THE NEW GITMO MEMORANDUM OF UNDERSTANDING: OBAMA FINALLY FIGURED OUT HOW TO CLOSE DOWN GITMO!

Yesterday, the NYT weighed in on a new practice at Gitmo: the requirement that lawyers whose clients have lost their habeas case sign new memoranda of understanding governing the terms of access to their client.

> The Obama administration's latest overuse of executive authority at Guantánamo Bay is a decision not to let lawyers visit clients in detention under terms that have been in place since 2004. Because these meetings pose little risk and would send a message about America's adherence to the rule of law, the administration looks as if it is imperiously punishing detainees for their temerity in bringing legal challenges to their detention and losing.
>
> [snip]
>
> Four years after the Supreme Court ruled that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law," the government may be calculating that it can decide what "meaningful" means.
>
> But if the wars where detainees were captured have been to defend American interests, surely the country has an interest in an unequivocal commitment to

> the rule of law, including full legal representation for detainees.

The NYT got closer to ascribing a motive and envisioning the impact of the policy than Lawfare's several posts on the subject. But I think both are missing what I suspect is the point.

Aside from giving detainees little recourse over issues affecting their own treatment (which is most urgent, in my opinion, to monitor the mental health of the detainees), the MOU will have three effects:

- Gutting Obama's own promise to provide Periodic Reviews to detainees
- Eliminating the risk that detainees will pursue justice internationally
- Burying Obama's biggest failed promise

Gutting the Periodic Review Boards

As Jack Goldsmith reminded back in April, a year earlier Obama had issued an executive order promising a Periodic Review Board for all detainees.

> In March 2011, the Obama administration issued an Executive Order (13567) that created a process of Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force." The "review and hearing" process was designed to operate on top of the habeas review process and the other internal review processes for GTMO detainees, and to facilitate release of detainees who were not "a significant threat to the security of the United States." Bobby analyzed the

> EO here and here, as did Tom Nachbar here.
>
> The EO states: "For each detainee, an initial review shall commence as soon as possible but *no later than 1 year from the date of this order*" (emphasis added). I have heard little about these reviews since last Spring, and the deadline for their commencement passed last month. Has the administration carried out its pledges under the EO?

Irrespective of the delay, it was crystal clear by April that Obama didn't put much stock in his promise to tie continued detention to the risk a detainee posed. After all, the Administration was willing to gut habeas with a detainee who, on multiple occasions, under both the Bush and Obama Administration, was cleared for release. When Obama did release the PRB guidelines, the timing involved—providing for just 4 months of election season during which the PRB would function (one of which has already elapsed)—made it clear it wasn't actually supposed to function.

But the whole thing is supposed to be driven by new information; it's not a reconsideration of information already in the files. And not only does the PRB determine the priority in which they'll consider cases, they get to decide whether any information from the detainee is relevant.

> Any additional relevant information (as defined in the Glossary) that has become available since the later of the Reference (k) review or prior PRB review, including information discovered as a consequence of information presented by the detainee's personal representative or private counsel.
>
> [snip]
>
> (1) The personal representative and private counsel, if any, shall be

> provided with advance notice of the PRB review, as well as a reasonable opportunity to meet or talk to the detainee to discuss the PRB process and the information the detainee may wish to submit.
>
> (2) The personal representative and private counsel, if any, may prepare a written submission for the PRB, which may include a written statement from the detainee. The written submission shall include all factual information that the detainee intends to present in the PRB proceedings. Such submission shall only contain information relevant and material to the determination of whether continued law of war detention of the detainee is necessary to protect against a continuing significant threat to the security of the United States. Relevance of the information is determined by the PRB.

And now the MOU warns that lawyers cannot assist their client for PRB matters under the MOU.

> Undersigned counsel and translator understand and acknowledge that access to the detainee post-habeas is for the sole purpose of obtaining the detainee's transfer or release from detention by the United States Government at Guantanamo Bay through potential habeas corpus or other litigation in United States federal courts or through discussions with the United States Government. Undersigned counsel and translator also understand that access under this MOU is not authorized for any other purpose, including assisting or representing that detainee in connection with military commission proceedings or Periodic Review Board proceedings under Executive Order 13567 (access for these purposes shall be governed by a separate set of procedures).

In effect, this means there is no way for a lawyer who knows a detainee's case best to try to present information to the PRB during its 3 remaining months.

