

WHEN MILITARIES CONSPIRE TO IGNORE THE WILL OF THE PEOPLE

The story of the day is from Michael Hastings, fresh off winning a Polk Award for his reporting on the insubordination of key members of Stanley McChrystal's staff. In today's story, he describes how Lieutenant General William Caldwell ordered a PsyOp unit to manipulate Senators—including John McCain, Carl Levin, Jack Reed, and Al Franken—to support increased troops and funding for training Afghan soldiers. When the commander of that unit objected, he was investigated and disciplined. (See Jim White's post on it [here](#).)

It's a troubling picture of the extent to which individual members of our military will push the war in Afghanistan, knowing how unpopular it is in the States.

But there's an equally troubling story reporting on the disdain with which our military treats public opinion. Josh Rogin reports on a regularly scheduled meeting between the Pakistani and American military in Oman that took place on Tuesday; because of the Raymond Davis affair, the meeting had heightened importance. The US was represented by, among others, Admiral Mullen and Generals Petraeus, Olson (SOCOM) and Mattis (CENTCOM).

As Rogin describes it, the Americans, whose views were represented in a written summary from General Jehangir Karamat with confirmation from another Pakistani participant, believed the two militaries had to restore the Pakistani-American relationship before it got completely destroyed by the press and the public.

“The US had to point out that **once beyond a tipping point the situation would be taken over by political forces**

that could not be controlled,” Karamat wrote about the meeting, referring to the **reported split** between the CIA and the Pakistani Inter-services Intelligence (ISI) that erupted following the Davis shooting.

[snip]

“[T]he US did not want the US-Pakistan relationship to go into a free fall under media and domestic pressures,” Karamat wrote. “These considerations drove it to ask the [Pakistani] Generals to step in and do what the governments were failing to do-especially because the US military was at a critical stage in Afghanistan and Pakistan was the key to control and resolution.”

“The militaries will now brief and guide their civilian masters and hopefully bring about a qualitative change in the US-Pakistan Relationship by arresting the downhill descent and moving it in the right direction.” [my emphasis]

In short, the US military wants to make sure that military intervenes to counteract the fury of the people and the press over the Davis affair.

Now, don't get me wrong. I'd rather have the military ensure close relations with this nuclear-armed unstable state. I'm cognizant of how, in different situations (notably the Egyptian uprising), close ties between our military and others' have helped to foster greater democracy. As Dana Priest's *The Mission* makes clear our military has increasingly become the best functioning “diplomatic” service we've got. And though I think a great deal of stupidity and arrogance got Davis into the pickle he's in, I certainly back our government's efforts to get him returned to our country (Rogin also provides details of the plan to do that).

But particularly coming as it does in the same theater and on the same day as news of PsyOps being waged against my Senator, I'm troubled that our military isn't more concerned with reining in the behavior that has rightly ticked off so many Pakistanis, rather than coordinating with the Pakistani military to make sure the people of Pakistan's concerns are ignored.

IT'S NOT THE PAKISTANIS FROM WHOM PAPERS WERE WITHHOLDING DAVIS' CIA AFFILIATION

Glenn and I both complained after the US media admitted yesterday it had been sitting on the very obvious news that Raymond Davis was a spook. But I got a number of questions from people who seem to miss the point. Why did I argue for years that Bob Novak shouldn't have published Valerie Plame's identity, yet was now arguing that newspapers should have revealed Davis' affiliation? This article from Michael Calderone gets closer to—but does not directly address—what I think the difference is.

Consider the whole reason why—at least as far as our government claims—we keep spies' identities secret. It's to make sure our adversaries don't know who we've got spying on them. Just as random example (just about all these cautionary claims use a similar formulation), here's what Robert Gates said about the danger that Wikileaks would reveal the identities of our sources to (in this case) our enemies in Afghanistan.

I Intelligence sources and methods, as

well as military tactics, techniques and procedures, will become known to our adversaries.

The whole point is to keep spies and their sources' identities secret from our enemies. (In spite of what some have reported about Aldrich Ames and Valerie Plame and Brewster and Jennings, CIA documents I've seen in the Plame case made it clear that the Agency believed Plame's identity was still secret when Novak published her identity; I also suspect that B&J's cover role was misunderstood.)

But consider this case. From the very earliest reports on Davis in Pakistan, he has been alleged to be a spook and/or Blackwater. Indeed, as Calderone points out, the people protesting in the streets of Pakistan have long been operating on the assumption that he is a spy.

But the shooting had already sparked a diplomatic crisis, with Pakistani protesters calling for violent retribution against Davis and burning American flags and an effigy of the CIA agent on the street. (The protest against Davis pictured above took place a week ago). And in the Pakistani media—where conspiracy theories involving the CIA are commonplace—Davis had already been pegged as a spy.

