERAL DYNAMICS: THE DIGITAL TALE OF JOHN & JILL AND DAVE & PAULA

Another giant shoe has dropped in L'Affaire Petraeus. Not simply more specifics, but yet

another General:

> Gen. John Allen, the top American and NATO commander in Afghanistan, is under investigation for what a senior defense official said early Tuesday was "inappropriate communication'' with Jill Kelley, the woman in Tampa who was seen as a rival for David H. Petraeus's attentions by Paula Broadwell, the woman who had an extramarital affair with Mr. Petraeus.
>
> In a statement released to reporters on his plane en route to Australia early Tuesday, Defense Secretary Leon E. Panetta said that the F.B.I. had informed him on Sunday of its investigation of General Allen.
>
> Mr. Panetta turned the matter over to the Pentagon's inspector general to conduct its own investigation into what the defense official said were 20,000 to 30,000 pages of documents, many of them e-mails between General Allen and Ms. Kelley, who is married with children.

Really, at this point, what can you even say about the secret storm soap opera that roils within the rarified brass air of the US Military? This was just the last hit for a night that saw the emergence of the Shirtless FBI Guy (now under investigation himself by the Office of Professional Responsibility at DOJ) to a nightime search of Paula Broadwell's home by the FBI.

There are too many tentacles, evolving too quickly, to go too deep on all the facts that have rolled out even in the last twelve hours. But the General Allen/Jill Kelley bit is fascinating. Remember, the handful of emails Paula Broadwell sent to Kelley reportedly did not mention Petraeus by name. This latest report at least raises the possibility Broadwell was referring to an inappropriate relationship

between Kelley and Allen, and not Kelley and Petraeus. I am not saying such is the case, but it is also arguably consistent with the currently known substance of Broadwell's emails to Kelley, so the question is valid to be raised.

A couple of other data points to note. First, Broadwell's father made a somewhat cryptic comment yesterday that may be being explained now:

> "This is about something else entirely, and the truth will come out," he told the Daily News.
>
> "There is a lot more that is going to come out … You wait and see. There's a lot more here than meets the eye."
>
> He said that his daughter, who's at the center of the controversy that prompted CIA director David Petraeus to resign from his post, is a victim of character assassination, and that there's something much bigger lurking behind the curtain.

Second, as I noted early yesterday morning, Jill Kelley has hired some of the most astoundingly powerful criminal defense and PR help imaginable:

> They hired Abbe Lowell, a Washington lawyer who has represented clients such as former presidential candidate John Edwards and lobbyist Jack Abramoff. And the couple are employing crisis PR person Judy Smith, who has represented big names like Monica Lewinsky, Michael Vick and Kobe Bryant.

Now, let's be honest, an innocent recipient of a handful of crank non-threatening emails, as Kelley was commonly portrayed when her name first came out, does NOT need that kind of heavy hitter professional service. Seriously, Abbe

Lowell is not only a great attorney, he is as preeminent a counsel as exists for spook and national security defense cases. No one in their right mind pays for that unless they need it, especially 1,000 miles away from his office.

Another oddity occurred last night: The North Carolina home of Paula Broadwell was searched for nearly four hours by a full on execution team from the FBI. From the New York Times:

> On Monday night, F.B.I. agents went to Ms. Broadwell's home in Charlotte, N.C., and were seen carrying away what several reporters at the scene said were boxes of documents. A law enforcement official, speaking on condition of anonymity because the case remains open, said Ms. Broadwell had consented to the search.

The key word in that quote that strikes me is "consensual". Broadwell has lawyered up too, having hired prominent Washington DC defense attorney Robert F. Muse. If an attorney feels his client is the target of a proposed search, he does not consent, he makes the officers get a warrant and search for only what a court orders and nothing else. You have to wonder what was being searched for that Broadwell and her counsel were not more worried about?

It is still early in the Allen portion of this mess, but it sure does cast the entire matter in a new light. Seriously, 30,000 pages of communications between Allen and Kelley in two years? That is 41 pages a day. When in the world did Allen find time to make war? And keep in mind, Kelley had already been stated to be regularly (up to once a day) emailing Petraeus for some of that period…she must be getting carpal tunnel syndrome.

There is also the pressing question of exactly what the methods and means were for discovering and extracting these 30,000 some odd pages of communications between General Allen and Jill

Kelley, and how that came to pass when she was supposedly and innocent victim of Paula Broadwell. There were already great questions in this regard about Broadwell and Petraeus. I will leave that for later, I suspect Marcy may have something to say on those issues.

