MARK UDALL'S UNSATISFACTORY SOLUTION TO THE DETAINEE PROVISIONS

As I have repeatedly described, I have very mixed feelings about the debate over Detainee Provisions set to pass the Senate tonight or tomorrow. I view it as a fight between advocates of martial law and advocates of relatively unchecked Presidential power. And as I've pointed out, the SASC compromise language actually limits Presidential power as it has been interpreted in a series of secret OLC opinions.

Which is why I'm no happier with Mark Udall's amendment than I am with any of the other options here.

On its face, Udall's amendment looks like a reset: A request that the Executive Branch describe precisely how it sees the military should be used in detention.

> **SEC. 1031. REVIEW OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.**
>
> (a) *In General*.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall, in consultation with appropriate officials in the Executive Office of the President, the Director of National Intelligence, the Secretary of State, the Secretary of Homeland Security, and the Attorney General, submit to the appropriate committees of Congress a report setting forth the following:
>
> (1) A statement of the position of the Executive Branch on the appropriate role for the Armed Forces of the United

> States in the detention and prosecution of covered persons (as defined in subsection (b)).
>
> (2) A statement and assessment of the legal authority asserted by the Executive Branch for such detention and prosecution.
>
> (3) A statement of any existing deficiencies or anticipated deficiencies in the legal authority for such detention and prosecution.

On one hand, this seems like a fair compromise. The Republicans want something in writing, Carl Levin claims SASC met just about every demand the Administration made in its attempt to codify the authority, but in response the President still issued a veto threat. So why not ask the President to provide language codifying the authority himself?

And after the President submits such language, then all three committees with equities on this issue—not just SASC, but also SJC and SSCI—can propose legislation to codify those authorities (note, Udall is a member of SASC and SSCI, but not SJC).

> (c) *Congressional Action*.—Each of the appropriate committees of Congress may, not later than 45 days after receipt of the report required by subsection (a), hold a hearing on the report, and shall, within 45 days of such hearings, report to Congress legislation, if such committee determines legislation is appropriate and advisable, modifying or expanding the authority of the Executive Branch to carry out detention and prosecution of covered persons.
>
> (d) *Appropriate Committees of Congress Defined*.—In this section, the term "appropriate committees of Congress" means—

> (1) the Committee on Armed Services, the Committee on the Judiciary, and the Select Committee on Intelligence of the Senate; and
>
> (2) the Committee on Armed Services, the Committee on the Judiciary, and the Permanent Select Committee on Intelligence of the House of Representatives.

So far so good—in the face of bad legislation, a legislative punt, one that requires the President to reveal to everyone how he uses and wants to use his Commander in Chief power.

My complaint with Udall's amendment, however, is that it—like the default of doing nothing—equates to an expansion on the way the 2001 AUMF is understood to be used (though it no doubt reflects the war powers the Executive currently claims to have). That's because Udall situates the definition of "covered persons"—those who can be detained, but also, because of the way OLC has built its opinions off of the AUMF and Hamdi, those who can be wiretapped or assassinated and probably a bunch of other things—not just in our war against al Qaeda (as the SASC language does), but also in the Iraq War and "Any other statutory or constitutional authority for use of military force."

> (b) *Covered Persons*.—A covered person under this section is any person, other than a member of the Armed Forces of the United States, whose detention or prosecution by the Armed Forces of the United States is consistent with the laws of war and based on authority provided by any of the following:
>
> (1) The Authorization for Use of Military Force (Public Law 107-40).
>
> (2) The Authorization for Use of Military Force Against Iraq Resolution 2002 (Public Law 107-243).

> (3) Any other statutory or constitutional authority for use of military force.

Now, I assume the "other statutory authority" is meant to cover things like FISA Amendment Acts and the Military Commissions Acts—though I'd bet there are some breathtaking interpretations hiding behind that "constitutional authority" bit. Also keep in mind that statutory authority does things like authorize the use of drones on the border.

And as I showed earlier this year, Jack Goldsmith used the Iraq War authorization language to expand the definition of "terrorists" against whom the President could direct his Commander in Chief authorities beyond just those tied to 9/11.

> I'll have much more to say about this. But note that Goldsmith's limit here [in his May 2004 OLC memo authorizing warrantless wiretapping] does not match the terms of the Afghan AUMF, which is limited to those who were directly tied to 9/11.
>
> > That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines **planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001**, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. [my emphasis]
>
> In other words, while the requirement that the program collect **content** only

> from those with a tie to a terrorist may be a new limit imposed in 2004, it also seems to exceed the very AUMF that Goldsmith was newly relying upon to authorize the program.
>
> Goldsmith does have one out for that problem. As he notes elsewhere, the Afghan AUMF language on terrorism is repeated (and actually expanded) in the Iraq AUMF.
>
> > Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;
> >
> > Whereas the President and Congress are determined to continue to take all appropriate actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;
>
> Did you know that the Iraq AUMF mentions "terrorist" or "terrorism" two more times—19—than it mentions "weapon"—17?

In other words, we know OLC (and therefore, the President) has, over the years, used language **in the Iraq AUMF** to expand the target of the GWOT from just terrorists tied to 9/11 to terrorists more generally. And Udall's amendment would codify that move.

Besides, **why the fuck** are we adhering to language in the Iraq AUMF when that war ends next month?

And none of this, of course, prevents the use of this authority against American citizens.

So while Udall offers a way to reconsider a crappy bill, it does so on terms that start by expanding the scope of the AUMF language included in the SASC bill.

I seem to be one of the few people that cares about this. But the reason the Administration has issued a veto threat is not because it wants to close Gitmo. Rather, it is increasingly clear the Administration has threatened to veto any language that does not codify the fairly limitless claims the Executive Branch has, over the last decade (and especially since 2004) greatly expanded the application of the AUMF as a way to ignore laws on the books.

There is, IMO, just one real advantage to the Udall Amendment: it would remove this debate from the Defense Authorization, which prevents either side from fear-mongering to push through their favored solution. Aside from that, though, Democrats and the Administration sure do seem intent on a really vast codification of Commander in Chief power.

IT'S THE ZENITH-

LIMITING WAR DECLARATION, NOT THE DETAINEE RESTRICTIONS, OBAMA WANTS TO VETO

A bit of a parlor game has broken out over whether Obama really means his veto threat over the detainee provisions of the Defense Authorization. Josh Gerstein weighed in here, including a quote from John McCain accusing the Administration of ratcheting up the stakes.

> It's also clear that, whether for political reasons or due to some complex internal dynamics, the administration seems at this point willing to put up more of a public fight over detainee-related strictures than it has in the past. However, whether that will ultimately translate to a willingness to blow up the defense bill with a veto is unclear. At least some lawmakers seem to view the threats as bluster, in light of the president's track record.
>
> As McCain said Thursday: "The administration ratcheted up the stakes…with a threat of a veto. I hope they are not serious about it. There is too much in this bill that is important to this Nation's defense."

