

LANNY BREUER COVERS UP MATERIAL SUPPORT FOR TERRORISM

I noted last week how prosecutors were claiming they were being extra tough on HSBC for all its money laundering because of the seriousness of the charge they were going to defer: money laundering. Yesterday, with great fanfare, DOJ rolled out their deferred prosecution for money laundering, as if it were a good thing to ratchet up the charges you excuse.

But I was struck even more by how DOJ treated HSBC's crimes they chose not to indict. Here's how Assistant Attorney General Lanny Breuer described HSBC's crimes:

HSBC is being held accountable for stunning failures of oversight – and worse – that led the bank to permit narcotics traffickers and others to launder hundreds of millions of dollars through HSBC subsidiaries, and to facilitate hundreds of millions more in transactions with sanctioned countries.

From 2006 to 2010, **the Sinaloa Cartel in Mexico, the Norte del Valle Cartel in Colombia, and other drug traffickers laundered at least \$881 million in illegal narcotics trafficking proceeds through HSBC Bank USA.** These traffickers didn't have to try very hard. They would sometimes deposit hundreds of thousands of dollars in cash, in a single day, into a single account, using boxes designed to fit the precise dimensions of the teller windows in HSBC Mexico's branches.

In total, HSBC Bank USA failed to monitor over \$670 billion in wire transfers from HSBC Mexico between 2006 and 2009, and failed to monitor over \$9.4 billion in purchases of physical

U.S. dollars from HSBC Mexico over that same period.

In addition to this egregious lack of oversight, from the mid-1990s through at least September 2006, **HSBC knowingly allowed hundreds of millions of dollars to move through the U.S. financial system on behalf of banks located in countries subject to U.S. sanctions**, including Cuba, Iran and Sudan. On at least one occasion, HSBC instructed a bank in Iran on how to format payment messages so that the transactions would not be blocked or rejected by the United States.

That is, Breuer says HSBC 1) helped Mexican drug cartels launder money and 2) helped Cuban, Iranian, and Sudanese banks avoid US sanctions.

But that's not all, according to the Permanent Subcommittee on Investigations, that HSBC did. The four main sections of the PSI report on HSBC's Bank Secrecy Act and money laundering violations pertain to:

1. Money laundering for Mexican cartels
2. Helping banks evade sanctions
3. Processing masses of travelers checks from Hokoriku bank in Japan which had suspicious ties to Russian "businessmen"
4. Maintaining correspondent accounts with banks that had ties to terrorism, most notably the Al Rajhi bank

One of the things, according to Carl Levin, that HSBC did was help banks involved in terrorist financing get US dollars (that section takes up

53 pages of a 340 page report). And yet, Breuer's speech did not once mention the word terrorism. The US Attorney's release used the word "terror" once, though not in conjunction with HSBC. And the Statement of Facts mentions terrorism in conjunction with a description of the laws HSBC violated and in this one paragraph.

In addition to the cooperative steps listed above, HSBC Bank USA has assisted the Government in investigations of certain individuals suspected of money laundering and terrorist financing.

In short, Lanny Breuer and his prosecutors did not mention that this bank they were letting off without prosecution provided a terrorist-connected bank with US dollars for years.

Rather than prosecute HSBC for helping a bank with ties to al Qaeda get US dollars that might be more easily used in terrorist attacks, Lanny Breuer is slapping them on the wrist and pretending the terrorist financing aspect of HSBC's violations doesn't even exist.

HSBC, the US-dollar cow for a terrorist-linked Saudi bank

Here's part of the PSI executive summary of HSBC's ties to banks suspected of terrorist finance.

After the 9-11 terrorist attack in 2001, evidence began to emerge that Al Rajhi Bank and some of its owners had links to financing organizations associated with terrorism, including evidence that the bank's key founder was an early financial benefactor of al Qaeda. In 2005, HSBC announced internally that its affiliates should sever ties with Al Rajhi Bank, but then reversed itself four months later, leaving the decision up to each affiliate. HSBC Middle East, among other HSBC affiliates, continued to do business with the bank.

