CHRIS HEDGES ET. AL WIN ANOTHER ROUND ON THE NDAA

You may remember back in mid May Chris Hedges, Dan Ellsberg, Jennifer Bolen, Noam Chomsky, Alexa O'Brien, Kai Wargalla, Birgetta Jonsdottir and the US Day of Rage won a surprising, nee stunning, ruling from Judge Katherine Forrest in the Southern District of New York. Many of us who litigate felt the plaintiffs would never even be given standing, much less prevail on the merits. But, in a ruling dated May 16, 2012, Forrest gave the plaintiffs not only standing, but the affirmative win by issuing a preliminary injunction.

Late yesterday came even better news for Hedges and friends, the issuance of a permanent injunction. I will say this about Judge Forrest, she is not brief as the first ruling was 68 pages, and todays consumes a whopping 112 pages. Here is the setup, as laid out by Forrest (p. 3-4):

> Plaintiffs are a group of writers, journalists, and activists whose work regularly requires them to engage in writing, speech, and associational activities protected by the First Amendment. They have testified credibly to having an actual and reasonable fear that their activities will subject them to indefinite military detention pursuant to § 1021(b)(2).

> At the March hearing, the Government was unable to provide this Court with any assurance that plaintiffs' activities (about which the Government had known—and indeed about which the Government had previously deposed those individuals) would not in fact subject plaintiffs to military detention pursuant to § 1021(b)(2). Following the March hearing (and the Court's May 16 Opinion on the preliminary injunction), the Government fundamentally changed its position.
>
> In its May 25, 2012, motion for reconsideration, the Government put forth the qualified position that plaintiffs' particular activities, as described at the hearing, if described accurately, if they were independent, and without more, would not subject plaintiffs to military detention under § 1021. The Government did not—and does not—generally agree or anywhere argue that activities protected by the First Amendment could not subject an individual to indefinite military detention under § 1021(b)(2). The First Amendment of the U.S. Constitution provides for greater protection: it prohibits Congress from passing any law abridging speech and associational rights. To the extent that § 1021(b)(2) purports to encompass protected First Amendment activities, it is unconstitutionally overbroad.
>
> A key question throughout these proceedings has been, however, precisely what the statute means—what and whose activities it is meant to cover. That is no small question bandied about amongst lawyers and a judge steeped in arcane questions of constitutional law; it is a question of defining an individual's core liberties. The due process rights guaranteed by the Fifth Amendment

> require that an individual understand what conduct might subject him or her to criminal or civil penalties. Here, the stakes get no higher: indefinite military detention—potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever. The Constitution requires specificity—and that specificity is absent from § 1021(b)(2).

Those were the stakes in the litigation and Katherine Forrest did not undersell them in the least. Now, truth be told, there is not really a lot of new ground covered in the new decision that was not touched on in the earlier ruling, but it is even more fleshed out and also formalizes a declination of the government's motion for reconsideration filed in June as well as argument on the additional grounds necessary for a permanent injunction over the preliminary injunction initially entered. As Charlie Savage pointed out, it is a nice little gift coming on the same day the House voted 301-118 to re-up the dastardly FISA Amendments Act.

And Forrest really did go out of her way to slap back the government's bleating that courts should stay out of such concerns and leave them to the Executive and Legislative Branches, an altogether far too common and grating refrain in DOJ arguments in national security cases (p 11-12):

> The Court is mindful of the extraordinary importance of the Government's efforts to safeguard the country from terrorism. In light of the high stakes of those efforts as well as the executive branch's expertise, courts undoubtedly owe the political branches a great deal of deference in the area of national security. See Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2711 (2010). Moreover, these same considerations counsel particular attention to the Court's obligation to

> avoid unnecessary constitutional questions in this context. Cf. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). Nevertheless, the Constitution places affirmative limits on the power of the Executive to act, and these limits apply in times of peace as well as times of war. See, e.g., Ex parte Milligan, 72 U.S. (4 Wall.) 2, 125-26 (1866). Heedlessly to refuse to hear constitutional challenges to the Executive's conduct in the name of deference would be to abdicate this Court's responsibility to safeguard the rights it has sworn to uphold.
>
> And this Court gives appropriate and due deference to the executive and legislative branches—and understands the limits of its own (and their) role(s). But due deference does not eliminate the judicial obligation to rule on properly presented constitutional questions. Courts must safeguard core constitutional rights. A long line of Supreme Court precedent adheres to that fundamental principle in unequivocal language. Although it is true that there are scattered cases—primarily decided during World War II—in which the Supreme Court sanctioned undue deference to the executive and legislative branches on constitutional questions, those cases are generally now considered an embarrassment (e.g., Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of Japanese Americans based on wartime security concerns)), or referred to by current members of the Supreme Court (for instance, Justice Scalia) as "wrong" (e.g., Ex parte

> Quirin, 317 U.S. 1 (1942) (allowing for the military detention and execution of an American citizen detained on U.S. soil)). Presented, as this Court is, with unavoidable constitutional questions, it declines to step aside.