The veto threat is probably tied to the new AUMF language

But I think Gerstein has the dynamic wrong—and his claim that this veto threat represents more public fight than he has shown in the past is flat out wrong. You see, Gerstein's making the claim based on the assertion that the fight is over the Administration's authority to move and try detainees as it sees necessary.

> In the past three years, President Barack Obama's administration has been in numerous public skirmishes with Congressional Republicans over legislation intended to limit **Obama's power to release Al Qaeda prisoners, move them to the U.S. and decide where they should face trial**.
>
> [snip]
>
> A couple of thoughts on the dust-up: Obama has already signed legislation **putting limits on releases of detainees**. While officials said at the time that the White House would oppose similar proposals in the future, it is clear that as a practical matter those limits have now become the baseline for those in Congress. [my emphasis]

Gerstein's right that Obama stopped short of vetoing the Defense Authorization last year, which had those limits, instead issuing a signing statement.

> Despite my strong objection to these provisions, which my Administration has consistently opposed, I have signed this Act because of the importance of authorizing appropriations for, among other things, our military activities in 2011.
>
> Nevertheless, my Administration will work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future.

And Obama didn't issue a veto threat on similar restrictions place on DHS funding.

But Obama **has** issued a veto threat on "detainee and related issues" before—on Buck McKeon's version of the Defense Authorization in May.

That version added a couple of things to last year's Defense Authorization: More limits on when the government can use civilian courts to try terrorists, limits on the detainee review system beyond what Obama laid out in an Executive Order last year.

And this language:

> Congress affirms that—
>
> (1) the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad;
>
> (2) the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 15 1541 note);
>
> (3) the current armed conflict includes nations, organization, and persons who—
>
> (A) are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or
>
> (B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A); and
>
> (4) the President's authority pursuant to the Authorization for Use of Military Force (Public Law 3 107–40; 50 U.S.C. 1541 note) includes the authority to detain belligerents, including persons described in paragraph (3), until the termination of hostilities.

The current bill is less harsh on several counts

than McKeon's language: it includes a series of waivers to bypass military detention and lets the Administration write procedures for determining who qualifies as a terrorist. While these loopholes require the Administration to do more paperwork, they still allow it to achieve the status quo if it does use those loopholes.

But it still includes very similar to McKeon's defining this war.

> Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.
>
> COVERED PERSONS—A covered person under this section is any person as follows:
>
> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or who has supported such hostilities in aid of such enemy forces.
>
> [snip]
>
> (d) CONSTRUCTION.—. Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

Given that the waivers and procedures get around

many of the worst parts of the McKeon version of this bill, I'd suggest it's this language, effectively restating the AUMF and affirming the ability to detain people based on that authority, and not limits on what he can do with detainees, that Obama finds so troublesome.

The new AUMF language threatens OLC interpretations of Youngstown used since 2004

Which is why I find it interesting that Jack Goldsmith has now weighed in, goading Obama to carry through on his veto threat.

> But failing to veto the bill after threatening one will hardly make the left happy; it is more likely to confirm its belief that he is spineless on detention issues.

Goldsmith's language repeats Gerstein's focus on detainee restrictions.

> Is the president really going to expose himself, in an election cycle, to the charge (fair or not) that he jeopardized the nation's defenses in order to vindicate the principle of presidential discretion to release terrorists from GTMO or to bring them to the United States to try them in civilian courts? It is the right principle, but it is a generally unpopular one that the president has not to date fought for.

But that's not really his baby like it is for his co-bloggers Robert Chesney and Benjamin Wittes. Or rather, just the presidential discretion part is. And Goldsmith, as much as anyone out there, knows well how that discretion has been built up over the years, in total secrecy, in OLC opinions that claim Presidential authorization for certain things—detention, certainly, but also wiretapping and assassination—based on the vaguely worded version of the AUMF passed in 2001. That's because he authored a particularly seminal

version of that argument when he shifted the justification for Bush's illegal wiretap program from raw Article II authority to authorization rooted in the AUMF.

> The [AUMF] functions as precisely such legislation [that overrides FISA]: it is emergency legislation passed to address a specific armed conflict and expressly designed to authorize **whatever military actions the Executive deems appropriate to safeguard the United States**. In it the Executive sought and received a blanket authorization from Congress **for all uses of the military against al Qaeda that might be necessary to prevent future terrorist attacks against the United States**. There mere fact that the Authorization does not expressly amend FISA is not material. By its plain terms it gives clear authorization for "all necessary and appropriate force" against al Qaeda that the President deems required "to protect United States citizens both at home and abroad from those (including al Qaeda) who "planned, authorized, committed, or aided" the September 11 attacks. [citation omitted] It is perfectly natural that Congress did not attempt to single out into subcategories every aspect of the use of the armed forces it was authorizing, for as the Supreme Court has recognized, even in normal times outside the context of a crisis "Congress cannot anticipate and legislate with regard to every posible action the President may find it necessary to take." [my emphasis]

After Hamdi, this assertion that the AUMF authorized fairly broad use of Presidential discretion became more closely tied to the President's detention authority, as that was the one example where SCOTUS had affirmed that broad "uses of the military" were included in the AUMF. Here's how it got translated in the White

Paper purportedly authorizing limited parts of Bush's illegal wiretapping program.

> The Supreme Court's interpretation of the AUMF in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), confirms that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad. This understanding of the AUMF demonstrates Congress's support for the President's authority to protect the Nation and, at the same time, adheres to Justice O'Connor's admonition that "a state of war is not a blank check for the President," Hamdi, 542 U.S. at 536 (plurality opinion), particularly in view of the narrow scope of the NSA activities.
> [snip]
>
> Although Congress's war powers under Article I, Section 8 of the Constitution empower Congress to legislate regarding the raising, regulation, and material support of the Armed Forces and related matters, rather than the prosecution of military campaigns, the AUMF indicates Congress's endorsement of the President's use of his constitutional war powers. This authorization transforms the struggle against al Qaeda and related terrorist organizations from what Justice Jackson called "a zone of twilight," in which the President and the Congress may have concurrent powers whose "distribution is uncertain," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), into a situation in which the President's authority is at is maximum because "it includes all that he

> possesses in his own right plus all that Congress can delegate," id. at 635. With regard to these fundamental tools of warfare—and, as demonstrated below, warrantless electronic surveillance against the declared enemy is one such tool—the AUMF places the President's authority at its zenith under Youngstown.

In other words, for years the Executive Branch has used the vague wording of the AUMF to claim all the laws limiting the Executive Branch didn't apply, because the AUMF trumped those laws. Their assertion the AUMF authorized detention authority became a cornerstone of that argument because in Hamdi, they claimed, SCOTUS affirmed that broad reading of the AUMF. But with the language in the Defense Authorization (both McKeon's earlier version and the one that will pass the Senate today), Congress asserts its authority to define the Executive Branch's authority, which ought to, at least, put limits to the areas in which the Executive can be claiming to acting at the zenith of its power.