Due to terrorist financing concerns, HBUS closed the correspondent banking and banknotes accounts it had provided to Al Rajhi Bank. For nearly two years, HBUS Compliance personnel resisted pressure from HSBC personnel in the Middle East and United States to resume business ties with Al Rajhi Bank. In December 2006, however, after Al Rajhi Bank threatened to pull all of its business from HSBC unless it regained access to HBUS' U.S. banknotes program, HBUS agreed to resume supplying Al Rajhi Bank with shipments of U.S. dollars.

Despite ongoing troubling information, HBUS provided nearly \$1 billion in U.S. dollars to Al Rajhi Bank until 2010, when HSBC decided, on a global basis, to exit the U.S. banknotes business. HBUS also supplied U.S. dollars to two other banks, Islami Bank Bangladesh Ltd. and Social Islami Bank, despite evidence of links to terrorist financing. Each of these specific cases shows how a global bank can pressure its U.S. affiliate to provide banks in countries at high risk of terrorist financing with access to U.S. dollars and the U.S. financial system. [my emphasis]

What this summary doesn't say, but which gets mentioned in the detailed section, is that HSBC briefly stopped doing business with Al Rajhi because its US regulator, OCC, was about to do an AML review of its banknotes business; HSBC stopped because it anticipated its notoriously lax US regulator might not approve. But then Al Rajhi threatened to withdraw all its business unless HSBC continued to feed it dollars, and so HSBC resumed the practice, though it waited until OCC's review was complete, suggesting the halt to this business was entirely a ploy to hide it from its regulator.

The effort to hide this business in particular from its US regulator—among all the

other problems HSBC had with AML compliance—should by itself be an indication of its understanding of what it was engaging in: providing a bank that laundered money for terrorists with the cash dollars it used to accomplish that act.

In the four years during which it resumed this business, HSBC sent out net \$990 million in US dollars that disappeared in a bank suspected of financing al Qaeda (that doesn't account for the dollars it provided Al Rajhi before 2005, including the period when it had ties to financing 9/11).

The Muslim being prosecuted for the HSBC/Al Rajhi laundering process, but not the banks

Only, not all the dollars HSBC sent Al Rajhi over the years disappeared. The government claims to know specifically what happened to \$130,000 of dollars sent during the earlier 25+ years when HSBC was feeding this terrorist-linked bank US dollars (in addition, it generally says that Al Rajhi was involved in the network that funded the 9/11 attack). The US government claims—in a case still being litigated—that Muslim charity al-Haramain (yup! the one the government was illegally wiretapping during this period) laundered travelers checks into dollars via Al Rajhi so it could fund violent Chechens.

In 2005, the United States indicted the Foundation and two of its senior officials, Pirouz Sedaghaty and Soliman Al-Buthe who was later designated by the United States as a terrorist financier.¹¹⁶⁴ Since both men were out of the country when the indictment was filed, the case was dormant for two years.¹¹⁶⁵ In 2007, Mr. Sedaghaty returned to the United States and was arrested at an airport.¹¹⁶⁶ In 2010, he stood trial, was convicted of two felonies, and sentenced to nearly three years in prison.¹¹⁶⁷ In the incident that led to his conviction, he and Mr.

Al-Buthe used funds from an Egyptian donor to purchase \$130,000 in U.S. travelers cheques from a bank in Oregon; Mr. Al-Buthe then traveled to Saudi Arabia and, in 2000, cashed the travelers cheques at Al Rajhi Bank; the money was then smuggled to violent extremists in Chechnya.

Now, PSI doesn't mention it, but Sedaghaty (who goes by Pete Seda) appealed his conviction and had a hearing before the 9th Circuit on December 3, just as this settlement was being finalized.

There are a ton of reasons Seda is appealing his conviction, most importantly that a key FBI witness and her husband—the only affirmative tie presented at trial between the payment and Chechen terrorists, as opposed to Chechen humanitarian causes—were paid \$14,500 and promised \$7,500 after trial.