The PRB, then, becomes nothing more than a campaign prop, in place for election season, but designed so it is almost impossible for it to do any good.

Eliminating the risk that detainees will pursue justice internationally

More troubling still is the second half of that above paragraph: the MOU explicitly prohibits lawyers from providing assistance to their clients for matters pertaining to anything aside from transfer. This in effect solidifies a practice already put into place through operation of the legal mail process, in which the government has prevented detainees from getting any documents pertaining to other kinds of legal challenges.

I'm most familiar with this happening in the context of Abu Zubaydah, who will, of course, never be transferred, partly because he's an extremist though not the high level al Qaeda figure they used to claim he was, partly because the government wants to hide how his torture and detention made him crazy.

But the government has repeatedly refused to allow AZ's legal team to get other legal documents to him. They refused to let him have a document to sign that would authorize a lawsuit in Lithuania.

> Attorneys for Abu Zubaydah say they have been trying to mount a meaningful defense for the "high-value" detainee, who has been in the custody of the US government since March 2002, and have also sought legal remedies outside of the United States to hold accountable those who were complicit in his rendition and torture.
>
> But the attorneys claim their efforts

> have been stymied by the Justice Department (DOJ), which refuses to turn over to them critical documents they need to press forward with Zubaydah's case.
>
> For example, late Thursday, Zubaydah's legal team filed a lawsuit against Lithuania with the Strasbourg-based European Court of Human Rights (ECHR), the leading human rights tribunal in the world, over the country's failure to reopen an investigation into its role in Zubaydah's rendition to a CIA black site prison in Lithuania and the torture he was subjected to there in 2005.
>
> But the DOJ on Wednesday told Zubaydah's lawyers they would not declassify and turn over to them a power-of-attorney form Zubaydah signed earlier this year authorizing his legal team to file the lawsuit against Lithuania on his behalf.

And they've tried to do that to prevent AZ from giving permission to release his FBI file.

At one level, this serves simply to ensure that no other country will hold American responsible for the torture it committed. At another level, it serves to prevent the full stories of Gitmo detainees from becoming public. In effect, it turns Gitmo back into the black hole that Rasul and then Boumediene, briefly, opened up.

Burying Obama's biggest failed promise

And all that happens in time for election season!

Obama made a bunch of promises before he got elected he has failed to keep: passing a public option and not passing a health insurance mandate, fixing the FISA Amendments Act, addressing climate change, renegotiating NAFTA.

But none of those promises was accompanied by the kind of first day theater as his promise to close Gitmo. Obama got into office, and the

first thing he did was implement a promise to close Gitmo.

And then (as Daniel Klaidman's book makes clear) he failed to do any of the political things he needed to do to make that happen.

That's probably the biggest effect of the this MOU: closing down Gitmo, as a press item or a political football, for election season (at least). It's effectively as much a political gimmick as it is a legal document—though of course it has pretty serious legal consequences.

UMAR PATEK: INDONESIA'S 20 YEAR SENTENCE VERSUS ONE ERRANT DRONE STRIKE

Mark Mazzetti has a fascinating collection of details on drones. In addition to showing drone pilots training in New Mexico practicing by tracking (and therefore incidentally collecting intelligence on) US civilian cars and displaying a real callousness about their video game killing, Mazzetti describes this 2006 drone strike in the Philippines.

> Over the years, details have trickled out about lethal drone operations in Pakistan, Somalia and Yemen and elsewhere. But the drone war has been even more extensive. According to three current and former intelligence officials I spoke to, in 2006, a barrage of Hellfire missiles from a Predator hit a suspected militant camp in the jungles of the Philippines, in an attempt to kill the Indonesian terrorist Umar Patek. The strike, which was reported at the time as a "Philippine military

> operation," missed Patek but killed others at the camp.

The detail is interesting not just because it reveals the scope of our drone war. It also provides an opportunity to compare two possible outcomes for Patek, who built the bombs used in the 2002 Bali bombings: death by drone strike in 2006, versus his conviction in an Indonesian court last year.

The outcome of the trial last month is a mixed bag. Because Patek apologized and argued successfully that he did not have as significant a role as the other conspirators (who have already been executed), he got just a 20 year sentence. But his conviction brings closure to the 2002 attacks (though it's not clear whether Hambali will ever be charged); compare that with 9/11, where victims still have seen none of the plotters convicted.

So while counterterrorism officials might argue Patek got off easy (and I wouldn't put it beyond the US to render him at the close of his sentence), some kind of justice has been served, which is more than the US can say.