The Executive Branch has already claimed authority to exceed the plain language of the new AUMF language

And while the language of the section—which purports to define the war in the same way the Administration already has in secret—and the Construction language, intending neither "to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force" (as well as the Administration's successful attempt to get SASC to take out language limiting the application of this definition to US citizens), might seem to achieve a status quo, I suspect that's not really the case.

That's because the Executive has already exceeded the terms of the newly-defined AUMF (or at least claimed the authority to do so). Here's how Goldsmith defined the application of the war

on terror in 2004 (probably because he needed to apply it to the way Bush's illegal wiretap program had already been used).

> the authority to intercept the content of international communications "for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are reasonable grounds to believe … [that] a party to such communication is a group engaged in international terrorism, or activities in preparation therefor, or any agent of such a group," as long as that group is al Qaeda, an affiliate of al Qaeda **or another international terrorist group** that the President has determined both **(a) is in armed conflict with the United States and (b) poses a threat of hostile actions within the United States**; [my emphasis]

This definition would seem to permit the use of the President's war on terror authority against groups like FARC or Hezbollah, not to mention—particularly in the wake of the Scary Iran Plot—al Quds. The language in the Defense Authorization limits the target of the President's counterterrorism authorities to "associated forces," which probably doesn't include FARC or the Quds Force.

In other words, by deigning to define the war on terror, Congress not only threatens that entire "AUMF puts the President at the zenith of his power" argument on which things like wiretapping and, presumably, geolocation and assassination authorities rely. But it has done so in terms that are more narrow than the Executive has already claimed in its OLC opinions.

Administration language opposes this limit on its claimed authority

And this focus—a concern that the explicit restatement of AUMF actually limits the

Executive Branch's authority—shows up in Administration objections to it. Here's what they said in May:

> The Administration strongly objects to section 1034 which, in purporting to affirm the conflict, would effectively recharacterize its scope and would risk creating confusion regarding applicable standards.

Here's what they said last week:

> Section 1031 attempts to expressly codify the detention authority that exists under the Authorization for Use of Military Force (Public Law 107-40) (the "AUMF"). The authorities granted by the AUMF, including the detention authority, are essential to our ability to protect the American people from the threat posed by al-Qa'ida and its associated forces, and have enabled us to confront the full range of threats this country faces from those organizations and individuals. Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.

And the language of one of Gerstein's anonymous Administration officials can certainly be read to include flexibility both on questions about

where you hold detainees but also on whether they can assassinate a US citizen affiliated with a group that didn't exist on 9/11.

> "The President's record in dealing effectively and forcefully with the terrorist threat is second to none," a senior administration official said. "The very idea that some members of Congress think we will be better off if they limit the flexibility of our counterterrorism professionals, micromanage their operational activities, and further restrict our ability to deal with terrorists currently or prospectively in our custody is utterly absurd."

The Administration—and Goldsmith—are ultimately talking about unchecked Executive Branch discretion. Sometimes the Administration has used that discretion to do things human rights supporters would prefer it did, such as trying detainees in civilian courts. But just as frequently, the Administration has done things that human rights supporters abhor, such as killing a US citizen with no due process or data mining and geolocating completely innocent citizens. The authority to do all of those things, good and bad, come from the claims about the AUMF that rely on its vague wording.

It seems fairly clear. The veto threat is about that discretion, not just detainee issues. And it's only when the underlying basis for Executive Branch discretion became threatened that the Administration issued a veto threat.

WITH LATIF DECISION,

SECTION 1031 AUTHORIZES INDEFINITELY DETAINING AMERICANS BASED ON GOSSIP

As I noted yesterday, both Dianne Feinstein and Carl Levin understand Section 1031 of the Defense Authorization to authorize the indefinite detention of American citizens. Levin says we don't have to worry about that, though, because Americans would still have access to habeas corpus review.

> Section 1031 makes no reference to habeas corpus, and places no limitation on habeas corpus review. Nor could it. Under the Constitution, habeas corpus review is available to any American citizen who is held in military custody, and to any non-citizen who is held in military custody inside the United States.

Even ignoring the case of Jose Padilla, which demonstrates how easily the government can make habeas unavailable to American citizens, there's another problem with Levin's assurances.

Habeas was gutted on October 14, when Janice Rogers Brown wrote a Circuit Court opinion holding that in habeas suits, judges must grant official government records the presumption of regularity.

The habeas case of Adnan Farhan Abdul Latif largely focused on one report purporting to show that Latif fought with the Taliban. I suspect the report is an early 2002 CIA report, written during the period when the US was trying to sort through hundreds of detainees turned over (sometimes in exchange for a bounty) by the Pakistanis. The report I suspect is at issue

summarizes the stories of at least 9 detainees, four of whom have already been transferred out of US custody. David Tatel's dissent makes it clear that there were clear inaccuracies in the report, and he describes Judge Henry Kennedy's judgment that this conditions under which this report was made—in the fog of war, the majority opinion agrees—increased the likelihood that the report was inaccurate. Of note, Latif's Factual Return reveals the government believed him to be Bangladeshi until March 6, 2002 (see paragraph 4); they blame this misunderstanding on him lying, but seeing as how the language of an interrogation—whether Arabic or Bangladeshi—would either seem to make his Arab identity clear or beset the entire interrogation with language difficulties, it seems likely the misunderstanding came from the problem surrounding his early interrogations.

Beyond that report, the government relied on two things to claim that Latif had been appropriately detained: The claim that his travel facilitator, Ibrahim Alawi, is the same guy as an al Qaeda recruiter, Ibrahim Balawi (usually referred to as Abu Khulud), in spite of the fact that none of the 7 detainees recruited by Balawi have identified Latif. And the observation that Latif's travel to Afghanistan from Yemen and then out of Afghanistan to Pakistan traveled the same path as that of al Qaeda fighters (here, too, none of the fighters who traveled that same path identified Latif as part of their group).

In other words, the government used one intelligence report of dubious reliability and uncorroborated pattern analysis to argue that Latif had fought with the Taliban and therefore is legally being held at Gitmo.

And in spite of the problem with the report (and therefore the government's case), Judge Janice Rogers Brown held that unless Judge Kennedy finds Latif so credible as to rebut the government's argument, he is properly held. More troubling, Rogers Brown held that judges must

presume that government evidence gathering—intelligence reports—are accurate as a default.

> When the detainee's challenge is to the evidence-gathering process itself, should a presumption of regularity apply to the official government document that results ? We think the answer is yes.

Rogers Brown is arguing for a presumption of regularity, of course, for the same intelligence community that got us into Iraq on claims of WMD; the report in question almost certainly dates to around the same period that CIA went 6 months without noticing an obvious forgery.

Rogers Brown's presumption of regularity is particularly troublesome given that raw intelligence is not meant to be definitive. It is the documentation of gossip and rumor that has not yet been vetted as to whether or not it is fact.

Here's what Sabin Willett—the lawyer for two Uuighurs, Parhat and Kiyemba—says results from the Court's decision that judges must accept such reports as definitive.