But a small part of his appeal argues that the government didn't examine what happened to the money allegedly laundered through Al Rajhi Bank, and in particular didn't examine an account dedicated to Chechen relief, which is what Seda claimed the money funded.

At least since 2004, the case agents were in possession of a list of AHIF-S bank accounts at the Al Rajhi Bank in Saudi Arabia which included an account for Chechen relief – the #9889 account. ER-Vol.9@2365. At least since 2005, the government was also in possession of copies of Mr. al-Buthe's receipts of the deposit showing the same Al Rajhi Bank account number. ER-Vol.9@2366-68,2395-98. The government did not, however, seek to obtain records from the same Al Rajhi Bank for any AHIF-S accounts. ER-Vol.9@2368. In addition, the government resisted all but one of Mr. Seda's efforts to obtain evidence from overseas.

And here's the nutty part. Just before HSBC dropped this business, Al Rajhi refused to cooperate with the government in that case.

In January 2010, after the United States served an administrative subpoena on Al Rajhi Bank to obtain authenticated bank documents for use in the al-Haramain Foundation criminal trial, the bank refused to produce them and filed a motion in court to quash the subpoena,¹¹⁷² leading to media reports that it was refusing to cooperate with a terrorist financing prosecution.¹¹⁷³

So the reason, presumably, why DOJ didn't do the investigation they should have to see whether Seda was really sending funds for Chechen relief, as he claims, or for terrorism is because this bank HSBC was still sending cash dollars to wouldn't cooperate with a terrorist investigation.

Now, I don't know whether Seda is guilty or not (I think the evidence is stronger against Al-Buthe, but then he has not presented a defense). I think DOJ's case against Seda has been far too tainted to determine whether they just framed him in an effort to justify the illegal wiretapping they did against al-Haramain and to get a conviction.

But one thing is clear. Pete Seda is currently in prison in Colorado (he was denied bail, even in spite of DOJ's tampering with its witnesses), serving time for allegedly laundering \$130,000 through the Al Rajhi bank to get cash to send to Chechen terrorists.

Cash that HSBC was providing to Al Rajhi.

And whereas Seda was only ever accused of sending \$130,000 total, HSBC provided this terrorist linked bank almost \$1 billion after the time they deliberately hid this business from OCC.

And yet, while Seda sits in prison for his

alleged crime, Lanny Breuer (and DOJ's Statement of Facts) didn't even mention HSBC's alleged role in terrorist finance.

And so while NYT and Glenn Greenwald and Matt Stoller and Howie Klein are all right that this HSBC non-indictment is an example of gross miscarriage justice (Glenn does mention HSBC engaged in money laundering for terrorism), they've just touched on a fraction of the problem.

HSBC had ties to a crime that DOJ currently has someone sitting in prison for, and is still pursuing at the appellate level. Yet not only didn't DOJ indict HSBC for that crime, but they don't even think HSBC's role in it is worth a mention.

WHAT IF IT WERE THE REAL MUSLIM HOUSEWIVES OF TAMPA BAY SCANDAL?

In all my coverage of the Petraeus scandal, I haven't really touched on the aspect that regular readers of this blog were presumably least surprised about: the virtually unchecked authority the FBI has to snoop. As always, Chris Soghoian and Julian Sanchez offer worthwhile discussions of that surveillance. Yesterday, Greg Miller and Ellen Nakashima described how folks in DC are freaking out upon discovery of how intrusive all this surveillance can be.

The FBI started its case in June with a collection of five e-mails, a few hundred kilobytes of data at most.

By the time the probe exploded into public view earlier this month, the FBI

was sitting on a mountain of data containing the private communications – and intimate secrets – of a CIA director and a U.S. war commander. What the bureau didn't have – and apparently still doesn't – is evidence of a crime.