If you relish such things, especially the rare ones where the good guys win, the whole decision is at the link. If you would like to read more, but not the entire 112 pages, the summary portion is contained in pages 3-14. For those longtime readers of Emptywheel, note the citation to *Ex Parte Milligan* on pages 12, 37, 51 and 79. Our old friend Mary would have been overjoyed by such liberal use of *Milligan*, especially this passage by Judge Forrest on pages 79-80:

> A few years later, in *Milligan*, the Supreme Court held:
> "Neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus." 71 U.S. at 4. The Court stated, "No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open." Id. at 73.

Indeed. Keep this is mind, because the concept of military tribunals not being appropriate to try citizens "at a place where the courts are open" is a critical one. Although the language invokes "citizens", the larger concept of functioning courts being preferable will be coming front and center as the Guantanamo Military Tribunals move through trial and into the appellate stages, and will also be in play should Julian Assange ever really be extradited for trial in the United States (a big if, but one constantly discussed).

So, all in all, yesterday's decision by Judge Forrest has far ranging significance, and is a remarkably refreshing and admirable one that should be widely celebrated. That said, a note of caution is in order: Enjoy it while you can, because if you are the betting type, I would not lay much of the family farm on Forrest's decision holding up on appeal.

There was talk on Twitter that the Supreme Court would reverse, but I am not sure it even gets that far. In fact, unless Chris Hedges et. al get a very favorable draw on the composition of their appellate panel in the 2nd Circuit, I am dubious it goes further than that. And one thing is sure, the government is going to appeal.

APPEALS COURT TREATS COMMISSARY GATORADE SUPPLIES AS A "CLEAR AND PRESENT DANGER"

Navy v. Egan—the SCOTUS case Executive Branch officials always point to to claim unlimited powers over classification authority—just got bigger.

Berry v. Conyers extends the national security employment veto over commissary jobs

The original 1988 case pertained to Thomas Egan, who lost his job as a laborer at a naval base when he was denied a security clearance. He appealed his dismissal to the Merit Systems Protection Board, which then had to determine whether it had authority to review the decision to fire him based on the security clearance denial. Ultimately, SCOTUS held that MSPB could not review the decision of the officer who first

fired Egan.

> The grant or denial of security clearance to a particular employee is a sensitive and inherently discretionary judgment call that is committed by law to the appropriate Executive Branch agency having the necessary expertise in protecting classified information. It is not reasonably possible for an outside, nonexpert body to review the substance of such a judgment, and such review cannot be presumed merely because the statute does not expressly preclude it.

Unlike Egan, the plaintiffs in this case did not have jobs that required they have access to classified information. Nevertheless, plaintiffs Rhonda Conyers (who was an accounting clerk whose "security threat" pertained to personal debt) and Devon Haughton Northover (who worked in a commissary and also charged discrimination) were suspended and demoted, respectively, when the government deemed them a security risk.

In a decision written by Evan Wallach and joined by Alan Lourie, the Federal Circuit held that the Egan precedent,

> require[s] that courts refrain from second-guessing Executive Branch agencies' national security determinations concerning eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to classified information.

That is, the Federal government can fire you in the name of national security if you have a "sensitive" job, whether or not you actually have access to classified information.

As Timothy Dyk's dissent notes, the effect of this ruling is to dramatically limit civil service protections for any position the government deems sensitive, both within

DOD—where both Conyers and Northover work—and outside it.

> Under the majority's expansive holding, where an employee's position is designated as a national security position, see 5 C.F.R. § 732.201(a), the Board lacks jurisdiction to review the underlying merits of any removal, suspension, demotion, or other adverse employment action covered by 5 U.S.C. § 7512.
>
> [snip]
>
> As OPM recognizes, under the rule adopted by the majority, "[t]he Board's review . . . is limited to determining whether [the agency] followed necessary procedures . . . [and] the merits of the national security determinations are not subject to review."

In doing so, the dissent continues, it would gut protection against whistleblower retaliation and discrimination.

> As the Board points out, the principle adopted by the majority not only precludes review of the merits of adverse actions, it would also "preclude Board and judicial review of whistleblower retaliation and a whole host of other constitutional and statutory violations for federal employees subjected to otherwise appealable removals and other adverse actions." Board Br. at 35. This effect is explicitly conceded by OPM, which agrees that the agency's "liability for damages for alleged discrimination or retaliation" would not be subject to review. OPM Br. at 25. OPM's concession is grounded in existing law since the majority expands Egan to cover all "national security" positions, and Egan has been held to foreclose

> whistleblower, discrimination, and other constitutional claims.