> It is not hyperventilation to say, as so many have said, that Latif guts *Boumediene*, because — trust me — every prisoner has an intelligence report. Now the prisoner hasn't just lost his judicial remedy to *Kiyemba*; if those reports control, factfinding is over, too.
>
> [snip]
>
> I tried *Parhat*. He had an intelligence report too. We picked it apart, as I'm sure Latif's lawyers must have done with their report, and as Judge Garland did in the classified *Parhat* opinion. No one could make a straight-faced argument for a presumption after that was done. You have to—I can't say this any other

> way, because *Parhat*'s documents remain classified—but you have to see an "intelligence report" to appreciate just how surreal the proposition is.
>
> The trial lawyer would think this way: **if this tissue of hearsay, speculation, and gossip comes in evidence at all, the trial court must at least be allowed to weigh it. But when the circuit lays the thumb of presumption on the scale, there's no more judicial review — not even in the court of appeals. "Review" is in the anonymous DoD analyst who wrote the report**.
>
> Review was Judge Kennedy's job, and he did his job. Whether we agree or disagree with his weighing, the scale had always been his before. This idea, I think, lies at the bottom of Judge Tatel's thoughtful dissent. **Can the jailer's report trump the judicial officer, in civil cases that are supposed to be a check on the jailer itself**? There's not much evidence that anybody up at SCOTUS cares about the GTMO prisoners any more (whose imprisonments now treble WW2 detentions), but there may still be four of them who worry about trial judges.
>
> [snip]
>
> Pause a moment. A man sits in government prison for ten years and counting, on the strength of a secret document created by the jailer, in haste, from hearsay, which didn't persuade an experienced trial judge. Does that sound like the stuff of regimes we are prone to condemn?

And now with some version of 1031 set to pass Congress, this is the standard that courts will use not just with UIghurs and Yemenis picked up in Afghanistan, but potentially with young

Muslim American men who sound off in chat rooms. With the presumption of regularity, intelligence reports based on paid informants' claims about what got said at a mosque will be enough to hold an American citizen indefinitely.

And it's not just the report. Rogers Brown accepts pattern analysis—which in Latif consisted of travel patterns but which in US-based counterterrorism usually tracks the patterns of the kinds of calls you make, your geolocation, which falafel joint you frequent—as the sole corroboration for the dicey intelligence report.

The way Rogers Brown treats such pattern analysis, in lieu of any real witnesses, as corroboration bodes particularly poorly for the US given how much pattern analysis the government is already doing on innocent Americans.

Carl Levin may well believe his compromise language carries no risk to Americans given the guarantee of habeas, but with Latif as precedent in war on terror habeas cases, he's wrong. As the senator representing one of the largest communities of Arab-Americans and Muslims in the country, his carelessness on this point is particularly troubling.

While it's not the primary goal, Levin's "compromise" language could put some of his constituents—guilty of nothing more than religion, proximity, and gossip—in indefinite detention, with little recourse. And he doesn't seem all that bothered by the possibility.

ARE THE CHINESE SPYING ON OUR

SPYING?

Danger Room reports that our nation's spooks have moved beyond their concern about Chinese chips and other "counterfeit" (read, sabotaged) parts in war toys to grow concerned about Chinese parts in our telecom system.

> Rep. Mike Rogers (R-Mich.), chairman of the House Permanent Select Committee on Intelligence (HPSCI), and the committee's top Democrat, Rep. Dutch Ruppersberger, announced on Thursday that their committee will look into the potential for Chinese telecommunications equipment — like commercial servers, routers and switches — to help China spy on the United States.
>
> "The investigation is to determine the extent to which these companies provide the Chinese government an opportunity for greater foreign espionage, threaten our critical infrastructure, and further the opportunity for Chinese economic espionage," Rogers tells Danger Room. "Through this investigation we will come to a better understanding of the threat so we are better prepared to mitigate."
>
> The concern is that Chinese companies could tamper with equipment for use in civilian communications infrastructure, allowing China to insert Trojan horses that eavesdrop on targets in the United States. Chinese companies already make a number of telecommunications products sold in the U.S., but several have bowed out of deals to acquire large stakes in American telecom companies after facing U.S. government pressure.
>
> Rogers says the investigation is an outgrowth of a review he commissioned shortly after becoming chairman of the committee in January.

Now, I don't think Rogers and Ruppersberger are wrong to be concerned. The Chinese have every incentive to steal what they can from us, and their country's corporations have always seemed willing to help out.

But I wonder if the concern doesn't go beyond just China's ability to affirmatively spy on select targets in the US and the rest of the world. To what degree are Rogers and Ruppersberger—the latter of whom represents the NSA—worried about the US monopoly on wiretapping switches? And is it possible that China will be able to create bottlenecks—as we did in the 1990s—to make it easier to wiretap? To what degree has China's ascendance threatened the Anglo-American superiority in wiretapping?

SCOTUS AND GPS TRACKING: US V. JONES AND SECRET PATRIOT

As I read the transcript of the SCOTUS hearing in the US v. Jones yesterday, I was most interested in what the comments suggest about the government's secret use of the PATRIOT Act to—presumably—use phone geolocation to track people. (Here's Dahlia Lithwick, Orrin Kerr, Julian Sanchez, Lyle Denniston, and Kashmir Hill on the hearing itself.)

Mind you, the facts in Jones are totally different from what we think may be happening with Secret PATRIOT (I'll borrow Julian Sanchez' speculation on what Secret PATRIOT does for this post). In Jones, a suspected drug dealer had a GPS device placed on his car after the 10-day warrant authorizing the cops to do so had already expired. As such, Jones tests generally whether the government needs an active warrant to track a suspect using GPS.

Whereas with Secret PATRIOT, the government is probably using Section 215 to collect the geolocation data from a large group of people—most of them totally innocent—to learn whom suspected terrorists are hanging around with. Not only does Secret PATRIOT probably use the geolocation of people not suspected of any crime (Section 215 requires only that the data be relevant to an investigation into terrorists, not that the people whose records they collect have any tie to a suspected terrorist), but it collects that information using a device—a cell phone—that people consensually choose to carry. Moreover, whereas in Jones, the government was tracking his car in "public" (though Justice Sotomayor challenges that to a degree), Secret PATRIOT probably tracks the location of people in private space, as well. Another significant difference is that, in Jones, the government is doing the tracking themselves; in Secret PATRIOT they probably get tracking data under the guise of business records from cell phone companies.

Nevertheless, the concerns expressed by the Justices seem to be directly relevant to Secret PATRIOT. After all, Chief Justice Roberts almost immediately highlighted that the government's argument—that the use of GPS to track cars on public streets was not a search and therefore it did not need probable cause to use it on anyone—meant that the government could also use GPS trackers on the Justices themselves.