Then there's the possibility that Patek served an added purpose.

At the very least, Patek underwent interrogation in Pakistani custody for 7 months before his extradition to Indonesia. Presumably, he provided intelligence on matters unrelated to the Bali bombings.

But there's a question that has, AFAIK, never been answered. Patek was arrested in January 2011 in Abbottabad, Pakistan. There have always been suspicions that the arrest of Patek in the city Osama bin Laden was hidden out in (Patek reportedly planned to meet OBL) helped to solidify the case that he was in fact the "Pacer" in the compound. Did Patek help the US get OBL?

We can't really compare that to what might have

happened had Patek died in 2006. How do you weigh the ongoing training Patek offered in the interim 5 years? How many innocents were killed in that strike in 2006?

But given how much intelligence the CIA appeared to be sustaining on Patek, it seems arrest rather than drone strike might bring additional tangible benefits.

THINGS WORTH FIGHTING FOR

Before you head out for barbecue and blowing fireworks up, take a moment to reflect on the things that were once worth fighting for. Here are a few that—given Anwar al-Awlaki's death and the dismissal of Jose Padilla's torture lawsuits since our last Independence Day—are particularly worth noting.

> For Quartering large bodies of armed troops among us:
> For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:
>
> [snip]
>
> For depriving us in many cases, of the benefits of Trial by Jury:

Awlaki and Padilla surely wanted to harm this country. But that doesn't excuse the harm done by those betraying the foundational principles of this great country.

Happy Independence Day! May we all continue to honor this country and its founding principles in the coming year.

BAGRAM: STILL A BLACK HOLE; SOMALIA: INCREASINGLY A BLACK HOLE

An Afghan named Zia-ur-Rahman held in Bagram petitioned for habeas corpus. And while District Court Judge James Gwin recognized "certain inconsistencies about—and the unsettled nature of—the Untied State's intentions from Bagram, he still found that Zia-ur-Rahman's plight matched that of the petitioners in al-Maqalah so closely that, under that precedent, he had to deny the petition.

> Because the Petitioner makes no argument that he is differently situated than the petitioners in Al Maqaleh (this Petitioner is a non-U.S. citizen held as an enemy alien), this Court share s the Al Maqaleh conclusion: the "adequacy of process" prong weighs in [the] Petitioner's favor but is not strong enough to offset the other legs of the Boumediene constitutional analysis.

And while none of the 16 detainees we've got hidden away in the prison in Bosaso, Somalia that Eli Lake visited, the conditions there are even worse than in Bagram.

> I have better luck with Ahmad Mohammed Ali, an 18-year-old who says he joined al-Shabab when he was 16. He wears a jacket that looks three sizes too big and a wraparound cotton *ma-awis*. Ali was arrested by the Puntland Security Force at the end of 2011 in a raid against Al-Shabab in Bosaso. A semi-autonomous region of Somalia, Puntland is a U.S. ally in the war on terrorism and piracy,

> and its president, Abdirahman Mohamud Farole, says U.S. military and CIA advisers work closely with his security force. Two U.S. military officials confirmed this.
>
> Before Ali was shipped to prison, American interrogators questioned him in a separate facility, he says. The Americans were mainly interested in Al-Shabab. “I was given military training, but I was always under their watch, they never trusted me,” Ali said of his Al-Shabab commanders. Once, he says, he was asked to guard a training camp and fell asleep at his post. When this was discovered, senior officers tied him up and beat his feet and ankles. He was then told that if he tried to leave Al-Shabab, his family would be murdered.
>
> Because of his terrorist ties, Ali is locked up with grown men who are also suspected members of the group. One reason I was able to interview him is because he is now cooperating with the Puntland authorities. But Ali has paid a price. He said the other inmates in the prison’s Al-Shabab section have attempted to strangle and beat him.

To be fair, Lake says most of the detainees at Bosaso are pirates. I don’t know anyone who has suggested we open Gitmo up to store all the pirates we capture in the Red Sea. And the example of Ali seems to suggest the problem in Bosaso (as opposed to the prison in Aden Adde Airport Jeremy Scahill reported on, for example) is more akin to the Yemenis stuck in Gitmo than the debate over where to put Ahmed Warsame.

That is, what we lack are not prison facilities, per se, but programs in which to deradicalize kids like Ali and give them enough resources to get a start in life.