Four-star generals. Two of them wrapped up in one salacious scandal. The Stones may need to modify their lyrics ever so slightly.

JAY BYBEE WROTE MEMO PERMITTING BROAD SHARING OF INTELLIGENCE-RELATED GRAND JURY INFORMATION

In March 2011, I noted a previously unreleased OLC memo mentioned in Jack Goldsmith's May 6, 2004 illegal wiretapping memo seemingly giving the President broad authority to learn about grand jury investigations.

> For example, this Office has concluded that, despite statutory restrictions upon the use of Title III wiretap information and restrictions on the use of grand jury information under Federal Rule of Criminal Procedure 6(e), the President has an inherent constitutional authority to receive all foreign intelligence information in the hands of the government necessary for him to fulfill his constitutional responsibilities and that statutes and rules should be understood to include an implied exception so as not to interfere with that authority. See Memorandum for

> the Deputy Attorney General from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Effect of the Patriot Act on Disclosure to the President and Other Federal Officials of Grand Jury and Title III Information Relating to National Security and Foreign Affairs 1 (July 22, 2002)

The Brennan Center has now liberated that memo (though they don't yet have it linked). And it shows that in July 2002, Jay Bybee interpreted a section of the PATRIOT Act that expanded information-sharing to include sharing grand jury information, with no disclosure, with the President and his close aides.

> The notion that grand jury testimony should be secret dates back to at least the seventeenth century. The rules governing disclosure of grand jury proceedings are set by the Federal Rules of Criminal Procedure; prior to the PATRIOT Act, those rules declared that grand jury information could be shared only under certain circumstances, such as when the material was necessary to assist a prosecutor. However, disclosures had to be reported to a judge, and everyone receiving the information had to be told of its confidentiality.
>
> The PATRIOT Act changed these rules significantly. Government lawyers could now share "any grand-jury matter involving foreign intelligence, counterintelligence …, or foreign intelligence information" with nearly any federal official, including those working in law enforcement, intelligence, immigration, national defense, or national security. Even records about a grand jury's deliberations or a particular grand juror's vote were apparently fair game. And the standard for sharing the

> information was not whether the material was "necessary" to the official's duties; instead, the information need only "assist" the official in some way.
>
> [snip]
>
> First, although the rule expressly requires that disclosures of grand jury information be reported to the court, Bybee advised that disclosures to the president need not be reported lest they "infringe on the presumptively confidential nature of presidential communications." (OLC had previously decided that similar disclosures to the president would be reportable in some circumstances but not in others.) In addition, disclosures to the president's "close advisors" – including the president's chief of staff, the vice president, and counsel to the president – could be kept secret as well. While only "information that is actually necessary for the President to discharge his constitutional duties" could be secretly disclosed to the president or his advisors, that requirement is highly unlikely to be tested in practice.
>
> Permitting the content of deliberations or a grand juror's vote to be shared secretly with the vice president is surprising enough. The memo goes much further, however. Once an attorney for the government has shared grand jury information with anyone – the president, one of his close advisors, or any other federal official whose duties are listed above – the person receiving the information can share it with anyone else without reporting to the court. That later disclosure, according to the memo's crabbed reasoning, is not a disclosure "under" the rule, and therefore is not bound by the reporting requirement.

> And there's more: the recipient of one of those subsequent distributions can use the information for any purpose. Because these down-the-line releases are not technically disclosures "under" the rule, the "official duties" constraint does not apply.

I'll have more to say about this once I get the memo.

But imagine how it might be used in, say, the Valerie Plame or the Thomas Drake investigations. They were, after all, investigations about the unauthorized disclosure of foreign intelligence information. They also happened to be investigations into Dick Cheney's law-breaking, but they were ostensibly about leaks of precisely the kind of information Jay Bybee permitted be shared with the President and … the Vice President. And in the case of the Plame leak, once Cheney got a hold of the information, he could share it with Karl Rove who could do whatever the fuck he wanted with it.

Mind you, once Pat Fitzgerald got put in charge, I doubt such sharing happened on the Plame case—at least not before August 2005, when Jim Comey retired. After that, who's to say what David Margolis, the master of institutional self-preservation, might have done with grand jury information implicating top White House officials?

And, yes, by all appearances, this memo remains operative.