Tracking Gatorade supplies can now represent a "clear and present danger"

There are a couple of particularly troubling details about how Wallach came to his decision. In a footnote trying to sustain the claim that a commissary employee might be a national security threat, Wallach argues that Northover could represent a threat in the commissary by observing how much rehydration products and sunglasses service members were buying.

> The Board goes too far by comparing a government position at a military base commissary to one in a "Seven Eleven across the street."
>
> [snip]
>
> Commissary employees do not merely observe "[g]rocery store stock levels" or other-wise publicly observable information. Resp'ts' Br. 20. In fact, commissary stock levels of a particular unclassified item – sunglasses, for example, with shatterproof lenses, or rehydration products – might well hint at deployment orders to a particular region for an identifiable unit. Such troop movements are inherently secret. Cf. Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right . . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the *publication of the sailing dates of transports or the number and location of troops*.") (citing

> Schenck v. United States, 294 U.S. 47, 52 (1919)) (emphasis added). This is not mere speculation, because, as OPM contends, numbers and locations could very well be derived by a skilled intelligence analyst from military commissary stock levels.

I love how every time these judges uphold the principle that the Executive is uniquely qualified to make these decisions, they always engage in this kind of (their argument would hold, completely incompetent) hypothetical explanation to prove the Executive's claims aren't totally bogus. (The government appears to have cued up the concept of commissary intelligence mapping—but not the Gatorade spying itself—in oral argument.)

And this one is a particularly lovely example, relying as it does not just on the proposition that how much Gatorade (or more advanced rehydration products) service members purchase is a national security issue, but also citing Near v. Minnesota (a key First Amendment case that established prior restraint) to get to Schenck v US (the regrettable decision upholding the Espionage Act that introduced the concept of "clear and present danger"). That is, ultimately Wallach invokes "clear and present danger" to describe how a commissary employee could hurt our country.

Then Wallach goes on to invoke the due process standard from Hamdi—the same one Eric Holder says was used to kill Anwar al-Awlaki.

> The Board and Respondents must recognize that those instances are the result of balancing competing interests as was the case in Egan and as is the case here. See Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) ("[T]he process due in any given instance is determined by weighing the 'private interest that will be affected by the official action' against the Government's asserted interest,

> ‘including the function involved’ and the burdens the Government would face in providing greater process.”) (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

Effectively Wallach argues that federal employees must be subject to the kind of justice socialists were—until the Red Scare showed how unreasonable that was—and enemy combatants are, all in the name of national security.

Accounting clerks can now be treated to the same kind of justice as Khalid Sheikh Mohammed.

This decision extends the Executive’s arbitrary secrecy regime over more Federal employees

In addition to the whistleblower concerns Dyk laid out in his dissent—which the Government Accountability Project addresses here—this decision exposes large numbers of federal employees to the arbitrary system that has been expanding—and Congress wants to expand still further—among those with security clearances. The clearance process is already an arbitrary one, which exposes people to the asymmetric authority of the Executive Branch to decide who can work and who can’t. But here there’s not even a formal review process: once a supervisor deems someone a threat to national security, that decision is largely unreviewable. Thus—as the language of clear and present danger was used before to sow fear and paranoia among government employees—this could be used for political persecution and petty retaliation.

Given past use of Navy v. Egan this decision might expand claims to Executive secrecy, too

I said above that Navy v. Egan is the SCOTUS case Executive Branch officials point to when making vast claims about the Executive’s unlimited power over classification issues. David Addington pointed to it to justify insta-declassifying the NIE (and presumably Valerie Plame’s covert identity). DOJ lawyers pointed to it to argue that they could prevent al-Haramain

from litigating its FISA claim by denying its lawyers had the "need to know" information pertaining to the case. As Steven Aftergood notes, these claims are suspect, but no Court has judged them so yet.

I fear this decision extends this (mis)application of Navy v. Egan, too.

To be clear, this decision only expands the original meaning Navy v. Egan; it doesn't affirm the more expansive readings of it, as pertains to classification, from recent years. Formally, it just means "sensitive" government employees are now subject to the same kind of national security veto that employees with security clearances have been.

Furthermore, this is just a Circuit decision, not a SCOTUS one.

That said, it relies on the language that the expansive readings of Egan also rely on. such as this passage:

> Affording such discretion to agencies, according to Egan, is based on the President's "authority to classify and control access to information bearing on national security and to determine" who gets access, which "flows primarily from [the Commander in Chief Clause] and exists quite apart from any explicit congressional grant."