Furthermore, we have every reason to believe that Pakistani intelligence (replete with its ties to Al Qaeda and the Taliban) know and knew who Davis is. Members of the ISI have said as much, for starters. Plus, there are the many allegations that the two men whom Davis killed had ties to ISI; if, as it appears, the ISI was tracking Davis, then it's a sure bet they knew before he was arrested that he was some kind of spook. And if they didn't know before they arrested him, then there are the items they captured with him, not least his phone, which allegedly had numbers of people in the tribal

regions. Thus, regardless of what Davis has said, the ISI likely already has a good idea who his sources are.

So almost all the people we'd like to keep Davis' identity secret from—the Pakistani government and the Pakistani people—already either knew or have been operating based on the assumption that he is a spy. The one exception, of course, is the Taliban or other extremists, who would no doubt like to know whom Davis was speaking to in their ranks. But to the extent they haven't already guessed those details, the Pakistani government now must be trusted to keep them secret, if they will. There's no more or less that the Taliban and Al Qaeda will learn about Davis based solely on US reporting confirming he is a spy.

In other words, had they revealed his CIA affiliation, American newspapers would not have revealed anything to the key people we're supposed to be protecting Davis' identity from; **those** people already knew or assumed it.

So the people from whom American newspapers were withholding the truth about Davis' identity were not America's adversaries, but the American readers who hadn't already read all the Pakistani coverage on Davis.

So why do it? Why did the government ask—and the newspapers accede—to keeping Davis' identity from the American people?

It's possible that the US government believed that so long as no one had officially confirmed Davis' identity (to the extent they have, which they have only insofar as newspapers have made it clear the government has freed them to publish these details now), it would put him at less risk in Pakistan. Perhaps they figured it would be easier for Asif Zardari's government to at least move Davis into a safer location so long as they were able to pretend he was a diplomat. But that seems to misread the source of pressure on the Pakistani government—the people in the street and those egging them

on—who are already quite certain that Davis is a spy.

Perhaps, too, they were just engaging in a kabuki with the Pakistanis, giving them as much space as possible to pretend **they** don't know Davis is a spy, making it easier for our allies within the Pakistani government to operate as if they believed that he was just a diplomat. Though, it seems like enough people in the ISI want this information to be public to prevent that kabuki from working.

The government may have asked newspapers to prevent Americans from discovering that our government is engaged in a similar kabuki. Thus far, the State Department has pretty consistently crafted its words for ambiguity: Davis is a member of the administrative and technical staff at the consulate, he is entitled to immunity; the State Department continues that line, even as everyone knows it's more complicated than that. But last week, President Obama went further than that (as Glenn points out).

With respect to Mr. Davis, our diplomat in Pakistan, we've got a very simple principle here that every country in the world that is party to the Vienna Convention on Diplomatic Relations has upheld in the past and should uphold in the future. And that is if – if our diplomats are in another country, then they are not subject to that country's local prosecution.

We respect it with respect to diplomats who are here. We expect Pakistan, that's a signatory and recognize Mr. Davis as a diplomat, to abide by the same convention.

By not confirming what everyone watching this process closely no doubt already knew, the American press lowered the cost for Obama of making statements like this in an effort to get

Davis released. (Me, I think he'd be best served simply repeating the State Department line, that Davis is a consulate technical staffer.)

Now that may well be the most honorable reason for the government to ask newspapers to hold this news (though not necessarily an appropriate reason for newspapers to agree to do so), though if that's the reason I doubt it'll work.

But there is one other reason—the one I referenced when I noted how ambiguous the reporting on Davis' precise position remains: if there is a reason why Davis' precise status would be either politically explosive in the US (still a Blackwater employee) or illegal (a JSOC one), then the government would love to invoke Davis' safety as a way to avoid any political consequences for being caught having deployed Davis for the mission he's on. But if that's the goal, then newspapers are still actively helping the government cover-up. Even 24 hours later, there is still no clarity on his role, though some of the more obedient newspapers are reporting a government official claiming, dubiously, that Davis was just a security person.

The newspapers may have believed government cautions that by publicizing Davis' status it would make him less safe (though that claim really doesn't seem credible). But to the extent they're still not reporting what Davis was doing, they seem more likely to be shielding the government from having to admit uncomfortable details about what we're doing in Pakistan—and who's doing it.

**\$9 MILLION PER SORT-
OF-KIND-OF IMPORTANT**

DRONE STRIKE

Amidst all the discussion of why the US froze drone strikes after Raymond Davis got picked up, Greg Miller published another important story on drone strikes.

Among other things, the story reveals that we've spent \$118 million in the last year to hit 581 militants, of which just two were on the CIA's most wanted list, and just 13 qualified as high value targets.

CIA drone attacks in Pakistan killed at least 581 militants last year, according to independent estimates. The number of those militants noteworthy enough to appear on a U.S. list of most-wanted terrorists: two.