But I don’t think we’re the ones to provide

that. Partly that's because the example in Bagram shows we're just interested in shell games that allow us to stash these men away and forget about them. Partly because we're the biggest prison planet in the world; we're the last country you'd turn to to use detention as a means to transition out of unacceptable behavior.

All that said, we do appear to be acquiring more and more black holes these days.

SCOTUS KILLS HABEAS CORPUS

SCOTUS has just declined to take all seven of the pending Gitmo habeas corpus petitions, including Latif and Uthman.

This effectively kills habeas corpus.

Consider what SCOTUS just blessed:

- Holding a person indefinitely for being in the wrong place at the wrong time—including a school, a road, and a guest house—where suspect people are.
- Holding a person indefinitely based on an admittedly error-ridden report the government wrote up itself.
- Holding a person indefinitely based on pattern analysis.
- Completely upending the role

> of District Court judges in the fact-finding process.

SCOTUS REVIEWS THE "MILITARY AGE MALE" STANDARD ON THURSDAY

One of the most consistent statements of outrage I've seen from people just coming to the horrors of the drone program is the military aged male criterion: the Administration's assumption that all military age males killed in a drone strike must be combatants.

> Mr. Obama embraced a disputed method for counting civilian casualties that did little to box him in. It in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.

Justin Elliott even got the Administration to reiterate the claim, albeit anonymously.

> I gave the White House a chance to respond, and it declined to comment on the record. But speaking on condition of anonymity, an administration official acknowledged that the administration does not always know the names or identities of everyone in a location marked for a drone strike.
>
> "As a general matter, it [the Times report] is not wrong that if a group of

> fighting age males are in a home where we know they are constructing explosives or plotting an attack, it's assumed that all of them are in on that effort," the official said. "We're talking about some of the most remote places in the world, and some of the most paranoid organizations on the planet. If you're there with them, they know you, they trust you, there's a reason [you're] there." [brackets original]

What no one seems to get, however, is that between them, the Bush and Obama Administrations have been using that standard to **detain** people for over a decade. Indeed, there are probably over 30 men (I suspect the number is closer to 50) still at Gitmo being held on that standard, most of them for over a decade.

More importantly, SCOTUS will decide whether to uphold that standard on Thursday (or whenever they get around to accepting or denying cert on the 7 Gitmo cases they've been agonizing over for weeks).

The case is question is Uthman Abdul Rahim Mohammed Uthman's habeas petition. Here's how his cert petition describes the issues presented by his case.

> Whether the Authorization of Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (''AUMF"), authorizes the President to detain, indefinitely and possibly for the rest of his life, an individual who was not shown to have fought for al Qaeda, trained to fight for al Qaeda, or received or executed orders from al Qaeda, and was not claimed to have provided material support to al Qaeda.

The government has always yoked its detention authority closely to its targeted killing authority (see, for example, the reported

justification for the Awlaki killing). And here you can replace “detain, indefinitely and possibly for the rest of his life” with “kill with a drone strike” and you’ve got precisely the authority that Obama (and Bush before him) claims to kill all men in the vicinity of suspected al Qaeda figures, even absent any claim they were al Qaeda fighters.

I wrote about the evidence against Uthman here (two of the men who gave evidence against him had been tortured), but here are the passages from Judge Henry Kennedy’s (yup, the same judge who presided over the Latif suit, with another Yemeni prisoner) opinion granting the habeas petition (before the DC Circuit overturned it).

> In sum, the Court gives credence to evidence that Uthman (1) studied at a school at which other men were recruited to fight for Al Qaeda; (2) received money for his trip from an individual who supported jihad; (3) traveled to Afghanistan along a route also taken by Al Qaeda recruits; (4) was seen at two Al Qaeda guesthouses in Afghanistan; and (5) was with Al Qaeda members in the vicinity of Tora Bora after the battle had occurred there.
>
> [snip]
>
> Even taken together, these facts do not convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda. Although this information is consistent with the proposition that Uthman was a part of Al Qaeda, it is not proof of the allegation. . . . Associations with Al Qaeda members, or institutions to which Al Qaeda members have connections, are not enough to demonstrate that, more likely than not, Uthman was part of Al Qaeda.