Update: Here's the memo. And here's the operative passage:

> Although the new provision in Rule 6(e) requires that any such disclosures be reported to the district court responsible for supervising the grand jury, disclosures made to the President fall outside the scope of the reporting requirement contained in that amendment,

> as do related subsequent disclosures made to other officials on the President's behalf.

DOD TO GIVE PENGUIN THE WIKILEAKS TREATMENT?

As a number of outlets have reported, DOD has written a threatening letter to Matt Bissonnette, the Navy SEAL whose memoir comes out next week.

But I think they're misunderstanding part of the nature of the threat (though Mark Zaid, a lawyer who has represented a lot of spooks in cases like this one, alludes to it here, which I'll return to). Here are, in my opinion, the two most important parts of the letter. First, DOD's General Counsel Jeh Johnson addressed it to Penguin's General Counsel as the custodian for the pseudonymous writer he makes clear he knows the real identity of elsewhere in the letter.

> Mr. "Mark Owen"
>
> c/o Alexander Gigante, Esquire
>
> General Counsel
>
> Penguin Putnam, Inc.

That, by itself, is not a big deal. But it does mean Johnson knows Penguin's GC will read this letter.

More importantly, here's how Johnson ended the letter:

> I write to formally advise you of your material breach and violation of your agreements, and to inform you that the

> Department is considering pursuing against you, and all those acting in concert with you, all remedies legally available to us in light of this situation. [my emphasis]

That is, DOD is also considering legal remedies against "those acting in concert" with Bissonnette.

As far as we know, the only people acting in concert with Bissonnette are at Penguin's imprint of Dutton. Thus, as much as this is a threat to Bissonnette, it's also a threat to Penguin.

Which would make sense because—as Zaid points out—the government has been trying to push the application of the Espionage Act to those sharing classified information since the AIPAC trial.

> Mark Zaid, a lawyer who has represented a variety of former military and intelligence officials in disclosure and leak cases, said the Johnson letter looked like a signal that the Pentagon was "contemplating a test case against the publisher or media for disclosing classified information."
>
> Zaid said it might be easier to file such a criminal case against the publisher than the author of the book, though a civil case against the author for violating secrecy agreements would be, in Zaid's opinion, a "slam dunk."
>
> Given U.S. media laws, including the First Amendment to the Constitution guaranteeing freedom of expression, Zaid said the result of any criminal prosecution against a publisher would be uncertain. "I'm not saying they're going to win … I don't know if they'll do it. (But) They've been waiting for a good factual case to bring it."

Moreover, if it worked, then they'd have a legal precedent they could use to go after WikiLeaks itself, which they've been trying to do for years.

Plus, going after Penguin, but not Bissonnette directly, would get around the problem I pointed to here. While they may have a legally sound case against Bissonnette, politically charging him would be really dangerous. But Penguin isn't a war hero, so would make a safer target—until the rest of the publishing community goes apeshit.

The legacy press may be willing to see WikiLeaks prosecuted, but I presume they're unwilling to see Penguin prosecuted for essentially the same actions WikiLeaks took and NYT takes all the time.

And if I weren't already having fun with this case, Bob "Gold Bars" Luskin (Karl Rove's lawyer in the Plame investigation) is representing Bissonnette. And he's already given DOD some nice answers on Bissonnette's behalf.

Most ironically, Luskin has basically used the very same excuse banksters and torturers use all the time to avoid jail time: they consulted with their lawyer who okayed it ahead of time.

> Mr. Bissonnette's lawyer, Robert D. Luskin, responded in a letter to the Pentagon that the author, who wrote under the pseudonym Mark Owen, had "sought legal advice about his responsibilities before agreeing to publish his book and scrupulously reviewed the work to ensure that it did not disclose any material that would breach his agreements or put his former comrades at risk."

Luskin's also pulling what I fully expected Bissonnette to pull: the same kind of legal loopholes that the Administration itself uses to make these kinds of operations legal.

> The letter also said that the book was not subject to the nondisclosure agreement that the Defense Department said was violated.
>
> That agreement applied only to "specially identified Special Access Programs" that did not include the subject matter of the book, Mr. Luskin wrote.
>
> "Mr. Owen is proud of his service and respectful of his obligations," the letter said. "But he has earned the right to tell his story."

I'm not sure whether Luskin's arguing that these subjects were never a Special Access Program, or are no longer one now that John Brennan blabbed to everyone about it. But whatever they're arguing, it suggests that if this goes to court, there will be a mighty interesting dispute about what is and is not classified in the era of political gamesmanship.