Despite a major escalation in the number of unmanned Predator strikes being carried out under the Obama administration, data from government and independent sources indicate that the number of high-ranking militants being killed as a result has either slipped or barely increased.

Even more generous counts – which indicate that the CIA killed as many as 13 “high-value targets” – suggest that the drone program is hitting senior operatives only a fraction of the time.

After a year in which the CIA carried out a record 118 drone strikes, costing more than \$1 million apiece, the results have raised questions about the purpose and parameters of the campaign.

In other words, we're spending \$9 million for each high value but not most wanted target.

Mind you, that's not as bad as the \$33 billion we spent on Afghanistan last year to go after roughly 50 members of al Qaeda (admittedly, some of that \$33 billion is probably paying for these

drone strikes).

But \$9 million per target is still far too expensive for a country purportedly needing to cut education funding.

SPY V. SPY: UNMASKED?

From the very first reports of Raymond Davis' killing of two Pakistanis and subsequent arrest, the insistence he was just a consular employee was obviously just polite fiction. The Guardian has stopped sustaining that fiction.

Based on interviews in the US and Pakistan, the Guardian can confirm that the 36-year-old former special forces soldier is employed by the CIA. "It's beyond a shadow of a doubt," said a senior Pakistani intelligence official. The revelation may complicate American efforts to free Davis, who insists he was acting in self-defence against a pair of suspected robbers, who were both carrying guns.

[snip]

The Pakistani government is aware of Davis's CIA status yet has kept quiet in the face of immense American pressure to free him under the Vienna convention. Last week President Barack Obama described Davis as "our diplomat" and dispatched his chief diplomatic troubleshooter, Senator John Kerry, to Islamabad. Kerry returned home empty-handed.

Yet even as Pakistani officials now willingly admit they've known all along that Davis is a spook, it's still unclear to what degree the press is sustaining further fictions.

Consider the ABC report that the two men in the rescue vehicle that attempted to pick Davis up had “slipped out” of the country.

A Pakistani court has demanded the arrest of a second U.S. official in connection with a deadly shootout in Lahore, Pakistan, last month, but that official, as well another American official involved in the incident, have already slipped out of the country and are back on American soil, a senior U.S. official told ABC News.

Which gives the Guardian’s source the opportunity to admit – shockers! – they’ve escaped.

The US refused Pakistani demands to interrogate the two men and on Sunday a senior Pakistani intelligence official said they had left the country. “They have flown the coop, they are already in America,” he said.

FB Ali, at Pat Lang’s blog, reports that these men flew back to the US on John Kerry’s CoDel plane.

The US, concluding that playing the heavy wasn’t achieving much, sent in the ‘good cop’, in the person of Senator Kerry, co-author of the 7.5 billion Pakistan aid bill. He expressed public regret for the deaths, held out the assurance that Davis would be criminally investigated back in the US, and met with the principal Pakistani players. His whirlwind one-day tour didn’t achieve much beyond smuggling out of the country on his plane the three Americans who had been in the backup van (and were being sought by the police and the courts).

Which sort of makes you wonder whether the

Pakistanis are so shocked that these men “flew the coop.”

Then there’s all the discussion about the tie between Davis’ arrest and the halt to drone attacks in Pakistan, which Reuters confirms as news in the same way the Guardian confirmed Davis’ CIA ties as news.

After months of frequent strikes from unmanned U.S. aircraft on militant hideouts in tribal areas on Pakistan’s border with Afghanistan, where bloodshed has hit record levels, reports of covert strikes have gone quiet for over three weeks.

Many analysts believe Washington has stopped the attacks to avoid further inflaming anti-American fury in Pakistan just as it pressures a vulnerable Islamabad government to release Raymond Davis, a U.S. consulate employee imprisoned after shooting two Pakistanis last month during what he said was an attempted robbery.

But FB Ali raises another possibility: that the tribal belt Pakistanis whose numbers were listed in his cell had helped him to target the drones.

On his cell phone were numbers that were later traced to phones in the tribal belt where the Taliban operate, while his camera had pictures of religious schools and military sites.

[snip]

A more ‘innocent’ explanation for these contacts is not being considered, at least publicly. They may merely have been informants that he and his colleagues had set up in the tribal areas to relay information for drone targetting. Incidentally, ever since his arrest drone attacks in the tribal belt have ceased. This may be due to a US

desire not to further inflame Pakistani public opinion, or it could be because target information has dried up, or both.

Note, too, that the last strike was on January 23, four days before Davis killed the Pakistanis. (Or rather, the last strike before today was several days before Davis' arrest.) Which, if FB Ali's suggestion is right, might suggest Davis lost his targeting assistance before the incident in Lahore. Or maybe they're just trying to save themselves at this point.

In any case, Reuters validated this as news and Voila! More drone strikes.

If there is such a direct tie between Davis and drone targeting, it's probably worth recalling (as the Guardian does, implicitly) the suspicion that the ISI may have outed the Islamabad station chief in December so he could be sued in a drone suit.