In other words, Uthman’s habeas appeal

challenges whether being in any of five wrong place at the wrong time—including a school, a travel route, a guest house, and the vicinity of Tora Bora, as well as funded by jihadists—amount to being an al Qaeda militant. Subsequent to Uthman, detainees' habeas petitions were rejected based on fewer of those criteria (for example, in addition to the error-ridden intelligence report against Latif, the main evidence against him is an even more tenuous travel route than used to jail Uthman). But the Circuit decision in Uthman basically enshrines the claim that being in the wrong place is all the evidence the government needs to detain someone indefinitely.

Since they're rushing to roll out drones in US airspace, you better start worrying about whether your travel patterns mark you for killing or detention.

BASHAR AL-ASSAD, GITMO JUDGE AND JURY

As Steven Aftergood reported, Syrian Gitmo detainee Abdulhadi Omer Mahmoud Faraj has challenged the government's inane policy prohibiting detainee attorneys from refuting the claims made in Gitmo files. The motion argues that letting the claims go unrebutted jeopardizes any chance Faraj might have for repatriation or resettlement, and even endangers his family in Syria.

Abu Zubaydah's Evidence

One problem, the motion argues, is the allegations in his Gitmo file come from, "unreliable claims made by individuals under conditions that amount to coercion, if not torture." Faraj's Gitmo file includes the following claims:

- In a 2002 CIA report, Abdurahman Khadr (Omar's brother, who was then working as a CIA informant) said the Syrian guesthouse in Kabul at which Faraj stayed conducted document forgery
- In a 2002 CIA report, Abu Zubaydah said he helped fund the Syrian guesthouse
- In a 2002, 2003, and 2005 CIA reports, Abu Zubaydah said one person at the guesthouse was an expert forger, another was a bomber with ties to Abu Musab al-Zarqawi, and a third met with him in 2001; only the third, Maasoum Abdah Mouhammad, is among the group of 4-5 Syrians with whom Faraj allegedly had the closest ties, and he was transferred to Bulgaria in 2010
- Mohammed Basardah, notorious for falsely implicating a large number of detainees, claimed that another of the Syrians Faraj had ties with was fighting with him at Tora Bora

In other words, many of the claims against Faraj constitute claims made by the two most unreliable Gitmo witnesses—and another who was then on the CIA payroll—implicating others

associated with Faraj. Most of those claims were minimized or ignored in Faraj's most recent Administrative Review Board.

Syrian Military Intelligence Evidence

The motion discusses the other problem with his Gitmo file more obliquely, with a reference to Syrian human rights violations, including its dubious allegations that opposition figures are Islamic extremists.

> According to Human Rights Watch, "Syrian security services regularly arrest men suspected of Islamist affiliation or sympathies" and torture them to obtain confessions.
>
> [snip]
>
> Given the current violent response by the Syrian government to pro-democracy protesters, the unchallenged narrative depicting Mr. Faraj as a "terrorist" only increases the risk of harm to him and his family.

But the Gitmo file clearly reveals the problem: some of the key allegations against Faraj come from two CIA reports, dating to 2001, recording claims passed on by Syrian Military Intelligence.

> Syrian authorities dismantled terrorist cells in Damascus and Hamah, SY in 2000, arresting fifteen members of the cells while some cell members, including SY-327, escaped. The Syrian Military Intelligence (SMI) stated that those who escaped were believed to have fled to Afghanistan.
>
> [snip]
>
> SMI noted the escaped Syrian cell members joined a Syrian camp in Afghanistan run by UBL associate Abu Musab al-Suri, and attended an al-Qaida training camp.

The Syrian intelligence further ties this alleged extremist cell to Abu Zubaydah.

The Gitmo file even suggests that since Faraj and the other Syrians he had ties to expressed fear of being sent back to Syria, they must be terrorists.

> Detainee, SY-327, SY-317, SY-326, and SY-330 have all expressed reservations of being sent back to Syria, citing fear of punishment for their travel to Afghanistan and for being at JTF-GTMO. (Analyst Note: The fear of punishment is more likely due to their terrorist activities within Syria.) [Footnotes removed]

Now, intelligence from the Syrians hasn't always proven terrifically reliable. So you have to ask whether we should be holding people at Gitmo based on what Bashar al-Assad's regime claimed 11 years ago.

But just as importantly, for better or worse, the American political view on possible Islamists who oppose Assad's government has changed pretty dramatically of late, so much so that we're about to start providing arms to "vetted" members of the Free Syrian Army. Thus, even if the SMI reports were true, what's to say that Faraj isn't the next Abdel Hakim Belhaj, who went from being rendered by us as a terrorist to partnering with us in overthrowing Qaddafi?