And here I thought football was going to be the most interesting game being played this weekend.

As a reminder, the book is due out Tuesday, so DOD has just one long weekend to prevent this from coming out.

Update: Here's the letter Luskin sent to Jeh Johnson.Here's the paragraph in which Luskin argues that Bissonnette (he uses the pseudonym Mark Owen just as Jeh Johnson did) didn't need to submit to a pre-publication review.

> As you are well aware, the Classified Information Non-Disclosure Agreement, which you attached to your letter, invites, but by no means requires Mr. Owen to submit materials for pre-publication review. Although the Sensitive Compartmented Information Nondisclosure Statement does require pre-publication security review under certain circumstances, that obligation

> is expressly limited to specifically identified Special Access Programs. That agreement was executed in January 2007, and the Special Access Programs to which it applies were identified on that date. Accordingly, it is difficult to understand how the matter that is the subject of Mr. Owen's book could conceivably be encompassed by the non-disclosure agreement that you have identified.

THE FIRST RULE OF THE FIGHT CLUB…

I've been waiting to comment on the news that one of the SEALs that killed Osama bin Laden has a book coming out on September 11.

The publication will undoubtedly be yet another telling episode in our government's asymmetric treatment of secrecy, but thus far it is too soon to say how. After all, when a SEAL wants to "correct the story," does he plan to engage in a little JSOC score-settling (I heard rumors the Rangers and the SEALs had competing versions not long after the operation). Will he reveal details that change our understanding of Pakistani knowledge of the operation? Or will he significantly upend the myth Obama's team has spun about it? All were—and probably still are—possible.

In any case, the book publication will present an interesting challenge for the Obama Administration, which has gone to great lengths to prevent or disincent publication of other books revealing secret information. Nevertheless, the completely arbitrary system for prepublication review seems to encourage

people to bypass the system. (This SEAL has already planned to donate much of the proceeds of the book, following a lead set by Ishmael Jones, which takes away one of the tools the government might use against him.)

Finally, there's the political problem Obama will have. It'll be hard for the Administration to villainize this SEAL the way it has given others. After all, the SEAL played a key role in half of Obama's re-election bumper sticker: "Osama bin Laden is dead, GM is alive." Either he's a hero for killing OBL, or he's not, right?

It's against that background that I read the exposure—first by a Fox News Pentagon reporter, citing "multiple sources," and then by Craig Whitlock, citing "Pentagon sources"—of the SEAL's real identity. Given that the Pentagon was sharing (or at least confirming) the SEAL's identity to the WaPo, then this line from the SOCOM spokesperson is rather ominous.

> And Col. Tim Nye, a Special Operations Command spokesman, said the author "put himself in danger" by writing the book.
>
> "This individual came forward. He started the process. He had to have known where this would lead," Nye said. "He's the one who started this so he bears the ultimate responsibility for this."

That is, the first DOD source to go on the record has effectively told this guy, "it's your fault if you become a target." (Though we're at least supposed to assume that Fishel and Whitlock are working with different sources, because Fishel reported that DOD had not yet confirmed the SEAL's identity, whereas the lead of Whitlock's story is that they had.)

Then there's this detail: Whitlock notes that the OBL raid, was, technically, a CIA covert op, meaning the CIA might get to complain about the information in the book even though DOD has no prepublication process.

> Pentagon and Navy officials said they were unaware of Bissonnette's plans to write the book until Dutton announced its publication Wednesday. They said he did not submit an advance copy to military officials for review to ensure that it does not contain classified information.that could jeopardize national security.
>
> But it was unclear what, if any, restrictions Bissonnette faced. Navy officials said there is no blanket rule requiring active-duty service members or veterans to obtain permission to publish, although they can be prosecuted after the factby the Justice Department if they disclose classified information.
>
> Bissonnette, however, was technically on assignment for the CIA, which oversaw the bin Laden operation.The spy agency routinely requires its personnel to sign non-disclosure agreements, particularly in the case of sensitive missions.
>
> The CIA has said that "No Easy Day" was not submitted for pre-publication review.

If the CIA did claim the SEAL violated prepublication requirements, it would be the height of cynicism. As I understand it, CIA had the lead on this solely to make it legally a non-military op, changing the legal status of it. While it was technically a covert op, the readiness with which the Administration has discussed it since should strip it of its covert status.