The identity of the CIA station chief is a closely guarded secret in any country. Khan's lawyer said he had obtained Banks's name from one Pakistani journalist and confirmed it with a second. "I asked around, then got an answer after three or four days of searching," he said.

There was also speculation that Banks could have been named by a disgruntled element within Pakistan's Inter-Services Intelligence spy agency. Last month, several senior ISI officials were named in a New York legal action brought by relatives of the 2008 Mumbai attacks.

At the root of all this polite fiction, after all, is the very rude fiction that the US has been bombing Pakistan without the consent of the government. Pakistan's government—and so presumably the ISI—have been players in the drone campaign and the fiction that sustains it.

While it seems clear that the unveiling of the fictions about Davis are part of a nervous and dangerous game between Pakistan and the US, what seems to underlie it is some lack of faith in that larger rude fiction. The fiction that Pakistan has nothing to do with our drone campaign depends, after all, on mutual trust and sustenance of the fiction. The ISI has to be willing to play its part. And it's not clear everyone wants to play that game anymore.

RUMMY'S DUMP

Donald Rumsfeld, channeling Julian Assange, has now made the database of documents accompanying his book available.

As Spencer notes, making these documents available is largely self-serving; a way for Rummy to point to early moments of reflection that were followed by later moments of rash stupidity or lies.

To put it uncharitably: when you've got a rep for being less-than-honest and unwilling to debate, you might as well let the documents speak for themselves.

So take, for instance, one that Rumsfeld's promoting on his website. It's a September 9, 2002 summary from the Joint Staff's top intelligence official confessing that U.S. assessments of Saddam Hussein's weapons of mass destruction "rely heavily on analytic assumptions and judgment rather than hard evidence." Rumsfeld told the chairman of the Joint Chiefs of Staff to "take a look" at the memo, because "what we don't know about WMD... is big."

Aha! Rumsfeld was a voice for moderation on the Iraq WMD all along! He looks pretty good for bravely disclosing that,

right? Not when you remember that *after* he received that summary, he continued to portray the evidence against Iraq as ironclad, up to and after the invasion. ("We know where [the WMD] are. They're in the area around Tikrit and Baghdad and east, west, south and north somewhat.")

Spencer points to similar examples relating to Afghanistan and interrogation.

But there are some fascinating documents in here. As Marc Ambinder noted yesterday, there's Rummy's memo to General Myers and Stephen Cambone supporting George Tenet's recommendation that John Brennan head the Terrorist Threat Integration Center; in that position Brennan oversaw targeting for Cheney's illegal wiretap program. But in news relevant to today, the memo also emphasizes Brennan's experience as CIA's Chief of Station in Cairo.

Then there's this memo from retired General Wayne Downing to Rummy recommending some changes to Special Operations. Among other things, this memo recommends that special operations report directly to the Secretary of Defense:

To flatten the chain of command, JSOC should report directly to the SD for the immediate future. There is precedent for this new approach to the combat employment of SOF that will better position DoD for the future fight. JSOC reported directly to the CJCS prior to Goldwater-Nichols legislation and the Nunn-Cohen Amendment.

Sy Hersh explained some of the implications of Bush reversing Goldwater-Nichols so as to give civilians direct oversight of JSOC in a 2008 article.

[T]he 1986 Defense Reorganization Act, known as Goldwater-Nichols, [] defined the chain of command: from the President

to the Secretary of Defense, through the chairman of the Joint Chiefs of Staff, and on to the various combatant commanders, who were put in charge of all aspects of military operations, including joint training and logistics. That authority, the act stated, was not to be shared with other echelons of command. But the Bush Administration, as part of its global war on terror, instituted new policies that undercut regional commanders-in-chief; for example, it gave Special Operations teams, at military commands around the world, the highest priority in terms of securing support and equipment. The degradation of the traditional chain of command in the past few years has been a point of tension between the White House and the uniformed military.

"The coherence of military strategy is being eroded because of undue civilian influence and direction of nonconventional military operations," [ret. General Jack] Sheehan said. "If you have small groups planning and conducting military operations outside the knowledge and control of the combatant commander, by default you can't have a coherent military strategy. You end up with a disaster, like the reconstruction efforts in Iraq."

The memo gives hints of other issues that would later be points of contention wrt JSOC. For example, it describes the activities JSOC will need to undertake:

The future GWOT fight will be conducted principally using indirect and clandestine ways and means. It will require sustained [unconventional warfare], [foreign internal defense] and operational preparation of the environment (OPE) in multiple countries. Building and leveraging partner capacity

will be a core element of strategy, and the employment of surrogates will be a key method for accomplishing many GWOT missions.

As we would see, JSOC and Cheney would make broad claims for activities included under “preparation of the environment” as a means to evade congressional oversight. As that same Hersh article explained, preparing the environment was the buzzword DOD used to avoid briefing Congress on ops.