> CHIEF JUSTICE ROBERTS: You think there would also not be a search if you put a GPS device on all of our cars, monitored our movements for a month? You think you're entitled to do that under your theory?
>
> MR. DREEBEN: The justices of this Court?
>
> CHIEF JUSTICE ROBERTS: Yes.
>
> (Laughter.)
>
> MR. DREEBEN: Under our theory and under this Court's cases, the justices of this Court when driving on public roadways

> have no greater expectation
>
> CHIEF JUSTICE ROBERTS: So your answer is yes, you could tomorrow decide that you put a GPS device on every one of our cars, follow us for a month; no problem under the Constitution?
>
> [snip]
>
> CHIEF JUSTICE ROBERTS: Well, then you're -you're moving away from your argument. Your argument is, it doesn't depend how much suspicion you have, it doesn't depend on how urgent it is. Your argument is you can do it, period. You don't have to give any reason. It doesn't have to be limited in any way, right?
>
> MR. DREEBEN: That is correct, Mr. Chief Justice.

And that possible application is mighty interesting given that it seems—if Sanchez' guess on Secret PATRIOT is right—that the government did with this case what they did with Paul Clement in *Hamdi* and Ted Olson in *In re Sealed Case*, which is to send a lawyer before the courts who was compartmented out of and therefore ignorant of key details on the government's counterterrorism program. After all, if he knew the government is currently tracking innocent people's location in their homes, Deputy Solicitor General Michael Dreeben probably would not have suggested that the government couldn't use a GPS tracker in a place where a person had a reasonable expectation of privacy.

> JUSTICE KENNEDY: Well, under that rationale, could you put a beeper surreptitiously on the man's overcoat or sport coat?
>
> MR. DREEBEN: Probably not, Justice Kennedy; and the reason is that this Court in Karo v. United States – United

> States v. Karo –specifically distinguished the possibility of following a car on a public roadways from determining the location of an object in a place where a person has a reasonable expectation of privacy.

And he probably would not have suggested that SCOTUS had carved out Fourth Amendment protection for the interior of people's homes (though Justice Ginsburg's emphasis on third party involvement–the government's use of phone company records, which is what we think the government is doing in Secret PATRIOT–would effectively limit that privacy right).

> JUSTICE GINSBURG: But it – it is a third party involved in the telephone – in the pen register case. And here, it's the police. Essentially, I think you answered the question that the government's position would mean that any of us could be monitored whenever we leave our – our homes, so the only thing secure is the home. Is – I mean, this is – that is the end point of your argument, that an electronic device, as long as it's not used inside the house, is okay.
>
> MR. DREEBEN: Well, we are talking here about monitoring somebody's movements in public. We are not talking about monitoring their conversations, their telephone calls, the interior of their cars, their private letters or packages. So there are enclaves of Fourth Amendment protection that this Court has recognized.

This tension is most explicit when Justice Sotomayor lays out where this is logically heading.

> JUSTICE SOTOMAYOR: You're – you're now suggesting [i]n answer to Justice

> Kennedy's question, which is it would be okay to take this computer chip, put it on somebody's overcoat and follow every citizen everywhere they go indefinitely. So — under your theory, and the theory espoused in your brief, you could monitor and track every person through their cell phone, because today the smartphones emit signals that police can pick up and use to follow someone anywhere they go. Your theory is so long as the — that all -that what is being monitored is the movement of person, of a person, they have no reasonable expectation that their possessions will not be used by you. That's really the bottom line —
>
> MR. DREEBEN: I think that —
>
> JUSTICE SOTOMAYOR: — to track them, to invade their sense of integrity in their choices about who they want to see or use their things. That's really argument you're making.
>
> MR. DREEBEN: Well, Justice Sotomayor, I think that that goes considerably farther than our position in this case, because our position is not that the Court should overrule United States v. Karo and permit monitoring within a private residence. That is off limits absent a warrant or exigent circumstances plus probable cause.

But therein lies the tension in this case. Justices Roberts, Breyer, Sotomayor, and Kagan all raised explicit concerns about the GPS tracking of innocent people which would seem to say that—whatever they think of the GPS use in this case, which involved a criminal suspect—they would vehemently object to the government's presumed use of Secret PATRIOT. Ginsburg and Kennedy seemed offended by that possibility too, though in ways the government could exploit to justify their program (because

Ginsburg appealed to the use of third party records and Kennedy focused on the consensual aspect of carrying a tracking device).

What a few of the Justices—Scalia and Breyer most explicitly—seem most inclined to do is to throw this back to Congress for guidance.

But therein lies the problem. Justice Breyer envisions the problem with this kind of tracking that the government is probably already doing with Secret PATRIOT.

> JUSTICE BREYER: Start with the other end. Start, what would a democratic society look like if a large number of people did think that the government was tracking their every movement over long periods of time. And once you reject that, you have to have a reason under the Fourth Amendment and a principle.

But at the same time he seems inclined to trust Congress to provide guidelines on when the government can use GPS.

> JUSTICE BREYER: Can you take it to Congress the other way? I mean, can you say that a general search of this kind is not constitutional under the Fourth Amendment, but should Congress pick out a subset thereof, say the — terrorism or where there is reasonable cause or like the FISA court or special courts to issue special kinds of warrants, that that's a different question which we could decide at a later time?
> That's a negative way of — I mean that way favors you in the result, but I've — I've been looking for if there is a way of going to Congress to create the situations where they can do it, rather than the situations where they can't.

But in doing so, Breyer gets us precisely where DOJ claims we currently are: with Congress having approved Secret PATRIOT, and in the name

of reasonable searches in the name of terrorism, searching, potentially, everyone.

The outcome of this is really unclear: the government has a sound argument, but a clear majority of the Justices seem offended by the implications of their argument (and even Scalia objects on more narrow grounds).

Yet it also seems clear that a majority of Justices also object to the very idea that seems to be realized in Secret PATRIOT. But at the same time, they seem most likely to write a decision—sending this back to Congress in some fashion—that will get us precisely where we are, with Congress approving, by not disapproving, of the second-hand GPS tracking (through phone records) of just about anyone.

Update: In a post calling for Congress to act regardless of what SCOTUS decides, Ron Wyden emphasizes the Secret PATRIOT questions that won't be answered with this ruling.

> A police department, for example, might not have the resources to follow everyone that lives within a city block for a month, but **they can request every resident's cell phone location history**, or place tracking devices on all of the residents' cars.
>
> [snip]
>
> The Supreme Court is being asked to decide the fate of Antoine Jones, who was convicted of drug conspiracy charges after federal agents used a tracking device to follow him to a house where drugs and money were kept. In all likelihood, the Court will settle the narrow question of whether or not government agents need to get a warrant before installing a tracking device on a suspect's car. And the justices may also consider whether government-installed GPS tracking devices require warrants in general. But what about all of the other questions that the Supreme Court won't

> be considering?
>
> What about the use of similar tracking devices by private citizens? A government agent may or may not have to get a warrant to track a suspect, but is it illegal for a stalker to place a tracking device on a young woman's car? Right now the law isn't clear.
>
> **What if instead of installing a tracking device, a government agent (or a private citizen) secretly uses a person's cell phone or GPS navigation device to ascertain that person's location? Is a warrant required for that? If so, should there be different rules for real-time tracking and getting records of someone's past movements?**
>
> **More broadly, when should a cellular company give law enforcement access to a customer's geolocation records?** What if instead of giving law enforcement access to its customers' location records, that cellular company wants to sell those records to another company? What are the rules then? [my emphasis]

THE SCANDAL IS THAT JONATHAN ALTER DOESN'T SEE THE SCANDAL

[Sorry for my unannounced absence. I'm on a road trip visiting Mr. EW's family. Thanks to Jim White and bmaz for guarding the likker cabinet! I know they'll keep it safe!]