How that happened and what it means for privacy and national security are questions that have induced shudders in Washington and a queasy new understanding of the FBI's comprehensive access to the digital trails left by even top officials.

I've been saying from the start this whole shit-show would be useful if it made some Members of Congress rethink their permissive attitude towards surveillance and lazy oversight.

All that said, it's important to note that the Petraeus example—at least what we know of it—isn't even close to as bad as Big Brother gets in this country, even with questions about the predicate of the investigation.

Which is why I wanted to consider how this might be different if, instead of a bunch of mostly-Anglo connected Republicans, this investigation had focused on Muslims (we've discussed Jill Kelley and her sister's interesting story as indebted Arab-Americans; it will be interesting to see how their access is treated going forward).

After all, while it is unlikely the FBI would have responded to a cyber-stalking complaint from an unconnected Muslim, it's possible the internet traffic involved, particularly if it spanned international boundaries, might have attracted attention in its own right.

Alternately, had the anonymous emails reflecting knowledge of the movement of top Generals involved a Muslim rather than a white Reserve Colonel, we would not now be debating whether the FBI had the predicate to investigate her emails further (though I maintain the FBI may

have used a Counter-Intelligence predicate to continue the investigation in the first place).

Probably, from there the FBI would have used additional intrusive investigative methods. The National Security establishment is only now focusing on Kelley and her sister's debt problems. Which leads me to suspect no one bothered to look at their financial records until the press started doing so. What would the FBI have found had they looked at financial records, showing more details about who paid what for whom when? How would the Kelleys' bogus cancer charity look, for example, if you had more access to their financial records?

And then there's one big difference. We know—because we've heard numerous individual stories and because Ted Olson admitted it in court—that the FBI uses discoveries like the ones they made here to coerce people to turn informant. Legal trouble, financial trouble, marital trouble? All have made people targets for "recruitment." And those informants are sent out, with little training or legal protection, to spy on their fellow citizens, often the leaders of their community. The FBI will send out series of informants, for years on end, to target Imams who never do anything illegal but nevertheless either have connections—possibly familial—or First Amendment protected views that lead the FBI to suspect them. In the Muslim community, some people live for years under this kind of surveillance, sometimes ultimately getting caught in an FBI sting, at other times, just living a law-abiding life under the most intrusive scrutiny.

I do hope the Petraeus example scares the shit out of the often more morally and legally compromised people empowered to approve and oversee such surveillance. But I still think the scandal offers the merest glimpse into what our current state of surveillance really looks like.

WHY WOULD THE US GOVERNMENT HAVE DECONFLICTION ISSUES WITH MANSSOR ARBABSJAR IN 2010?

Before I look at the other ways Gregory Saathoff's report opining that Manssor Arbabsiar is not manic hurts the government's case, I want to discuss a rather curious citation Saathoff includes.

Troutman, D. (2010, January 13). Email to Virginia Villareal re: Deconfliction (in reference to a national security concern regarding Manssor Arbabsiar), p. 1.

As you'll recall, the government claims that Arbabsiar first came on their radar in May 2011 when a DEA Informant claimed that Arbabsiar contacted him to arrange a kidnapping.

And yet, according to this, someone was emailing Virginia Villareal (there's a Customs and Border Patrol Officer currently in San Antonio by that name) in January 2010 about a national security issue involving Arbabsiar?

Deconfliction is the term used for when agencies with overlapping interests sort out their turf—particularly if the agencies are using weapons or informants. The timing indicates that it came during—and probably was part of—Arbabsiar's naturalization process in 2009-2010.

DHS: U.S. Citizenship and Immigration Services (USCIS).(2009, June 24). Memorandum subject:IBIS hit resolution for applicant: Manssor Arbabsiar, p. 1.

DHS: USCIS. (2010, April 23). N 652, naturalization interview results, pp. 1-8.

DHS: USCIS. (2010, August 6). N-400, application for naturalization, pp. 1-10.

DHS: USCIS. (2010, August 30). Form N-445, notice of naturalization oath ceremony, pp. 1-2.