Indeed, it's the US embrace of regime change in Syria that seems to best explain this motion—filed over a year after Gitmo file gag orders were first contested. We have held Faraj for years based on the fact that Syria considers him a terrorist, but now we like people Assad considers terrorists. Given the changed political environment, we might well see fit to free Faraj. Except all the other stuff—the kind of allegations made by Abu Zubaydah and Basardah that the government refuses to use in real

courts—would make it rather hard for the US to do that.

The government responded to this motion with a sealed filing. So they may well be addressing precisely these issues. Perhaps they're going to stand by their inane policy but make an exception for Faraj?

WHAT THE WHITE HOUSE "OFFICIAL ANNOUNCEMENT" OF UNDIEBOMB 2.0 WOULD HAVE LOOKED LIKE

As I've been tracing, there's a pissing contest going on between the AP and John Brennan over the roll-out of the UndieBomb 2.0 "plot" earlier this month.

When the AP first broke the story on UndieBomb 2.0, it explained that it had held the story but decided to publish before the Administration made an official announcement on what would have been Tuesday, May 8.

> The AP learned about the thwarted plot last week but agreed to White House and CIA requests not to publish it immediately because the sensitive intelligence operation was still under way.

> Once those concerns were allayed, the AP decided to disclose the plot Monday **despite requests from the Obama administration to wait for an official announcement Tuesday.** [my emphasis]

Since that time, the Administration has tried to claim they never intended to make an official announcement about the "plot." They did so for a May 9 LAT story.

> **U.S. intelligence officials had planned to keep the bomb sting secret**, a senior official said, but the Associated Press learned of the operation last week. The AP delayed posting the story at the request of the Obama administration, but then broke the news Monday.
>
> "When the AP got it and started talking about it, it caused all kinds of problems with the operation," said a U.S. official who would not be quoted by name discussing the classified operation. "The investigation never went to its full conclusion."
>
> AP spokesman Paul Colford said the news agency held off publishing until U.S. officials told the AP that security concerns were allayed.
>
> "We were told on Monday that the operation was complete and that the White House was planning to announce it Tuesday," he said.

Then the White House tried misdirection for a Mark Hosenball story last week—both blaming AP for information about the Saudi infiltrator the AP didn't break, and attributing Brennan's comments implying the plot involved an infiltrator to hasty White House efforts to ~~feed the news cycle~~ ~~spin~~ respond to the story.

> According to National Security Council spokesman Tommy Vietor, due to its

> sensitivity, the AP initially agreed to a White House request to delay publication of the story for several days.
>
> But according to three government officials, a final deal on timing of publication fell apart over the AP's insistence that no U.S. official would respond to the story for one clear hour after its release.
>
> When the administration rejected that demand as "untenable," two officials said, the AP said it was going public with the story. At that point, Brennan was immediately called out of a meeting to take charge of damage control.
>
> [snip]
>
> The AP denies any quid pro quo was requested by them or rejected by the White House. "At no point did AP offer or propose a deal with regard to this story," said AP spokesman Paul Colford.
>
> [snip]
>
> **The White House places the blame squarely on AP, calling the claim that Brennan contributed to a leak "ridiculous."**
>
> "It is well known that we use a range of intelligence capabilities to penetrate and monitor terrorist groups," according to an official statement from the White House national security staff.
>
> "None of these sources or methods was disclosed by this statement. **The egregious leak here was to the Associated Press. The White House fought to prevent this information from being reported and ultimately worked to delay its publication for operational security reasons. No one is more upset than us about this disclosure**, and we support

> efforts to prevent leaks like this which harm our national security," the statement said.
>
> The original AP story, however, made no mention of an undercover informant or allied "control" over the operation, indicating only that the fate of the would-be suicide bomber was unknown. [my emphasis]

Now, there are several problems with this latest White House story. The allegation of a quid pro quo rests on the premise that the Administration was also about to release the information; it's just a different version of the request to hold the story until an official White House announcement. Furthermore, if the White House didn't want this information out there, then why brief Richard Clarke and Fran Fragos Townsend, who went from there to prime time news shows and magnified the story?

In short, the White House attempt to blame the release of this story on the AP makes less and less sense every time they change their story.

But there's another piece of counter-evidence to claims the White House didn't intend to do a dog-and-pony show boasting of their success at "foiling" an AQAP bomb "plot."