I once got in trouble for mocking people who

thought that blowjobs were a scandal worth legal investigation, but torture was not. Given that Jonathan Alter is the so-called liberal who, weeks after 9/11, affirmatively embraced torture, I'm not surprised he **still** falls in the former group. On Thursday, he wrote a Bloomberg piece sycophantically wondering how Obama managed to have such a scandal-free Administration. This, of the President whose Administration continues to invent all sorts of legal gimmicks to protect his predecessor's torture. And this, of the guy who is looking high and low for new ways to bail out the banksters from the consequences of their crimes.

This Administration has smothered what was left of rule of law. And yet Alter can't find a scandal?

Part of the problem stems from Alter's terms. he equates scandal with some kind of honesty.

> President Barack Obama goes into the 2012 with a weak economy that may doom his reelection. But he has one asset that hasn't received much attention: He's honest.

Obama certainly lies: about his commitment to the public option, his opposition to telecom immunity, and even his belief that no one is above the law. But what Obama does more is spin—spending months claiming that the deficit is the biggest threat to our country, claiming that a bank settlement is necessary to get the housing market back on track. That kind of spin requires real analysis to catch. Which, I guess, Alter isn't up to.

And part of Alter's problem is his adoption of Brendan Nyhan's definition of scandal: the reference to something **as a scandal** by a WaPo reporter on that rag's front page.

> Nyhan says that political scientists generally see *The Washington Post* as a solid indicator of elite opinion — so for his study, a problem officially

> curdles into a scandal once the S-word is used in a reporter's own voice in a story that runs on the front page of the *Post*.

Given that one of the WaPo editorial page's most striking ideological commitments is to torture, it seems nearly impossible that torture—and the refusal to prosecute it—would ever be a scandal by Nyhan's (and therefore Alter's) terms. And Dana Milbank's bankster epiphany notwithstanding, WaPo reporters are, almost by definition, isolated from the effects of the banksters' crimes by class and distance.

The WaPo is designed not to see the scandals at the heart of the Obama Administration, not least so people like Jonathan Alter can pretend they don't exist.

And part of Alter's blindness to the scandal of Obama finishing off the rule of law in this country lies in his banal understanding of how spin can immunize from scandal. Apparently, tone matters. Substance does not.

> For starters, the tone is always set at the top. Obama puts a premium on personal integrity, and with a few exceptions (Tim Geithner's tax problems in 2009) his administration tends to fire first and ask questions later.

TurboTax matters, the conflict of interest that leads men to try to hide their past horrible decisions (TurboTax Timmeh) or serve their employer (Bill Daley) does not.

And curiously, Alter finds fault with Obama's selection of people like Daley (instead of, presumably, people like Jamie Dimon?), and not with the way Obama permitted people like TurboTax Timmeh to undercut Elizabeth Warren's efforts.

> But the White House's intense focus on scandal prevention has had mixed

> results. The almost proctological vetting process has ended up wounding Obama as much as prospective nominees. He gets cleaner but often less imaginative officials. The kind of swashbuckling figures from the private sector who might have, say, come up with a far more ambitious job-creation plan often don't bother to apply for government service these days.

The problem seems to be that Alter can't see the scandal of Obama's betrayal on the rule of law because he remains committed to elites, like him, playing the fixer, no matter what that does to this country's integrity (or, more basically, their ability to actually fix anything).

The scandal at the heart of the Obama Administration is that people like Alter—and most within the Administration—don't see that they are deploying the tools of the federal government to institutionalize looting and other abuses.

Just as interesting as Alter's failure to see this scandal, though, is his interpretation of how it will affect the 2012 election. In his mind, the economy might doom Obama, but his purported freedom from scandal will mitigate that.

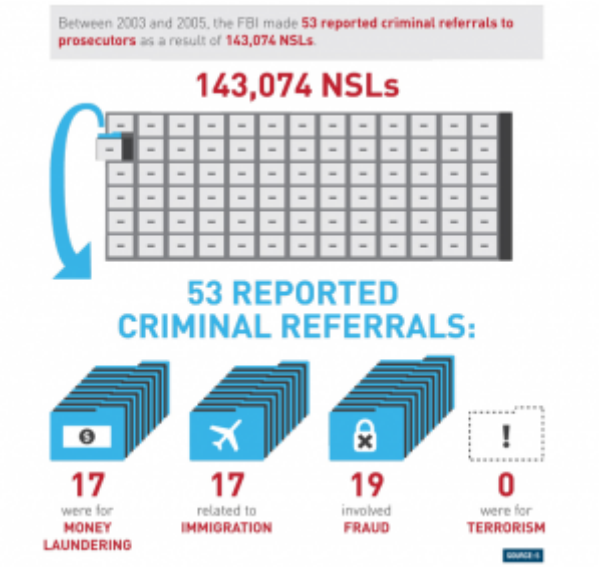
> These kinds of stories [Solyndra] are unlikely to derail Obama in 2012. If he loses, it will be because of the economy — period.

There are people occupying squares all around this country to protest, largely, bankster corruption. The bankster corruption Obama has enabled. The corruption that caused the lousy economy.

And yet, because Alter doesn't get that Obama's coddling of the banksters exacerbated the lousy economy, he doesn't see that that scandal—Obama catering to his donors the banksters while the

biological people of this country suffered as a result—might be the only thing that gives the parade of nutcases auditioning to run against Obama an opening against him.

"THE PATRIOT ACT, WHICH THE PRESIDENT SIGNED INTO LAW ON OCTOBER 2001"



I only noticed two things that might generously be considered typos (as opposed to outright falsehoods or lies of omission) in Dick Cheney's entire infernal tome. There's this reference to an October 10, 2002 speech from Jello Jay Rockefeller in support of the Iraq war:

> One of the most eloquent statements of the necessity of removing Saddam came from Senator Jay Rockefeller, the vice chairman of the Senate Intelligence Committee. (393)

On October 10, 2002, of course, Jello Jay was not yet Ranking Member of SSCI. Rather, Bob Graham was Chair. On October 10, 2002, Graham

was saying the following about the war:

> With sadness, I predict we will live to regret this day, Oct. 10, 2002, the day we stood by and we allowed these terrorist organizations to continue growing in the shadows.
>
> [snip]
>
> This timid resolution, I fear, will only increase the chance of Americans being killed, and that is not a burden of probability that I am prepared to take. Therefore I will vote no.