Moreover, it does something with national security information that the government has already been trying to do, most notably in Espionage cases like Thomas Drake's, where they tried to prosecute him for retaining information that wasn't even classified, or shouldn't have been.

This kind of language from Wallach's opinion is precisely the kind of argument the government has been trying to make of late.

> In fact, Egan's core focus is on "national security information," not

> just “classified information.” 484 U.S. at 527 (recognizing the government’s “compelling interest in withholding national security information”) (emphasis added).
>
> [snip]
>
> Egan therefore is predicated on broad national security concerns, which may or may not include issues of access to classified information.

Read expansively (as Egan already has been), this is the kind of language the government might use to justify prosecuting someone for talking about critical infrastructure—problems with bridges or PEPCO’s pathetic electrical grid or the Keystone pipeline. Applied the way Navy v. Egan already is, it would extend the Executive Branch’s authority to police any information it wants to call national security related.

The government has been trying to assert its control over information that is not even classified in recent years. While this decision could only be used to supplement these efforts, I wouldn’t be surprised if it were.

When managing Gatorade supplies can make a guy a “clear and present danger,” such an eventuality no longer seems a stretch.

LATEST STUXNET INCARNATION RESEMBLES ALLEGED PROJECT OF MURDERED

GCHQ OFFICER

Kaspersky Labs has found a new incarnation of StuxNet malware, which they've called Gauss. As Wired summarizes, the malware is focused geographically on Lebanon and has targeted banks.

> A newly uncovered espionage tool, apparently designed by the same people behind the state-sponsored Flame malware that infiltrated machines in Iran, has been found infecting systems in other countries in the Middle East, according to researchers.
>
> The malware, which steals system information but also has a mysterious payload that could be destructive against critical infrastructure, has been found infecting at least 2,500 machines, most of them in Lebanon, according to Russia-based security firm Kaspersky Lab, which discovered the malware in June and published an extensive analysis of it on Thursday.
>
> The spyware, dubbed Gauss after a name found in one of its main files, also has a module that targets bank accounts in order to capture login credentials. The malware targets accounts at several banks in Lebanon, including the Bank of Beirut, EBLF, BlomBank, ByblosBank, FransaBank and Credit Libanais. It also targets customers of Citibank and PayPal.

I find that interesting for a number of reasons. First, every time banks have squawked about our government's access of SWIFT to track terrorist financing, the spooks have said if they don't use SWIFT they'll access the information via other means; it appears this malware may be just that. And the focus on Lebanon fits, too, given the increasing US claims about Hezbollah money

laundering in the time since Gauss was launched. I'm even struck by the coincidence of Gauss' creation last summer around the same time that John Ashcroft was going through the Lebanese Canadian Bank to find any evidence of money laundering rather than—as happens with US and European banks—crafting a settlement. I would imagine how that kind of access to a bank would give you some hints about how to build malware.

But the other thing the malware made me think of, almost immediately, was the (I thought) bogus excuse some British spooks offered last summer to explain the murder of Gareth Williams, the GCHQ officer—who had worked closely with NSA—who was found dead in a gym bag in his flat in August 2010. Williams was murdered, the Daily Mail claimed, because he was working on a way to track the money laundering of the Russian mob.

> The MI6 agent found dead in a holdall at his London flat was working on secret technology to target Russian criminal gangs who launder stolen money through Britain.
>
> [snip]
>
> But now security sources say Williams, who was on secondment to MI6 from the Government's eavesdropping centre GCHQ, was working on equipment that tracked the flow of money from Russia to Europe.
>
> The technology enabled MI6 agents to follow the money trails from bank accounts in Russia to criminal European gangs via internet and wire transfers, said the source.
>
> 'He was involved in a very sensitive project with the highest security clearance. He was not an agent doing surveillance, but was very much part of the team, working on the technology side, devising stuff like software,' said the source.
>
> He added: 'A knock-on effect of this

> technology would be that a number of criminal groups in Russia would be disrupted.
>
> ‘Some of these powerful criminal networks have links with, and employ, former KGB agents who can track down people like Williams.’

Frankly, I always thought that explanation was bogus—I suggested that the Brits could just partner with the US to access such data via SWIFT. And whatever it means, I haven’t seen such an explanation since.

But I do find it rather interesting that one of the most prominent unsolved murders of a spook was blamed—at around the time the StuxNet people were working on Gauss—on a plan to track money laundering.

NUKE SITE BREACHED JUST DAYS AFTER SSCI MOVED TO ELIMINATE REPORTING ON NUKE SITE SECURITY

I have been dawdling about writing this post, in which I explain that two of the reporting requirements the Senate Intelligence Committee rather stupidly, IMO, moved to eliminate last week pertain to the security of our nuclear labs.