And at one level, it's not all that surprising that there would be a national security concern as Arbabsiar applied for citizenship: his cousin is a high ranking Quds Force member. Indeed that—plus Arbabsiar's criminal background—is one of the reasons it's hard to believe he **even got** citizenship, given that equivalent issues can get a Green Card holder deported. And he appears to have done that without paying for an immigration attorney (he complained to Saathoff he had to pay for an attorney for his son during this period, but not an immigration attorney, though they can be inexpensive).

So at the very least, this suggests at least one other agency was aware of Arbabsiar as he went through the immigration process.

But I do find the timing rather interesting given the way Saathoff describes Arbabsiar's actions that year. He was taking many trips to Iran—purportedly to bring cash back from real estate investments there and he was living in Corpus Christi, away from his wife. (Note, IBIS is the database the government uses to check people as they cross borders to make sure they're not terrorists or drug runners, which is presumably why the entry above and a 2012 one were listed as sources.)

In my interviews with Mr. Arbabsiar and in reviewing documents that were not cited by Dr. First at the time of his declaration, Mr. Arbabsiar acknowledged that this was in fact a period of significant international activity. In

addition to attaining his United States citizenship, during early 2010 he spent most of his time apart from his wife living mostly in Corpus Christi or travelling overseas. In 2010, he flew to Iran on four separate occasions in order to secure and bring back rental money from his Iranian property holdings. He estimated that during these trips he brought back up to \$8,000-\$9,000 on each trip.

[snip]

In his August 4, 2012 interview, he recalled a 2009 trip to Iran where he obtained hair transplant surgery in Iran because it was less expensive than in the U.S. With decreasing revenues in the U.S., he made four separate trips to Iran in 2010 in order to bring back funds from his Iranian investment properties.

[snip]

In fact, 2010 was a year of significant international activity for Mr. Arbabsiar with more international air travel for him than was recorded for any other year in the previous decade. He took four separate flights to Iran during 2010 and also attained his U.S. citizenship and passport. In his interviews with me, he reported that he would bring back money from Iranian investments as well as Iranian goods for his wife and son.

Then his business partner died and yet, in spite of the fact he was financially strapped, he dropped (or rather, lost) the car business.

By late 2010, following the death of his business partner in July, he had moved from Corpus Christi to Austin in order to live at home with his wife. In our September 26 interview, he recalled: "After Steve died, my life changed a

lot. Up until that point I was spending some time in Austin and some time in Corpus. But after he died, I didn't want to do the car business [in Corpus Christi] any more.

[snip]

Living in both Austin and Corpus Christi during that year, it was only late in the year and following his friend's death in July that he finally moved to Austin to live with his wife where he engaged in activities including landscaping around the home and planting fruit trees.

His wife described him during as depressed, sitting at home, in this later period.

For this example, he relies on Ms. Arbabsiar's wife's report that "for roughly one year around approximately 2010, Mr. Arbabsiar was severely depressed, isolating himself in his bedroom and rarely getting out of bed except to pace around his bedroom and chain smoke."

It was after that depression and a period when he was in medical treatment in late 2010 that Arbabsiar reached out to his cousin to build an "export business."

My life was going bad – I had lost my friend and my dad – my cousin, he took advantage of me. I hate to say that, and I trusted him – my whole family, they should help me. I wanted to do a good business, an export business.

Remember, in addition to talking to Narc about killing the Saudi Ambassador, Arbabsiar was also talking about dealing drugs.

Again, all of this might suggest nothing more than an appropriate awareness of Arbabsiar's

cousin's identity (but even so, that suggests the myth that Arbabsiar approached Narc out of the blue is just that—a myth).