Finally, note this dynamic, which never ceases to be of interest: the guy who was ultimately in charge of the "covert op" to kill OBL Leon Panetta, now heads the Pentagon, where all this chatter about the SEAL's identity seems to be coming from.

Update: I hadn't seen this Eli Lake story before

I wrote this. He quotes Admiral McRaven suggesting this SEAL wrote the book for his own self-enrichment.

> The pending publication of the book, *No Easy Day: The First Hand Account of the Mission that Killed Osama bin Laden*, so stirred Admiral William McRaven, chief of the Special Operations Command, that he sent a letter Thursday to special-operations forces warning against using their elite military affiliation for personal gain, according to Pentagon officials who asked not to be named.
>
> In the letter, McRaven said that while it was within the rights of former special-operations soldiers to "write books about their adventures, it is disappointing when these actions either attempt to represent the broader [special-operations forces] community, or expose sensitive information that could threaten the lives of their fellow warriors." [my emphasis]

That impugns what this SEAL at least claims his motive is: to tell the truth. Moreover, since he has already donated most of his proceeds, he doesn't seem to be trying to get rich off this book (though now that he's been outed, it is likely he'll get follow-up deals).

If there are inaccurate details out there, how is it self-serving to try to correct those inaccuracies?

We still don't know that's what the book is about, but DOD seems quick to hang this guy out.

JOHN BRENNAN CHANNELS SCOTT MCCLELLAN DODGING LEAK QUESTIONS

When Margaret Warner asked John Brennan about the leak witch hunt today, he said, in part,

> First of all, there are investigations underway, so we have to be mindful of that and respectful of that investigative process.
>
> Secondly, the President has made it very clear that any leak of classified national security information is something that should be rigorously pursued.

Let's see. Dodging the question by invoking an ongoing investigation.

Check.

Reassurance that—quote—"the President has made it very clear" that he takes this stuff seriously.

Check.

Brennan must not have seen this movie when it was first released. Because this strategy ultimately didn't work out that well.

USING PENSIONS TO "PUNISH" "LEAKS" WILL

SUBJECT CLEARANCE HOLDERS TO ARBITRARY POWER

The Senate Intelligence Committee's new anti-leak laws are the part of the Intelligence Authorization that will generate the most attention. Greg Miller already got Dianne Feinstein to admit there's no reason to think one of the new provisions—permitting only the most senior intelligence officials to do background briefings—will limit leaks.

> Feinstein acknowledged that she knew of no evidence tying those leaks or others to background sessions, which generally deal broadly with analysts' interpretations of developments overseas and avoid discussions of the operations of the CIA or other spy services.

Another of the provisions—requiring intelligence committee heads to ensure that every sanctioned leak be recorded—ought to be named the Judy Miller and Bob Woodward Insta-Leak Recording Act.

> (a) RECORD REQUIREMENT.—The head of each element of the intelligence community shall ensure that such element creates and maintains a record of all authorized disclosures of classified information to media personnel, including any person or entity under contract or other binding agreement with the media to provide analysis or commentary, or to any person or entity if the disclosure is made with the intent or knowledge that such information will be made publicly available.

I'm sure someone can think of some downside to this provision, but I can't think of it at the moment (which is why Obama will probably find

some way to eliminate it). It will end some of the asymmetry and abuse of classification as it currently exists.

In addition, there are a bunch of provisions that are just dumb bureaucracy.

But it's this one that is deeply troubling. Among the other provisions making nondisclosure agreements more rigorous is a provision that would allow an intelligence community head to take away a person's pension if they "determine" that an individual violated her nondisclosure agreement.

> (3) specifies appropriate disciplinary actions, including the surrender of any current or future Federal Government pension benefit, to be taken against the individual if the Director of National Intelligence or the head of the appropriate element of the intelligence community determines that the individual has knowingly violated the prepublication review requirements contained in a nondisclosure agreement between the individual and an element of the intelligence community in a manner that disclosed classified information to an unauthorized person or entity;

Ron Wyden objects to this on the obvious due process grounds (and notes a big disparity between the treatment of intelligence agency employees and those in, say, the White House). He also describes a scenario in which a whistleblower might be targeted that gets awfully close to the plight of Thomas Drake, who was prosecuted for the documents he had—upon the instruction of the NSA Inspector General—kept in his basement to make a whistleblower complaint.