Back when I criticized the plan to eliminate these reports in June, I wrote,

> The bill would eliminate two reporting requirements imposed in the wake of the Wen Ho Lee scandal: that the President

> report on how the government is defending against Chinese spying and that the Secretary of Energy report on the security of the nation's nuclear labs. Just last year, the Oak Ridge National Laboratory had to separate from the Internet because some entity—China would be a good candidate—had hacked the lab and was downloading data from their servers. Now seems a really stupid time to stop reporting on efforts to avoid such breaches.

In spite of these very obvious reasons, the Senate did indeed eliminate two reporting requirements pertaining to national labs (though they kept the one pertaining to Chinese spying).

> (7) REPEAL OF REPORTING REQUIREMENT REGARDING COUNTERINTELLIGENCE AND SECURITY PRACTICES AT THE NATIONAL LABORATORIES.—Section 4507 of the Atomic Energy Defense Act (50 U.S.C. 2658) is repealed.
>
> (8) REPEAL OF REPORTING REQUIREMENT REGARDING SECURITY VULNERABILITIES OF NATIONAL LABORATORY COMPUTERS.—Section 4508 of the Atomic Energy Defense Act (50 U.S.C. 2659) is repealed.

I'm glad I waited. Now I can use this story to demonstrate how vulnerable our nuclear labs remain.

> The U.S. government's only facility for handling, processing and storing weapons-grade uranium [Oak Ridge National Lab] was temporarily shut this week after anti-nuclear activists, including an 82-year-old nun, breached security fences, government officials said on Thursday.
>
> [snip]
>
> The activists painted slogans and threw

> what they said was human blood on the wall of the facility, one of numerous buildings in the facility known by the code name Y-12 that it was given during World War II, officials said.
>
> While moving between the perimeter fences, the activists triggered sensors which alerted security personnel. However, officials conceded that the intruders still were able to reach the building's walls before security personnel got to them.

When James Clapper's office asked to throw these reports out, they justified it by saying they could just brief the information rather than report it regularly.

> This reporting requirement should be repealed because it is over a decade old and the Secretary of Energy and the National Counterintelligence Executive can provide the information requested through briefings, as requested, if congressional interest persists.

Oak Ridge Lab has been breached twice in two years, once via its computer systems and now physically. I'm sure Congress will be getting a slew of briefings about the lab, but it really does seem like a little reporting requirement might help DOE to take this seriously.

"DEAR JOHN BRENNAN: YOU'RE BEING INVESTIGATED"

A number of people have pointed to Scott Shane's story on the leak witch hunt for the details it

gives on the increasing concern about leak witch hunts among journalists and national security experts.

But this paragraph includes the most interesting news in the article.

> The F.B.I. appears to be focused on recent media disclosures on American cyberattacks on Iran, a terrorist plot in Yemen that was foiled by a double agent **and the so-called "kill list" of terrorist suspects approved for drone strikes**, some of those interviewed have told colleagues. The reports, which set off a furor in Congress, were published by The New York Times, The Associated Press, Newsweek and other outlets, as well as in recent books by reporters for Newsweek and The Times. [my emphasis]

That's because prior reporting had indicated that the Kill List stories were not being investigated.

> Recent revelations about clandestine U.S. drone campaigns against al Qaeda and other militants are not part of two major leak investigations being conducted by federal prosecutors, sources familiar with the inquiries said.
>
> [snip]
>
> The CIA has not filed a "crime report" with the Justice Department over reports about Obama's drone policy and a U.S. "kill list" of targeted militants, an action which often would trigger an official leak investigation, two sources familiar with the matter said. They

So Shane's revelation that the Kill List stories **are** being investigated amounts to the author of one of the Kill List stories reporting that some people who have been interviewed by the FBI told

colleagues they got asked about the Kill List. Which might go something like, “Scott, they’re asking about your story, too.”

All without Shane acknowledging that Shane wrote one of the main Kill List Shiny Object stories.

Meanwhile, I find his reference to the outlets involved very interesting. Using the principle of parallelism, the passage seems to suggest the FBI is investigating the NYT for David Sanger’s sources on StuxNet, the AP for Adam Goldman and Matt Apuzzo’s sources on the UndieBomb 2.0 plot, and Newsweek for Daniel Klaidman’s sources on the Kill List. But of course the NYT also wrote a Kill List story, the AP wrote what is probably the most interesting Kill List story (which reported that the Kill List is now run by John Brennan). “And other outlets.” Which might include ABC for revealing that the UndieBomb 2.0 plotter was actually an infiltrator (ABC got the story indirectly from John Brennan, though Richard Clarke). Or the WaPo for Greg Miller’s original story on drone targeting, revealing that we were going to use signature strikes in Yemen. Or the WSJ, reporting that we had started using signature strikes.