The dog-and-pony show they rolled out the last time they foiled an AQAP bomb plot targeting the US, four days before the midterm elections in 2010.

In a nearly analogous situation with the toner cartridge plot—the US taking credit for foiling an AQAP plot largely thanks to a Saudi-run agent—the White House had a big announcement, including an appearance from the President.

I'm not certain, but news of the plot first came out of the UK, where officials intercepted one of the two bombs in East Midlands Airport (the Beeb did a timeline of the news as it rolled out; the times are 6 hours ahead of ET). Reports

of two planes being searched—in Newark and Philadelphia—came out in late morning. Then Press Secretary Robert Gibbs issued official statements on the plot. In mid-afternoon, the White House announced Obama would make a statement at 4:15. Obama spoke, followed by Gibbs offering a chronology of the government response to the plot (which notably neglects to mention that Brennan first found out about the plot from Saudi intelligence head Mohammed bin Nayef). The White House even released a picture, above, purportedly of Brennan briefing Obama and others in the situation room, though not matching any of the meetings Gibbs described at the presser. And then Brennan answered questions, as he has with other national security ops.

Not surprisingly, Brennan's briefing doesn't mention Jabir al-Fayfi, the former Gitmo detainee who had flipped and infiltrated AQAP under Saudi control, and had just returned to Saudi Arabia 13 days earlier and tipped the Saudis off to the plot. But the briefing also pointedly avoids mentioning the Saudis—or their role providing the tracking numbers for the packages—at all.

> Q Mr. Brennan, if you could talk about what we know beyond the fact that this was from Yemen, there are people in Yemen with AQAP who want to harm us – if there is more that can be established to create a direct link beyond the country of origin?
>
> MR. BRENNAN: I think, as Robert said, this is an active and ongoing investigation. We are working very closely with our partners in Yemen and United Arab Emirates, as well as in the United Kingdom **and other countries**, as well.
>
> [snip]
>
> Q I wonder, Mr. Brennan, if you can back that tick-tock up just a little

bit. What did you know at the time when you briefed the President last night? And were these packages just discovered through random screenings? Or was there something that tipped you off to these packages?

MR. BRENNAN: Well, I knew enough last night to be able to brief the President, number one. Number two, I think the American people should feel particularly good that since 9/11, **the U.S. government has built up a very, very capable and robust intelligence**, law enforcement, homeland security system. And as a result of the strength of that system, information became available that we were able to act upon very quickly and that we were able to locate these packages.

So **I'm not going to go into the details about how we became aware of it**. But the redundant layers of security, the tremendous work of the counterterrorism professionals, law enforcement, homeland security, intelligence, was the reason why we were able to succeed.

Q   If I can just follow up on that — you're saying then that you were aware of this plot not because of the packages but because of something else?

MR. BRENNAN: I'm saying that whenever you pull a string, **there's a reason why you start to pull that string. And we had a reason to pull it**. And as a result of what we were able to uncover in East Midlands Airport, with the very strong cooperation of British authorities, we were able to also then take additional steps. And that's why those prudent measures were taken today to ensure that we were able to identify any other packages that might be out there of concern.

> [snip]
>
> Q Can I get someone to clarify – and it follows up on Ann's question – with the packages themselves, what made the packages suspicious, or something else led you to the package?
>
> MR. BRENNAN: As I said, **the American people should be very pleased that we were able to get insight into the fact that there were suspicious packages out there** that we had to find. And **I'm not going to go into those operational details**. I think that's the reason why we have a security system in place that has these redundancies and the ability to detect things, from inception all the way to the possible execution of an operation. So we were on to this, but I'm not going to get into details about how we knew. [my emphasis]

I guess Brennan has gotten worse at hiding the involvement of Saudi infiltrators in AQAP plots. Too much practice leaking secrets, I guess. Oddly, it appears the Saudis—and possibly Mohammed bin Nayef himself—revealed their role in the Saudi press within two days (as they had publicized the return of al-Fayfi).

Brennan also rolled off the same kind of generic statement he has made numerous times, including a number of times since UndieBomb 2.0 was revealed, vouching for the always better than ever before Yemeni counterterrorism cooperation.