Yeah, Cheney's misattribution probably wasn't a typo, but instead a cynical attempt to pretend that the Democrat who had reviewed the intelligence behind the war most closely had backed the war, rather than correctly predicted it would heighten the threat of terrorism.

But I don't think the grammatical error in the following passage, describing the relationship between Cheney's illegal wiretap program and the PATRIOT Act (which turns 10 today), is really a typo either.

> One of the first efforts we undertook after 9/11 to strengthen the country's defenses was securing passage of the Patriot Act, which the president signed into law on October 2001.

Thus begins the passage in which Cheney describes the genesis of his illegal wiretap program. Of course, the passage should either say, "which the president signed into law **on** October 26, 2001," or "which the president signed into law **in** October 2001."
A minor point, but one that might suggest Cheney once had the date in there and then took it out.

You see, including the actual date would have really disrupted Cheney's narrative, which suggests Congress passed the PATRIOT Act and only then did he begin thinking about how to use

NSA to fight terrorism, which (implicitly) is why he didn't include the illegal program in PATRIOT. After a description of how PATRIOT broke down the wall between intelligence and law enforcement in the first paragraph, Cheney continues,

> I also thought it important to be sure the National Security Agency, or NSA, which is responsible for collecting intelligence about the communications of America's adversaries, was doing everything possible to track the conversations of terrorists, so I asked George Tenet whether the NSA had all the authorities it needed. Tenet said he would check with General Mike Hayden, who was then director, and a short time later both of them came to see me in my office in the White House. Hayden explained that he had already made adjustments in the way NSA was collecting intelligence. Those adjustments were possible within NSA's existing authorities, but additional authorities were needed in order to improve the coverage and effectiveness of the program.

A few paragraphs later, he continued.

> With [Bush's] approval, I asked Dave Addington to work with General Hayden and the president's counsel, Alberto Gonzales, to develop a legal process by which we could ensure the NSA got the authorizations Hayden needed.

It's only five paragraphs after Cheney's description of PATRIOT that he provides the date that—had he actually included the date of the PATRIOT Act—would have made clear that the illegal program started before the signing of the PATRIOT Act.

> On October 4, 2001, the president, on

> the recommendation of the director of central intelligence and the secretary of defense, which the determination of the attorney general that it was lawful to do so, authorized the program for the first time.

Of course, Cheney leaves out some key details along the way, such as that Hayden briefed the House Intelligence Committee about what he was already doing on October 1, which elicited some questions from Nancy Pelosi, then the Ranking Member on HPSCI. Cheney doesn't mention that Bush clamped down on briefing Congress on October 5. And he doesn't mention that Pelosi raised questions about minimization, in writing, on October 11, but never got answers to those questions.

Cheney also doesn't mention that David Kris, who was busy drafting the PATRIOT Act, got an OLC opinion on September 25 approving the one change to FISA he deemed necessary to make with the PATRIOT.

To reveal those details—the briefings to Congress, Pelosi's questions, Kris' ability to get FISA changed under PATRIOT—would have made it clear that the rest of the "legal approval" process Cheney describes could have—should have—instead been done with Congress as part of the PATRIOT Act. I may be nitpicking here, writing an absurdly long post about Cheney's use of the wrong preposition. But Cheney's choice to bypass Congress even as it was making changes to FISA remains the biggest piece of evidence that he knew he was engaging in an illegal program that Congress would not entirely approve.

There will be a number of retrospectives in "honor" of PATRIOT Act's birthday today. ACLU's got a nifty infographic (the image above is just one part of it).

But ACLU's other "tribute" to the PATRIOT—a lawsuit to force the government to reveal its secret interpretation of PATRIOT Act—and

Cheney's typographical tell that he recognizes he deliberately chose not to get Congressional approval for the illegal wiretap program are even more important.

As horrible as the PATRIOT Act is, after all, both the Bush Administration and the Obama Administration have exceeded the plain meaning of the act. For ten years, then, it has not been enough that Congress has eagerly dealt away our civil liberties. But the Executive Branch will take even what Congress won't give.

WARRANTS FOR INNOCENT PEOPLE ARE NOT LIKE WARRANTS FOR SUSPECTS

As Charlie Savage reports, Ron Wyden and Mark Udall have written Eric Holder scolding him for mischaracterizations DOJ has made about how the government is using the Patriot Act, in part to collect information on people's location.

They cite two examples of such mischaracterizations: First, when a number of Justice Department officials claimed,

> that the government's authority to obtain business records or other "tangible things" under section 215 of the USA Patriot Act is analogous to the use of a grand jury subpoena.
>
> [snip]
>
> As you know, Section 215 authorities are not interpreted in the same way that grand jury subpoena authorities are, and we are concerned that when Justice Department officials suggest that the two authorities are "analogous" they provide the public with

> a false understanding of how surveillance is interpreted in practice.

What they don't say, but presumably mean to suggest, is that the claim Section 215 is like a grand jury subpoena is false, since the latter are routinely used to collect the "tangible things" (and even ephemeral things like cell phone tracking data) of completely innocent people.

Section 215 is not like a grand jury subpoena because you don't even have to be connected to a crime (or suspected terrorist or spy) to be caught in the surveillance it has been used to authorize.

Wyden and Udall's second complaint pertains to word games played by DOJ spokesperson Dean Boyd in speaking to Al Jazeera English; I've bolded the passage they object to.

> US Justice Department public affairs officer Dean Boyd dismissed the senators' allegations. "It's quite unfortunate that your facts are so incorrect," Boyd told Al Jazeera English when asked about Wyden and Udall's comments.
>
> Boyd highlighted one provision of the Patriot Act in his response, Section 215. "Contrary to various claims in recent months and years, **Section 215 is not a secret law, nor has it been implemented under secret legal opinions by the Justice Department**," he said.

Boyd's dodge, it appears, is that DOJ hasn't gotten an OLC opinion; they're relying solely on FISC opinions.

> This statement is also extremely misleading. As the NSA General Counsel testified in July of this year, significant interpretations of section 215 of the Patriot Act are contained in classified opinions of the Foreign Intelligence Surveillance Court and these opinions—and the legal interpretations they contain—continue to be kept secret. In our

> judgment, when the government relies on significant interpretations of public statutes that are kept from the American public, the government is effectively relying on secret law.

There are two problems that Wyden and Udall's letter present, which they don't lay out themselves.

First, after noting that warrants for people who are not suspects are not like warrants for suspects, the Senators observe that DOJ officials have made misleading claims to the contrary to Congress. They seem to be reminding Holder that it is a crime to lie to Congress.

Or, at least, it used to be. Given DOJ's treatment of Scott Bloch, who as a DOJ employee lied to Congress, it's clear that DOJ is unlikely to allow its own employees to go to jail for lying to Congress. Perhaps Senators Wyden and Udall would like to make a stink about that? Otherwise, their implicit threat of legal consequences for these lies is completely impotent.