In other words, it presents a rather interesting group of potential stories and sources.

Now I don’t know that John Brennan was the source for all this or that he’s really being investigated. I’m not saying Shane is being manipulative by reporting on this (though seriously, it’s another example of the NYT having a reporter report on a story that he is really a part of).

But I do find it rather interesting that a reporter targeted in this leak witch hunt just made news about the scope of the leak witch hunt.

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.

FAILED OVERSEERS PREPARE TO LEGISLATE AWAY SUCCESSFUL OVERSIGHT

Before I talk about the Gang of Four's proposed ideas to crack down on leaks, let's review what a crop of oversight failures these folks are.

The only one of the Gang of Four who has stayed out of the media of late—Dutch Ruppersberger—has instead been helping Mike Rogers push reauthorization of the FISA Amendments Act through the House Intelligence Committee with no improvements and no dissents. In other words, Ruppersberger has delivered for his constituent—the NSA—in spite of the evidence the government is wiretapping those pesky little American citizens Ruppersberger should be serving.

Then there's Rogers himself, who has been blathering to the press about how these leaks are the most damaging in history. He supported

such a claim, among other ways, by suggesting people (presumably AQAP) would assume for the first time we (or the Saudis or the Brits) have infiltrators in their network.

> Some articles within this "parade" of leaks, Rogers said late last week, "included at least the speculation of human source networks that now – just out of good counterintelligence activities – they'll believe is real, even if its not real. It causes huge problems."

Which would assume Rogers is unaware that the last time a Saudi infiltrator tipped us off to a plot, that got exposed too (as did at least one more of their assets). And it would equally assume Rogers is unaware that Mustafa Alani and other "diplomatic sources" are out there claiming the Saudis have one agent or informant infiltrated into AQAP regions for every 850 Yemeni citizens.

In short, Rogers' claim is not credible in the least.

Though Rogers seems most worried that the confirmation–or rather, reconfirmation–that the US and Israel are behind StuxNet might lead hackers to try similar tricks on us and/or that the code–which already escaped–might escape.

> Rogers, who would not confirm any specific reports, said that mere speculation about a U.S. cyberattack against Iran has enabled bad actors. The attack would apparently be the first time the U.S. used cyberweapons in a sustained effort to damage another country's infrastructure. Other nations, or even terrorists or hackers, might now believe they have justification for their own cyberattacks, Rogers said.
>
> This could have devastating effects, Rogers warned. For instance, he said, a cyberattack could unintentionally spread

> beyond its intended target and get out of control because the Web is so interconnected. “It is very difficult to contain your attack,” he said. “It takes on a very high degree of sophistication to reach out and touch one thing…. That’s why this stuff is so concerning to me.”

Really, though, Rogers is blaming the wrong people. He should be blaming the geniuses who embraced such a tactic and—if it is true the Israelis loosed the beast intentionally—the Israelis most of all.

And while Rogers was not a Gang of Four member when things started going haywire, his colleague in witch hunts—Dianne Feinstein—was. As I’ve already noted, one of the problems with StuxNet is that those, like DiFi, who had an opportunity to caution the spooks either didn’t have enough information to do so—or had enough information but did not do their job.The problem, then, is not leaks; it’s inadequacy of oversight.

In short, Rogers and Ruppersberger and Chambliss ought to be complaining about DiFi, not collaborating with her in thwarting oversight.

Finally, Chambliss, the boss of the likely sources out there bragging about how unqualified they are to conduct intelligence oversight, even while boasting about the cool videogames they get to watch in SCIFs, appears to want to toot his horn rather the conduct oversight.

Which brings me back to the point of this post, before I got distracted talking about how badly the folks offering these “solutions” to leaks are at oversight.

Their solutions:

> Discussions are ongoing over just how stringent new provisions should be as the Senate targets leakers in its upcoming Intelligence Authorization bill, according to a government source.

> Many of the options up for consideration put far stricter limits on communications between intelligence officials and reporters, according to the source, who told CNN that **early proposals included requiring government employees who provide background briefings to reporters to notify members of Congress ahead of time**.
>
> Such background meetings are not widely seen as opportunities to discuss classified programs. Reporters routinely use background briefings to gather contextual information on stories they are covering.
>
> According to the government source, there were also discussions about consolidating some of the press offices within the intelligence community, limiting the number of people who are available to answer common media inquiries. [my emphasis]

Aside from making it harder for reporters to get government input on stories, the members of Congress who have failed at oversight want to require Executive Branch officials check with them before they communicate with reporters.

Because people like DiFi have shown such great judgment—not—and discretion—not about these things.

In short, the solution from a bunch of people who have failed at oversight is to grant themselves a bigger role in preventing any oversight. Which sounds more like CYA than a solution that will improve America's national security.