There is a growing realization among some legislators that the Bush Administration, in recent years, has conflated what is an intelligence operation and what is a military one in order to avoid fully informing Congress about what it is doing. “This is a big deal,” the person familiar with the Finding said. “The C.I.A. needed the Finding to do its traditional stuff, but the Finding does not apply to JSOC. The President signed an Executive Order after September 11th giving the Pentagon license to do things that it had never been able to do before without notifying Congress. The claim was that the military was ‘preparing the battle space,’ and by using that term they were able to circumvent congressional oversight. Everything is justified in terms of fighting the global war on terror.” He added, “The Administration has been fuzzing the lines; there used to be a shade of gray”—between operations that had to be briefed to the senior congressional leadership and those which did not—“but now it’s a shade of mush.”

Note, too, that last year, the Armed Services Committees expressed concern about (on the Senate side) DOD using special ops’ ability to provide support to “surrogates” being used to

justify long-term engagements in countries other than Iraq and Afghanistan and (on the House side) involving contractors. When asked whether he would share information to alleviate these concerns with intelligence committees at his confirmation hearing last year, DNI James Clapper said he wasn't obligated to, again hiding information on ops under the veil of DOD legal authorities.

Closely related is Downing's complaint that the difference between Title 10 and Title 50 authorities impede flexibility.

Operations [redacted] outside of Iraq and Afghanistan are complicated by Title 10 vs. Title 50 authorities, and inability to flexibly detail personnel.

Title 10 activities fall under DOD war-making authority and less stringent Armed Services Committee oversight; Title 50 fall under CIA covert op authority with the required Findings to be shared with Intelligence Committees.

Now, none of this is new—we're had ongoing reporting on how both the Bush and Obama Administrations have used the legal distinction between DOD war-making and IC clandestine ops to operated with limited oversight. But it is interesting seeing Downing lay some of that framework back in 2005.

OBAMA/BUSH DOJ UPDATE TO OLC CHRISTMAS CAROL

Through what can only be described as a Christmas miracle, our very own Mary has "discovered" the new version of the OLC Christmas carol, as updated by the Obama/Bush

IF WE'RE ELIMINATING SYMBOLS USED FOR RECRUITMENT, WHY NOT DRONES?

Here's what Obama said in response to a question of whether and why he was going to close Gitmo.

Q But it makes me wonder where you are, sir, at about the two-year mark on Guantanamo, when closing it was one of your initial priorities, sir?

THE PRESIDENT: Obviously, we haven't gotten it closed. **And let me just step back and explain that the reason for wanting to close Guantanamo was because my number one priority is keeping the American people safe.** One of the most powerful tools we have to keep the American people safe is not providing al Qaeda and jihadists recruiting tools for fledgling terrorist.

And Guantanamo is probably the number one recruitment tool that is used by these jihadist organizations. And we see it in the websites that they put up. We see it in the messages that they're delivering.

And so my belief is that we can keep the American people safe, go after those who would engage in terrorism. And my administration has been as aggressive in going after al Qaeda as any administration out there. And we've seen progress, as I noted during the Afghan review.

Every intelligence report that we're seeing shows that al Qaeda is more hunkered down than they have been since the original invasion of Afghanistan in 2001, that they have reduced financing capacity, reduced operational capacity. It is much more difficult for their top folks to communicate, and a lot of those top folks can't communicate because they're underground now.

But it is important for us, even as we're going aggressively after the bad guys, to make sure that we're also living up to our values and our ideals and our principles. **And that's what closing Guantanamo is about – not because I think that the people who are running Guantanamo are doing a bad job, but rather because it's become a symbol.**
[my emphasis]

Now, I actually think this is not a bad answer. I'd love to see Obama go out and repeatedly talk about how important it is for our national security to close Gitmo. I'd love for Obama to criticize those who are preventing the closure of Gitmo for making our country less safe. And I don't doubt that Gitmo is still a dangerous symbol.

But I wonder whether it is **the** symbol anymore. I question whether Gitmo is the most potent recruiting story for al Qaeda.

After all, almost everyone of the people who have recently attacked us—people like Faisal Shahzad—have cited not Gitmo, but our drone strikes in Pakistan, our attacks that have killed so many civilians, as the reason they've attacked the United States.

Now maybe it's the case that the US claims to oppose torture, but doesn't claim to oppose collateral damage in its pursuit of empire. Maybe dropping drones in Pakistan and elsewhere doesn't—as Gitmo does—violate "our values and

our ideals and our principles.”

And maybe the whole question is moot, since Obama’s not going to close Gitmo anytime soon anyway.

But if Obama thinks it important to eliminate the symbols al Qaeda uses to recruit people to attack America, shouldn’t he be considering ending drone strikes, too?