But Arbabsiar was a very unlikely person to have gotten his citizenship when and how he did, particularly without the apparent assistance of an immigration lawyer. And between the time the government presumably identified Arbabsiar as an Iranian with ties to Quds Force and the time he ultimately got his citizenship, he made a lot of trips to Iran to get cash. Then, once he got citizenship, he lost his business and went into a funk and then—went to, or went back to, his cousin to launch “a good business, an export business,” and once again he returned to the States with thousands of dollars in cash, just like in 2010. During the entire time the FBI was purportedly watching him set up an assassination attempt, according to the Corpus Christi cops, they never once contacted those cops, not even to check the criminal record that their dead tree files showed.

It sure sounds like the government was following Arbabsiar a lot longer than the 18 months they claim.

But then the report also reveals how Arbabsiar first found Narc.

Mr. Arbabsiar stated that the Mexican woman that he contacted to help identify someone to carry out the assassination attempt on the Saudi Ambassador had a younger sister with whom he had a sexual relationship in 1992, while he was married to his third wife.

So maybe his relationship with the DEA goes back to 1992, when he fucked his way into the family?

HOW MANY OF THE PROTESTS HAVE GOTTEN DIPLOMATIC DOCUMENTS?

Here's a few data points to suggest that the protests in Muslim countries may have been, in part, an effort to grab sensitive diplomatic correspondence.

I noted—but did not quote—this report on the documents taken from the US Consulate in Benghazi.

Sensitive documents have gone missing from the consulate in Benghazi and the supposedly secret location of the “safe house” in the city, where the staff had retreated, came under sustained mortar attack. Other such refuges across the country are no longer deemed “safe”.

Some of the missing papers from the consulate are said to list names of Libyans who are working with Americans, putting them potentially at risk from extremist groups, while some of the other documents are said to relate to oil contracts.

Then on Saturday, Yemeni lawyer Haykal Bafana suggested we might soon see secret files taken from the Yemeni Embassy last week.

Forecasted in the local press : **#Wikileaks #Yemen** soon from secret info in computers & documents looted from the US Embassy, Sanaa.

Here's a picture of “protestors” in Sanaa carrying out computer equipment.

Today, Tim Shorrock described a military person on Fox admitting that Marines at Embassies

prioritize protecting classified information over lives.

Military guy on Fox: Marines' priorities at the embassies are 1) protect classified communications & 2) protect human lives. In that order.

Now, possibly it's only the Libyan attack that got or even deliberately sought documents. Libyans have proven to be master information operatives in the past. After all, somebody conveniently left documents implicating the US and UK in rendition to Libya and torture. Human Rights Watch used those files to compile its recent report on torture.

But the US Embassy in Tunis was also breached (though not, I think, sufficiently to get files). And the German Embassy in Khartoum was overrun, so the "protestors" there probably got close enough to get files as well (I'm less sure about the breaches at the British and US Embassies in Khartoum).

In all of these successful breaches, there seems to have been some cooperation from local guards who allowed the protestors to get close or into the diplomatic properties, so they may also have had information on where to look for the most sensitive files.

It's possible that none of these breaches was designed specifically to get diplomatic correspondence (and remember, these would presumably be far more sensitive than what we've seen from WikiLeaks, none of which were Top Secret) and only in Libya is it clear attackers **did** get documents.

But it's worth considering that all the places we've sent Marine response teams, there may be very compromising documents floating around.

Update: The AP reports the Lebanese Embassy is preemptively destroying classified documents.
(h/t TPM via fatser)

MAYBE REPUBLICANS DIDN'T WANT HOLOGRAM REAGAN BECAUSE THEY DIDN'T WANT A SNITCH AT THEIR CONVENTION?

Last week, before we learned Mitt's surprise speaker at the RNC was an actor speaking to an invisible President, there were rumors that the speaker would be a half-visible actor-President, hologram Reagan. But unlike Clint Eastwood's invisible president, hologram Reagan actually exists. Only, the GOP didn't think Mitt was up for the competition with hologram Reagan.

Despite some conflicting reports, Yahoo News has learned that a holographic projection of former President Ronald Reagan is in the works and was originally intended to debut outside the halls of the Republican National Convention this week. But its official unveiling has been put on hold until later this year or early 2013.