RON WYDEN: "AN OBVIOUS QUESTION I HAVE NOT ANSWERED"

In the background of the larger drama of the leak witch hunts is a paragraph that, to me, summarizes where the balance between secrecy and sanity is in our country.

> An obvious question that I have not answered here is whether any warrantless searches for Americans' communications have already taken place. I am not suggesting that any warrantless searches have or have not occurred, because Senate and committee rules regarding classified information generally prohibit me from discussing what intelligence agencies are actually doing or not doing. However, I believe that we have an obligation as elected legislators to discuss what these agencies should or should not be doing, and it is my hope that a majority of my Senate colleagues will agree with that searching for Americans' phone calls and emails without a warrant is something that these agencies should not do.

This is the language Ron Wyden used to attempt to persuade his colleagues to join his opposition to the reauthorization of the FISA Amendments Act without first including protections for Americans' communications. A very similar paragraph appeared at the end of Wyden and Mark Udall's dissent from the Senate Intelligence Report on the legislation.

Now, I have already shown that even leak witch hunt convert Dianne Feinstein (who supports reauthorization without telling citizens what the legislation really does) made it clear that while NSA may not **target** Americans under FAA, the agency does **query** information collected

under FAA to find the communications of Americans. That is, DiFi herself made it clear that the communications collected "incidentally" are fair game for review. And both the Wyden/Udall dissent and the exchange Wyden had with Director of National Intelligence James Clapper last year—which he re-released in conjunction with his hold—make it more clear that the government is reviewing Americans' communications it collects in the guise of "targeting" non-US persons.

Everyone—Wyden, DiFi, DNI Clapper—admit that the government is accessing Americans' communications under FAA; it's just the latter two are pretending they're not doing so by hiding behind the magic word "targeting."

With that said, let's look at Wyden's paragraph closely and what it says about democracy in the age of secrecy. The first sentence reads like CYA, insulation against any accusation that Wyden has revealed classified information.

> An obvious question that I have not answered here is whether any warrantless searches for Americans' communications have already taken place.

Yet at the same time, Wyden defines the question that DiFi refuses to answer clearly: whether or not the government is using FAA to conduct warrantless searches of Americans' communications.

It's an obvious question, Wyden continues, but he's not legally permitted to answer it.

> I am not suggesting that any warrantless searches have or have not occurred, because Senate and committee rules regarding classified information generally prohibit me from discussing what intelligence agencies are actually doing or not doing.

That said, Wyden makes it clear **he** knows the

answer. Which, given that he insists other Senators ought to demand to know the answer makes it pretty clear what that answer is.

> However, I believe that we have an obligation as elected legislators to discuss what these agencies should or should not be doing,

But the whole scaffold of secrecy on which this legislative discussion takes place leaves Wyden with the weakest of legislative hammers with which to embarrass his colleagues into backing his hold on FAA.

> it is my hope that a majority of my Senate colleagues will agree with that searching for Americans' phone calls and emails without a warrant is something that these agencies should not do.

If this were not a secret discussion—if Wyden were not prohibited from stating clearly what he and DiFi and James Clapper have made clear indirectly—then he could say explicitly that a vote to reauthorize FAA is a vote to allow these agencies to search for Americans' phone calls and emails without a warrant. That's a vote these Senators' constituents would likely despise.

Yet Wyden and the ACLU and the TeaParty will never be able to whip against such a vote effectively because Senators can pretend the question has never been answered.

"Targeting," they'll say, when their constituents call to complain.

This is an area where it's clear that secrecy doesn't hide the underlying facts; it serves only to prevent real democratic accountability. But that's true well beyond this legislation. There's the Trans Pacific Trade deal on which Wyden has been forced to try to legislate transparency, which Obama's Administration has kept secret, in the lead-up to an election, from

the many members of the Democratic base that loathe it. And that's even true of StuxNet, where we now know DiFi has rubber stamped the release of the next generation of WMD without first demanding enough details to understand what a grave threat it might be.

This is what this leak witch hunt is all about: guarding a system that makes democratic accountability impossible.

DIFI ADMITS SHE OKAYED UNLEASHING 21ST CENTURY WMD WITH INADEQUATE DETAILS

The reason Dianne Feinstein is so torqued about the StuxNet story, according to this SFChron piece, is because she learned things from it that she didn't know as a Gang of Four member.

> Feinstein declared, "This has to stop. When people say they don't want to work with the United States because they can't trust us to keep a secret, that's serious."
>
> A week later, Feinstein is more than halfway through New York Times reporter David E. Sanger's book, "Confront and Conceal: Obama's Secret Wars and Surprising Use of American Power." She told me Wednesday, "You learn more from the book than I did as chairman of the intelligence committee, and that's very disturbing to me."