HATFILL AND WEN HO LEE AND PLAME AND AL- AWLAKI AND ASSANGE

Last night I appeared on a panel on the Scooter Libby case. It was Judge Reggie Walton, Peter Zeidenberg, Alexandra Walsh from the Libby team, Lee Levine (who represented Andrea Mitchell and Tim Russert), Walter Pincus and I.

The panel itself was good. My high point came after Walsh had explained why the Defense had argued that bloggers might embarrass the nice people who had written leniency letters for Libby. I said, “well I was flattered we were considered such a threat. But there were at least three people who submitted letters who were implicated in the case. And I was shocked that I was one of only two or three people who demonstrated the many conflicts of those who wrote letters.”

But I also had several weird moments when we were talking about reporter’s privilege, when I was acutely aware that I was sitting between Judge Walton—who had forced journalists to reveal who had blamed Steven Hatfill for the anthrax case [see Jim White’s post for an update on the anthrax case]—and Walter Pincus—who said he had had eight or nine sources for his stories implicating Wen Ho Lee in security leaks. Walton

made the very good point that if he hadn't held AP reporter Toni Locy in contempt, then Hatfill might not have gotten the huge settlement he did for having had DOJ ruin his life. Walton's comment suggested he had had to choose between reporter's privilege or government impunity for attacking one of its citizens.

The collection of people sitting there had all touched on three major cases recently where the government had ruined civil servant's lives and then hid behind reporter's privilege to try to get away with it.

I had that in mind when I read this Jay Rosen piece, in which he suggests the behavior best incarnated by the Judy Miller-Michael Gordon aluminum tubes story created the need for Wikileaks.

The aluminum tube story, Rosen suggests, marks the moment when top journalists came to see their role as simply repeating what the government said.

This was the nadir. This was when the watchdog press fell completely apart: On that Sunday when Bush Administration officials peddling bad information anonymously put the imprimatur of the New York Times on a story that allowed other Bush Administration officials to dissemble about the tubes and manipulate fears of a nuclear nightmare on television, even as they knew they were going to war anyway.

The government had closed circle on the press, laundering its own manipulated intelligence through the by-lines of two experienced reporters, smuggling the deed past layers of editors, and then marching it like a trained dog onto the Sunday talk shows to perform in a lurid doomsday act.

Rosen argues that the NYT was not only on the wrong side of the facts with that story, but

also on the wrong side of secrecy.

But it has never been recognized that secrecy was itself a bad actor in the events that led to the collapse, that *it* did a lot of damage, and that parts of *it* might have to go. Our press has never come to terms with the ways in which it got itself on the wrong side of secrecy as the national security state swelled in size after September 11th. (I develop this point in a fuller way in my 14-min video, [here](#).)

The failures of skepticism back then, Rosen argues, creates the need or opportunity for Julian Assange today.

Radical doubt, which is basic to understanding what drives Julian Assange, was impermissible then. One of the consequences of that is the appeal of radical transparency today

Now, I think Rosen actually misses a key step here: from where the press sees itself as the neutral conduit of what the government is thinking, to where the press thinks its leaks from the government can stand-in for due process in the Anwar al-Awlaki case, and from there to Assange. Recall how Dana Temple-Raston, a very good national security journalist, lectured Glenn Greenwald about how the leaks she had received justified the government's targeting of al-Awlaki.

Glenn Greenwald on his exchange with NPR's **Dina Temple-Raston**:

At roughly 53:00, the Q-and-A session with the audience began, and the first questioner was NPR's national security reporter Dina Temple-Raston, whose Awlaki reporting I had criticized just a couple days earlier for uncritically repeating claims

told to her by anonymous Pentagon officials. She directed her rather critical multi-part question to me, claiming, among other things, that she had seen evidence of Awlaki's guilt as a Terrorist (which she had not previously reported or described in any detail), and that led to a rather contentious – and, in my view, quite revealing – exchange about the role of journalists and how Awlaki can and should be punished if he is, in fact, guilty of any actual crime.

It's really an amazing exchange – Temple-Raston snaps at Greenwald, asking him, "Isn't it possible that I've seen something you haven't seen?" When asked about the evidence of al-Awlaki's operational role in al-Qaeda in the Arabian Peninsula, she smugly tells him that "he doesn't do national security for a living."

Temple-Raston is a good reporter, and hardly ignorant of the civil-liberties side of the national-security equation. I have no doubt that government officials have shown her evidence of al-Awlaki having an operational role in AQAP. But that's really beside the point when we're discussing whether or not the government has the authority to kill an American citizen without due process based on secret evidence. So it's interesting to me that she felt obligated to back Greenwald down, since that suggests the kind of analytical conclusion "objective" reporters aren't supposed to make: Al-Awlaki is guilty therefore targeting him is ok.