> It is unfortunately entirely plausible to me that a given intelligence agency could conclude that a written submission to the congressional intelligence committees or an agency Inspector

> General is an “unauthorized publication,” and that the whistleblower who submitted it is thereby subject to punishment under section 511, especially since there is no explicit language in the bill that contradicts this conclusion.

But there’s one thing Wyden left out: the proven arbitrariness of the existing prepublication review process. A slew of people have well-founded gripes with the prepublication review process: Valerie Plame, for CIA’s unwillingness to let her publish things that Dick Cheney already exposed; Peter Van Buren for State’s stupid policy on WikiLeaks; Glenn Carle for the delay and arbitrariness. That list alone ought to make it clear how a provision giving agencies even more power to use the prepublication review process as a means to exact revenge for critics would be abused.

Now consider the most egregious case: the disparate treatment of Jose Rodriguez and Ali Soufan’s books on torture. Rodriguez was able to make false claims, both about what intelligence torture produced and about legal facts of his destruction of the torture tapes. Yet Soufan was not permitted to publish the counterpart to those false claims. Thus, not only did prepublication review prevent Soufan from expressing legitimate criticism. But the process facilitated the production of propaganda about CIA actions.

What’s truly bizarre is that the same people who want to leverage the already arbitrary power prepublication review exacts over government employees have also expressed concern about how arbitrary the prepublication review process is.

> U.S. officials familiar with the inquiry, who spoke on condition of anonymity, said that it reflects growing concern in the intelligence community that the review process is biased toward agency loyalists, particularly those

> from the executive ranks.
>
> Members of the Senate Intelligence Committee expressed such concerns in a recent letter to CIA Director David H. Petraeus, a document that has not been publicly released.

As it is, intelligence community officials will be subject to unreliable polygraph questions focusing on unauthorized (but not authorized) leaks. Those expanded polygraphs come at a time when at least one agency has already been accused of using them for fishing expeditions.

And now the Senate Intelligence Community want to allow agency heads to use a prepublication review process that they themselves have worried is politicized to punish alleged leakers?

CHENEY'S THUGS WIN THE PRIZE FOR LEAK HYPOCRISY

I wasn't much interested in Mitt Romney's latest efforts to change the narrative from the evil things he profited off of at Bain Capital and the tax havens he stashed the money he got as a result. Not only don't I think journalists will be all that interested in Mitt's claim that Obama's White House is a leaky sieve. But I'm not about to defend the Most Fucking Transparent™ White House in Fucking History against such accusations.

Until Cheney's thugs start leading the attack.

Such as Eric Edelman, who says we need "change" because Obama's Administration leaked details of the Osama bin Laden raid.

Eric Edelman is this guy:

> Shortly after publication of the article in The New Republic, LIBBY spoke by telephone with his then Principal Deputy [Edelman] and discussed the article. That official asked LIBBY whether information about Wilson's trip could be shared with the press to rebut the allegations that the Vice President had sent Wilson. LIBBY responded that there would be complications at the CIA in disclosing that information publicly, and that he could not discuss the matter on a non-secure telephone line

Four days after Edelman made the suggestion to leak information about Joe Wilson's trip, Scooter Libby first revealed to Judy Miller that Valerie Plame worked at the CIA.

But Edelman is not the only one of Cheney's thugs bewailing leakers: (h/t Laura Rozen, who follows BabyDick so I don't have to)

> Romney today at VFW on contemptible conduct of Obama White House leaking classified info for political gain. Must read. http://tinyurl.com/bw4s4lt

Now, to be fair to dear BabyDick, unlike Edelman she has not been directly implicated in her father's deliberate exposure of a US CIA officer working to stop nuclear proliferation. Unlike Edelman, she was not protected from legal jeopardy by Scooter Libby's lies.

But she did co-author her father's book, which was a whitewash of his treachery (even if it did reveal that Cheney had a second interview with Pat Fitzgerald, one treated as a grand jury appearance, just around the time Fitzgerald

subpoenaed Judy Miller. BabyDick Cheney is complicit in the lies the Cheney thugs have used to hide what a contemptible leak for political gain the Plame leak was.

And now she thinks she should lecture others about far less treacherous leaks?