Now, as a threshold matter, I think DiFi and

others are underestimating how much our foreign partners are leaking on these stories; not only did foreign sources serve as early confirmation on UndieBomb 2.0, but the Saudis and Yemenis exposed the last infiltrator the Saudis put into AQAP. And as for StuxNet, the Israelis are now complaining that Sanger didn't give them enough credit.

> The Israeli officials actually told me a different version. They said that it was Israeli intelligence that began, a few years earlier, a cyberspace campaign to damage and slow down Iran's nuclear intentions. And only later they managed to convince the USA to consider a joint operation – which, at the time, was unheard of. Even friendly nations are hesitant to share their technological and intelligence resources against a common enemy.

Plus, if and when Israel bombs Iran and has to deal with the retaliation, I can assure you the Israelis will be happy to work with us.

And there's a far bigger problem here. DiFi was not a Gang of Four member when this program started under Bush (Jay Rockefeller would have been the Democrat from the Senate Intelligence Committee). But she seems to say she got what passed for briefing on StuxNet.

Yet she's learning new details from Sanger.

StuxNet is, both because it can be reused by non-state actors and because of the ubiquity of the PLCs they affected, the 21st Century version of a WMD. And all that's before we learned Flame was using Microsoft's update function.

Now from the sounds of things, DiFi never had the opportunity to authorize letting StuxNet free; the Israelis don't have to brief the Gang of Four. But the possibility StuxNet would break free on its own always existed. One reason we have Congressional overseers is to counterbalance spooks whose enthusiasm for an op

might cloud any judgment about the wisdom of pursuing that op.

The US, in partnership with Israel, released a WMD to anyone who could make use of it. And the people in charge of overseeing such activities got fewer details about the WMD than you could put in a long-form newspaper article.

And DiFi thinks there's too little secrecy?

SHELDON ADELSON COULD BUY BIBI A VERY EFFECTIVE OCTOBER SURPRISE

The Internet is abuzz today with Sheldon Adelson's announcement that he has already donated $10 million to Mitt Romney's SuperPAC and plans to provide limitless donations to defeat Obama.

> Forbes has confirmed that billionaire Sheldon Adelson, along with his wife Miriam, has donated $10 million to the leading Super PAC supporting presumptive Republican presidential nominee Mitt Romney—and that's just the tip of the iceberg. A well-placed source in the Adelson camp with direct knowledge of the casino billionaire's thinking says that further donations will be "limitless."

But the attention is mostly focused on the sheer numbers he's talking about, not what it suggests that Adelson—who already spent buckets of money to try to defeat Mitt in the primary—has now promised limitless donations to defeat Obama.

This is about Likud trying to decide the

American elections.

Adelson doesn't hide the fact that this donation is about Israel as much as it is Obama's "socialism."

> Adelson, this source continues, believes that "no price is too high" to protect the U.S. from what he sees as Obama's "socialization" of America, as well as securing the safety of Israel. He added that Adelson, 78, considers this to be the most important election of his lifetime.

Nor is it surprising he's doing this. More than he is for any of these American politicians, Adelson is Bibi Netanyahu's Sugar Daddy. And Obama has been remarkably successful thus far in stymying Bibi's goal of forcing the US to attack Iran. In addition to the sanctions regime that has brought about negotiations, in recent months, the Administration has leaked both a white paper showing that an Iran attack would do nothing but set off a regional war and news of the bases in Azerbaijan Israel would use if it unilaterally attacked Iran. David Sanger quoted Presidential briefers and Joe Biden—Bibi's old nemesis—blaming Israel for freeing StuxNet, possibly intentionally. Leon Panetta has, on the record, told the entire world, including Iran, when Israel planned to attack. (I actually thought Panetta's latest 60 Minutes appearance might have been an attempt to placate Israel.)

It may appear to us that the Administration continues typical American policy of capitulating to Israel. But the Obama Administration has taken surprisingly strong measures to push back against Israel.

And now Sheldon Adelson has promised to use unlimited funds to get rid of President Obama.

As much as the money concerns me, that's not what I worry about the most. The Israelis have never been shy about running off-the-books operations to influence our policies. Indeed,

they played a role in Iran-Contra, the start of which goes back to the last October Surprise plot to make sure a Democrat didn't get reelected in 1980. And the state of affairs in Israel's neighborhood (both Syria and Egypt would be excellent candidates, though if I were Turkey I'd be cautious, too) is such that it would be very very very easy to create an October Surprise that would make it a lot harder for Obama to get reelected.

Bibi's Sugar Daddy just announced the world he will do anything in his power to defeat Obama. You can be sure Bibi feels the same way.

Update: Iran/Israel confusion fixed, h/t vl.