The story of al-Awlaki's targeting started when

senior government officials repeatedly and very deliberately leaked to reporters that the Yemeni-American had been targeted, first by JSOC and then by CIA. Yet when his father sued to find out whether he had been targeted appropriately, the government sortof kindof invoked state secrets, allowing the judge in the case to sortof kindof say state secrets would apply but he didn't need that to dismiss the suit. Meanwhile, Temple-Raston argues her access to secrets—because she “does national security for a living”—gives her adequate knowledge to certify the government's assassination order against al-Awlaki. Whereas before, journalists were used as a star chamber to condemn Hatfill and Lee and Plame to lose their livelihoods, they're now serving as the government's star chamber to condemn an American citizen to death.

And we come full circle with Assange. Now, many (not all) journalists are condemning someone who has committed the “crime” of facilitating the publication of unfiltered news. In this odd new economy, it's the relationship built on secrets that seems to be defended, not the First Amendment (and certainly not the Fifth).

Rosen seems optimistic Wikileaks will make some difference here. Me? I'm still skeptical that the Bill of Rights will win out over the culture of secrecy.

AS EXPECTED, JUDGE BATES PUNTS ON RULE OF LAW

I almost felt like I was reading Judge John Bates' ruling on whether or not Valerie Plame could sue those who outed her when I read Judge Bates' ruling dismissing the suit challenging the government's ability to assassinate Anwar

al-Awlaki with no due process.

He starts by admitting the importance of the issues at hand.

This is a unique and extraordinary case. Both the threshold and merits issues present fundamental questions of separation of powers involving the proper role of the courts in our constitutional structure. Leading Supreme Court decisions from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), through Justice Jackson's celebrated concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to the more recent cases dealing with Guantanamo detainees have been invoked to guide this Court's deliberations. Vital considerations of national security and of military and foreign affairs (and hence potentially of state secrets) are at play.

Stark, and perplexing, questions readily come to mind, including the following: How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death? Can a U.S. citizen – himself or through another – use the U.S. judicial system to vindicate his constitutional rights while simultaneously evading U.S. law enforcement authorities, calling for “jihad against the West,” and engaging in operational planning for an organization that has already carried out numerous terrorist attacks against the United States? Can the Executive order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever,

based on the mere assertion that he is a dangerous member of a terrorist organization? How can the

courts, as plaintiff proposes, make real-time assessments of the nature and severity of alleged threats to national security, determine the imminence of those threats, weigh the benefits and costs of possible diplomatic and military responses, and ultimately decide whether, and under what circumstances, the use of military force against such threats is justified? When would it ever make sense for the United States to disclose in advance to the “target” of contemplated military action the precise standards under which it will take that military action? And how does the evolving AQAP relate to core al Qaeda for purposes of assessing the legality of targeting AQAP (or its principals) under the September 18, 2001 Authorization for the Use of Military Force?

But then he punts entirely on standing grounds.

Although these threshold questions of jurisdiction may seem less significant than the questions posed by the merits of plaintiff’s claims, “[m]uch more than legal niceties are at stake here” – the “constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.”

[snip]

Because these questions of justiciability require dismissal of this case at the outset, the serious issues regarding the merits of the alleged

authorization of the targeted killing of a U.S. citizen overseas must await another day or another (non-judicial) forum.

But just for good measure, Bates says he **would** rule in the government's favor on state secrets, but doesn't need to.

So, too, defendants have established that the three procedural requirements for invocation of the state secrets privilege – (1) a formal claim of privilege (2) by an appropriate department head (3) after personal consideration – have been satisfied here. See *Reynolds*, 345 U.S. at 7-8; *Jeppesen Dataplan*, 614 F.3d at 1080; *Defs.’ Mem.* at 48-50.[snip]

Under the circumstances, and particularly given both the extraordinary nature of this case and the other clear grounds for resolving it, the Court will not reach defendants' state secrets privilege claim. That is consistent with the request of the Executive Branch and with the law, and plaintiff does not contest that approach. Indeed, given the nature of the state secrets assessment here based on careful judicial review of classified submissions to which neither plaintiff nor his counsel have access, there is little that plaintiff can offer with respect to this issue.¹⁷ But in any event, because plaintiff lacks standing and his claims are non-justiciable, and because the state secrets privilege should not be invoked “more often or extensively than necessary,” see *Jeppesen Dataplan*, 614 F.3d at 1080, this Court will not reach defendants' invocation of the state secrets privilege.

It was nice of Bates to save the Obama Administration the embarrassment of invoking state secrets to hide the logic for its tyranny.

All in all, a tremendous victory for unchecked executive powers!

Update: Key to Bates' ruling is the government's claim that al-Awlaki can just waltz up to an Embassy and make a legal request that they stop their illegal targeting of him.