> Q And a quick big picture – the Yemeni cooperation – considering this is now multiple attempted terrorist attacks it looks like emanating from Yemen, is it fair to say that we don't have the best cooperation yet with the Yemeni government?
>
> MR. BRENNAN: I would say that over the past 22 months or so, during this administration, and even in the prior

> administration, there has been a steady improvement in that cooperation. **I would say that the CT cooperation right now with Yemen is better than it's been ever before. That doesn't mean that it can't improve more. It needs to improve more.** I've been out to Yemen four times during the past two years. We're working very closely with them. And we found that they are courageous partners. Many Yemenis have lost their lives in the battle against al Qaeda.
>
> [snip]
>
> We are working very closely with the Yemeni government, and we've been able to make some significant progress against al Qaeda in the Arabian Peninsula inside of Yemen, working with those partners.
>
> We'll continue to do this. If anything, this just demonstrates to us, and I think to the Yemenis as well, that we need to redouble our efforts so that we're able to destroy al Qaeda. And we will. [my empahsis]

Overall, Brennan created the illusion that we discovered this plot through American intelligence and quick response, not a phone call from Mohammed bin Nayef reporting on the intelligence he got from the former Gitmo detainee he had flipped.

Now, I explored all this to show how utterly absurd White House pique at AP is, on its face. Given the opportunity, it seems clear, they would have rolled out a similar dog-and-pony, hiding the Saudi role in this plot, particularly that of the Saudi infiltrator, while celebrating the intelligence success of the US.

So why is John Brennan so cranky at the AP?

MORE FAILED TARGETING BASED ON TRAVEL PATTERNS

The other day I noted what happened when the US or its allies applied the standard it is using in the Latif case: targeting people based on claims the route they traveled makes them a terrorist. In Turkey, 34 Kurds were killed because they were using the same path PKK guerrillas use.

In Honduras, our travel-based targeting appears to have killed civilians as well, sparking anti-US outrage in response. On May 11, four Hondurans were killed in a joint DEA-Honduran attack against suspected drug traffickers. It turns out the law enforcement officials (the US claims DEA agents didn't shoot) shot at an unlit boat carrying 4 civilians nearby, not the lit traffickers' boat; the traffickers escaped.

In US denials of fault, they said the unlit boat could not have been civilians, since it was the middle of the night. But it turns out there is a reasonable explanation for their presence.

> In fact, Ms. Lezama and her husband say, they were not fishing, as the mayor initially suggested — they were returning from a daily trip in which they dropped off lobster fishermen at the Caribbean coast, coming back with passengers picked up at several spots along the river.
>
> "We've been doing this for 25 years, day and night," Ms. Lezama said. Her husband and other relatives, surrounding her as she lay in bed, nodded. They and other town residents confirmed that the family business had been making the trip for years.

> And the spot in the river where the shooting occurred is not as isolated as Honduran and American officials have suggested.
>
> “**The Patuca River is like a highway; it’s always full of traffic from the village**,” said Mayor Lucio Baquedano. Indeed, on Friday afternoon the landing where witnesses said the shooting occurred looked like a taxi stand: about 20 long, skinny boats bobbed in the brown water. A gray Yamaha motor hung from the back of one carrying families east to Brus Laguna, a larger town where Ms. Lezama’s boat usually stops. In another sat a red bike, while in a third, a man carried a hunk of freshly cut wood as long and wide as his leg.
>
> Near the end was Ms. Lezama’s blue boat. A half dozen gunshot holes could clearly be seen.
>
> “What worries me is that if there are more drugs moving along that river,” Mayor Baquedano said, “more of our people are going to be attacked.” [my emphasis]

Another common highway Americans didn’t recognize as such, seeing instead a route conveying only traffickers.

How many times do you suppose we’re going to do this before we learn that common travel routes are not, themselves, evidence of terrorism or trafficking?

SCOTUS GRANTS

CLAPPER CERT, STALLS ON DETAINEE CASES

SCOTUS has just listed orders from last week's conference, where they had been discussing the handful of Gitmo cases that had petitions for cert pending. It has relisted the detainee cases, which suggests they may need a week or more to sort through their decision.

SCOTUS did, however, grant cert to Clapper v. Amnesty, which I wrote about here and here. On its face, Clapper is just about the FISA Amendments Act. But it also has implications for wiretap exceptions—and, I've argued—data mining exceptions to the Fourth Amendment. In any case, SCOTUS seems interested in reversing the 2nd Circuit opinion, which had granted standing to people whose work had been chilled by the passage of the FAA. Also, as I hope to note further today, SCOTUS' Clapper decision may also impact the Hedges v. Obama ruling from last week.