LAMAR SMITH'S FUTILE LEAK INVESTIGATION

Lamar Smtih has come up with a list of 7 national security personnel he wants to question in his own leak investigation. (h/t Kevin Gosztola)

> House Judiciary Committee Chairman Lamar Smith, R-Texas, told President Obama Thursday he'd like to interview seven current and former administration officials who may know something about a spate of national security leaks.
>
> [snip]
>
> The administration officials include National Security Advisor Thomas Donilon, Director of National Intelligence James Clapper, former White House Chief of Staff Bill Daley, Assistant to the President for Homeland Security and Counterterrorism John Brennan, Deputy National Security Advisor Denis McDonough, Director for Counterterrorism Audrey Tomason and National Security Advisor to the Vice President Antony Blinken.

Of course the effort is sure to be futile—if Smith's goal is to figure out who leaked to the media (though it'll serve its purpose of creating a political shitstorm just fine)—for

two reasons.

First, only Clapper serves in a role that Congress has an unquestioned authority to subpoena (and even there, I can see the Intelligence Committees getting snippy about their turf—it's their job to provide impotent oversight over intelligence, not the Judiciary Committees).

As for members of the National Security Council (Tom Donilon, John Brennan, Denis McDonough, Audrey Tomason, and Antony Blinken) and figures, like Bill Daley, who aren't congressionally approved? That's a bit dicier. (Which is part of the reason it's so dangerous to have our drone targeting done in NSC where it eludes easy congressional oversight.)

A pity Republicans made such a stink over the HJC subpoenaing Karl Rove and David Addington and backed Bush's efforts to prevent Condi Rice from testifying, huh?

The other problem is that Smith's list, by design, won't reveal who leaked the stories he's investigating. He says he wants to investigate 7 leaks.

> Smith said the committee intends to focus on seven national security leaks to the media. They include information about the Iran-targeted Stuxnet and Flame virus attacks, the administration's targeted killings of terrorism suspects and the raid which killed Usama bin Laden.
>
> Smith wants to know how details about the operations of SEAL Team Six, which executed the bin Laden raid in Pakistan, wound up in the hands of film producers making a film for the president's re-election. Also on the docket is the identity of the doctor who performed DNA tests which helped lead the U.S. to bin Laden's hideout.

But his list doesn't include everyone who is a likely or even certain leaker.

Take StuxNet and Flame. Not only has Smith forgotten about the programmers (alleged to be Israeli) who let StuxNet into the wild in the first place—once that happened, everything else was confirmation of things David Sanger and security researchers were able to come up with on their own—but he doesn't ask to speak to the Israeli spooks demanding more credit for the virus.

Then there's the Osama bin Laden raid, where Smith has forgotten two people who are almost certainly part of the leak fest: Ben Rhodes and Brigadier General Marshall Webb.

Smith's inclusion of Shakeel Afridi's plight here is downright ridiculous. It's fairly clear the first leaks about Afridi's role in the OBL operation came from the ISI, with reporting originally published in the UK, not the US. The source for confirmation that Afridi was working for the CIA? Well, if Lamar Smith and his staffers can't negotiate a TV remote or an internet search to find Leon Panetta confirming Afridi's role on TV, then they have no business serving in an oversight role, period. And yet Panetta's not on Smith's list.

Smith also wants to know who leaked details of the UndieBomb 2.0 plot. Well, he better start subpoenaing some Yemeni and Saudi—and even British—partners, then, because they were all part of the leak.

Finally, there are the various drone targeting stories. What Smith seems not to get is that the Kill List stories were responses to earlier stories on signature strikes and Brennan's grasp of targeting under NSC. Those leaks almost certainly did not arise from the White House; if I had to guess, they came from folks in JSOC who are miffed about losing a turf battle. Yet they, too, are not on the list. And all that's before you consider that CIA did not report a leak on, at least, the later targeted killing stories,

suggesting the possibility that they're not leaks at all, but myths told to the American public.

All that, of course, is before you get to the circumstance that Republicans fiercely defended during the Plame investigation: for original classification authorities—and the Vice President if pixie dust has been liberally applied—can unilaterally declassify whatever the fuck they feel like, leak it to select journalists, and then start wars or end careers on it. All with no paperwork, making it hard to prosecute either the legitimate instadeclassifications as well as the illegal ones. Lamar Smith had absolutely no problem with that unacceptable state of affairs five years ago. Now, it turns his entire witch hunt into a farce.

So either Lamar Smith is going to need to find a way to undo all the precedent on executive prerogative on secrecy he and his party set under the Bush Administration—as well as find a way to start subpoenaing our allies—or this entire effort is futile.

Unless, of course, this is all about election year posturing.