In his complaint, plaintiff maintains that his son cannot bring suit on his own behalf because he is "in hiding under threat of death" and any attempt to access counsel or the courts would "expos[e] him[] to possible attack by Defendants." Compl. ¶ 9; see also id. ¶ 26; Al-Aulaqi Decl. ¶ 10. But while Anwar Al-Aulaqi may have chosen to "hide" from U.S. law enforcement authorities, there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in Yemen and expressing a desire to vindicate his constitutional rights in U.S. courts. Defendants have made clear – and indeed, both international and domestic law would require – that if Anwar Al-Aulaqi were to present himself in that manner, the United States would be "prohibit[ed] [from] using lethal force or other violence against him in such circumstances."

Bates makes the very helpful suggestion that if al-Awlaki wants to access the justice system, he should just email some lawyers—not admitting, of course, that the government now routinely wiretaps attorney-client correspondence.

There is no reason why – if Anwar Al-Aulaqi wanted to seek judicial relief but feared the consequences of emerging from hiding – he could not communicate with attorneys via the Internet from his

current place of hiding.

But there's a problem with this (aside from the whole abuse of attorney-client privilege). Bates has said that he would support the government's state secrets claim, if it came to that. Which means even if al-Awlaki waltzed up the American Embassy in Yemen, he would have no way to challenging his targeting, because his suit—like that of Binyam Mohamed or Maher Arar—would be dismissed on state secrets grounds. Which gets to the whole underlying problem here. The government has refused to indict al-Awlaki, to even place their accusations into a legal form. Absent that and in light of Bates' advance assault on state secrets, al-Awlaki would still have no legal means to challenge his targeting.

JOHN BELLINGER: IF THE WAR IS ILLEGAL, JUST CHANGE THE LAW

John Bellinger has been publicly suggesting the Obama Administration had exceeded the terms of the AUMF for some time. So it is unsurprising that he took the opportunity of a Republican House, the incoming Armed Services Chair's explicit support for a new AUMF, and the Ghailani verdict to more fully develop his argument in an op-ed. It's a well-crafted op-ed, such as in the way it avoids explicitly saying the government has been breaking the law in its pursuit of terrorism, when he pretends the only people we've been targeting in Pakistan, Yemen, and Somalia are al Qaeda leaders.

The Bush and Obama administrations have relied on this authority to wage the ground war in Afghanistan; to exert lethal force (including drone strikes)

against al-Qaeda leaders in Pakistan, Yemen and Somalia; and to detain suspected al-Qaeda and Taliban members in Guantanamo Bay, Cuba, and Afghanistan.

In fact, the targets include a heck of a lot of grunts and many people with terrorist ties, but not direct affiliation with al Qaeda. Oh, and a bunch of civilians, but I guess we're to assume the government just has bad aim.

Then there's this game attempt to pretend that everyone will find something to love in the Forever War.

Nearly 10 years after the Sept. 11 attacks, the Obama administration, congressional Republicans and Democrats, and civil liberties groups all have an interest in updating this aging legislation. Republicans should be willing to help the president ensure that combatant commanders and intelligence agencies have ample legal authority to kill or capture terrorists who threaten the United States today. Many Republicans also want to give clearer statutory direction to federal judges regarding who may be detained and for how long. For their part, civil liberties groups and their Democratic supporters in Congress can insist that terrorist suspects who are U.S. nationals receive additional protections before being targeted and that persons detained now or in the future under the laws of war have a right to adequate administrative or judicial review.

As if Republicans weren't already clamoring for more war and more war powers. As if there would be any doubt that Republicans would answer the "who may be detained and for how long" with any answer but, "Forever War, Baby!" As if dubbing the new AUMF "the al-Awlaki and PETA

law”—putting some limits on the targeting of American citizens that presumably already exist—would be enough to entice civil libertarians (whom, Bellinger seems to suggest, only have support among Democrats).

And did you notice how Bellinger slipped in giving **intelligence agencies** the legal authority to kill terrorists? One of the problems—though Bellinger doesn’t say this explicitly—is that we’re increasingly using non-military personnel to target drones, which raises legal questions about whether they’re not unprivileged combatants in the same way al Qaeda is.

In any case, the lawyer did his work on this op-ed.

But here’s what I find to be the most interesting detail in it:

For at least five years, lawyers in and outside the Bush and Obama administrations have recognized the need to replace this act with a clearer law. The Bush administration chose not to seek an update because it did not want to work with the legislative branch.

Which I translate to read, “Back in 2005, several lawyers in the Bush Administration and I [I’m assuming Comey and Zelikow and Matthew Waxman] told the President he was breaking the law and should ask for an updated AUMF. But in spite of the fact that Congress was **at that very moment** passing the Detainee Treatment Act, the Bush White House claimed it couldn’t work with Congress to rewrite the AUMF to try to give the war they were already fighting some legal cover.”

Though of course, in 2005, Bush’s lawyers may have been trying to pretty up the fact that their illegal wiretap program—which constituted the use of military powers within the United States against US citizens—some kind of pretty face before it was exposed.

We've been fighting the Forever Whoever War since at least 2005. And now this clever lawyer wants to make sure the Forever War is legally sanctioned for the foreseeable future.