The other problem—one they probably can't lay out in an unclassified letter—is the precedent of the In re Sealed Case decision by FISCR. As I've laid out, Cheney's illegal wiretap program appears to have been in tension if not outright conflict with the FISCR for a year and a half, until Jack Goldsmith purportedly resolved that conflict with specious (though still classified) arguments. Given that DOJ has apparently not laid out what they're actually doing with Section 215 and geolocation in an OLC memo, it increases the likelihood that the language of the FISC opinions may not precisely apply to the behavior of DOJ (as an OLC opinion might). Furthermore, in that previous case, DOJ sent a bunch of lawyers who weren't even briefed into relevant activities to argue before the court.

There's no affirmative evidence DOJ is doing such things in this case. But the In re Sealed Case precedent, the unexplained chose not to get

OLC to approve this activity, as well as the Obama Administration's precedent of overriding OLC when its lawyers counseled against continued Libyan bombing all raise real questions about the legal process by which the Administration came to claim this stuff has some kind of legal sanction.

In other words, while the bigger issue in this letter seems to be the government's continued pretense that warrants for surveiling innocent Americans are just like warrants for investigating suspects, I'm beginning to suspect the bigger story is the unusual means by which the Administration got "authority" to spy on innocent Americans.

JOHN BRENNAN, THE INTELLIGENCE COMMUNITY'S ONE MAN JUSTICE DEPARTMENT

Matt Apuzzo has a story describing three different responses to growing concerns about the CIA-on-the-Hudson.

There's Rush Holt, who unfortunately is no longer on the House Intelligence Committee and therefore has limited ability to look into this:

> "I believe that these serious and significant allegations warrant an immediate investigation," Holt wrote.
>
> [snip]
>
> Holt, who previously served on the House Intelligence Committee, said he never remembers being told about the CIA partnership or the programs the NYPD was running.

> [snip]
>
> Holt asked for a special prosecutor because he wanted both the civil rights issues and the NYPD-CIA collaboration to be investigated, his office said.

So Holt, who suggests he should have been informed of the NYPD spook program but wasn't, suggests one means of oversight never happened.

There's Mike Bloomberg, who has been Mayor for almost the entire post-9/11 period and therefore ought to have exercised some oversight over this program:

> In New York, Mayor Michael Bloomberg was asked Thursday about the CIA's investigation and whether he thought the partnership violated any laws.
>
> "How would I know?" Bloomberg replied. "They're doing an investigation. That's what – if I knew, I'd be happy to tell them. But my guess is no."

Surprisingly, Bloomberg hasn't thought of consulting one of NY's own lawyers, or one of the thousands of lawyers inhabiting NY, to find out whether the partnership was legal. A smart guy like Mayor Mike and he claims not to even know how he might find out if the program were legal. Rather than finding out, though, he's just gonna guess.

And then, finally, there's John Brennan, the guy who apparently did the targeting for Cheney's illegal wiretap program and also was personally involved in one of the whistleblower cases the Obama Justice Department is prosecuting, who cites his intimate knowledge of the program as his basis for being sure there's no problem.

> President Barack Obama's homeland security adviser, John Brennan, who was the deputy executive director the CIA when the NYPD intelligence programs began, said he was intimately familiar with the CIA-NYPD partnership. He said that agency knew what

> the rules were and did not cross any lines.

Call me crazy. But I think there's a third reason to support Holt's call for an independent prosecutor. Not only is Obama's DOJ personally involved, but his top Homeland Security advisor was involved in this mess, too. Given the White House's past involvement in shutting down DOJ investigations pertaining to the Brennan-era CIA, I'd say we need someone free of that chain of authority.

TEN YEARS AFTER 9/11, INHERENT AUTHORITY DIES A SMALL LEGAL DEATH

Al-Haramain has submitted its brief for the appellate review on a number of issues related to the government's illegal wiretapping of the charity. The questions at issue are:

> 1. Does FISA waive federal sovereign immunity?
> 2. Does FISA preempt the state secrets privilege?
> 3. Was plaintiffs' non-classified evidence sufficient to prove their warrantless electronic surveillance?
> 4. Did the district court properly award counsel's full attorney's fees?
> 5. Did the district court err in dismissing defendant Mueller in his individual capacity?

Most of the brief will be familiar to those who have followed this case. But this passage—because it comes at the appellate level—is new.

> Finally, we note that defendants do not

> challenge the district court's ruling that the President lacks inherent power to disregard FISA's preemption of the state secrets privilege. See 564 F. Supp. 2d at 1121 [ER 108]; supra at 16. Thus, for purposes of this appeal, defendants have forfeited any claim of inherent power to disregard FISA. See, e.g., Independent Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003). **More broadly, defendants have abandoned any defense of the TSP's purported theoretical underpinning that the President may disregard an Act of Congress in the name of national security**.
>
> This forfeiture should come as no surprise. Top officials in the Obama administration had conspicuously repudiated the inherent power theory before taking office. See Donald Verrilli (now Solicitor General) et al., Brief for Amici Curiae Center for National Security Studies and the Constitution Project, American Civil Liberties Union v. National Security Agency, 493 F.3d 644 (6th Cir. 2007), 2006 WL 4055623, at *2 & *15 (inherent power theory is "particularly dangerous because it comes at the expense of both Congress's and the judiciary's powers to defend the individual liberties of Americans"); Neal Kumar Katyal (now Principal Deputy Solicitor General), Hamdan v. Rumsfeld: The Legal Academy Goes to Practice, 120 HARV. L. REV. 65, 117 (2006) ("overblown assertions" of inherent power "risk lawlessness in the name of national security"); Eric Holder (now Attorney General), Address to American Const. Society (June 13, 2008), http://www.youtube.com/watch?v=6CKycFGJOUs&feature=relmfu (videotape at 3:41–3:52) ("We must utilize and enhance our intelligence collection capabilities to identify and root out terrorists, but we must also comply with the law. We must also comply with FISA."). [my emphasis]

The passage is not central to the argument

except insofar as it notes the government has procedurally given up the theory that they used to initially rationalize the illegal wiretap program. It is, as I said, just a small legal death, limited to this one case, rather than a wholesale repudiation.

Nevertheless, I thought the timing—not just coinciding with the anniversary of 9/11 but also the release of Dick Cheney's autobiographical novel—rather apt.

And the rhetorical value in citing three of DOJ's top lawyers dismissing the theory—which the brief repeats by citing Holder's even more damning call for "a reckoning" in that same ACS speech at the very start of the brief does have value.

> "[S]teps taken in the aftermath of 9/11 were both excessive and unlawful. Our government . . . approved secret electronic surveillance of American citizens . . . . These steps were wrong when they were initiated and they are wrong today. We owe the American people a reckoning." Eric Holder, June 13, 2008

Verilli's and Katyal's and Holder's criticism of inherent power may have just been the rhetorical blatherings of political lawyers then in the political and legal opposition, blatherings not entirely consistent with steps they have taken since they've been in positions of authority.

But for the purposes of this legal brief, who better to kill the theory of inherent authority than the Attorney General?