[snip]

However, Reynolds says he discussed the idea with a number of Republican activists who asked him to delay the project out of concern it would overshadow Mitt Romney's acceptance speech.

"At the time he hadn't chosen Paul Ryan, so I think they were a little worried about his energy," Reynolds said. "Even in a hologram form I think Reagan's going to beat a lot of people in terms

of communicating.”

Or maybe there’s another explanation. Maybe the Republicans just didn’t want an FBI snitch reporting back on all the scandalous things they were doing at the RNC?

Reagan was more involved than was previously known as a government informer during his Hollywood years, and that in return he secretly received personal and political help from J. Edgar Hoover, the longtime F.B.I. director, at taxpayer expense.

[snip]

[O]ne night in 1946, F.B.I. agents dropped by his house overlooking Sunset Boulevard and told him that Communists were infiltrating a liberal group he was involved in. He soon had a new purpose; as he wrote, “I must confess they opened my eyes to a good many things.”

The newly released files flesh out what Reagan only hinted at. They show that he began to report secretly to the F.B.I. about people whom he suspected of Communist activity, some on the scantiest of evidence. And they reveal that during his tenure as president of the Screen Actors Guild in the ’40s and ’50s, F.B.I. agents had access to guild records on dozens of actors. As one F.B.I. official wrote in a memo, Reagan “in every instance has been cooperative.”

But it wasn’t just alleged communists (which I presume the GOP wouldn’t mind). As Seth Rosenfeld, author of this op-ed and a new book on Reagan’s informant activities, *Subversives: The F.B.I.’s War on Student Radicals, and Reagan’s Rise to Power*, goes onto explain, in exchange for his assistance Reagan got help from the FBI on at least two occasions, spying on his

children.

It's that kind of spying—sending out the FBI to find out whether his children and ideological children were shacking up with married people—the GOP might not like.

I think that's why the GOP didn't want Reagan.
Who wants to invite a snitch to a great party?

EVEN LIARS GET TO INVOKE STATE SECRETS

As the LAT first reported, Judge Cormac Carney has dismissed a suit, *Fazaga v. FBI*, brought by Southern California Muslims against the FBI for illegal surveillance. Carney actually made two rulings, one dismissing most of the suit on state secrets grounds and one dismissing part of the suit against the government—but not individual FBI officers—on FISA grounds.

The rulings are interesting for four reasons:

- Carney has basically accepted the government's claims in a case that is closely related to one where—three years ago—he called out the government for lying to him personally
- Carney overstates the degree to which the Administration appears to be adhering to its own state secrets policy
- The case is an interesting next step in FISA litigation
- Carney suggests the FBI now investigates people for

radicalization

Liars get to invoke state secrets

Three years ago, Carney caught the government lying to him about what documents it had collected on Southern Californian Muslims in this and related investigations. In an unclassified version of his ruling released last year, he revealed part of the government's breathtaking claim.

The Government argues that there are times when the interests of national security require the Government to mislead the Court. The Court strongly disagrees. The Government's duty of honesty to the Court can never be excused, no matter what the circumstance. The Court is charged with the humbling task of defending the Constitution and ensuring that the Government does not falsely accuse people, needlessly invade their privacy or wrongfully deprive them of their liberty. The Court simply cannot perform this important task if the Government lies to it. Deception perverts justice. Truth always promotes it.

Yet in finding the government's state secrets invocation here, he is effectively accepting the government's word—which in some way claims to have a real predicate for its investigation into Southern Californian mosques—over the word of their former informant, Craig Monteilh, who says he was instructed to collect information indiscriminately because “everybody knows somebody” who knows someone in the Taliban, Hamas, or Hezbollah.

Now, I'm not surprised by this outcome. Carney's earlier ruling basically held, correctly, that the government needs to share its top secret information with judges even if it plans to withhold it from ordinary citizens. So now that the government has started sharing classified

information with him, I bet it puts more pressure on him to keep all this information secret by approving the state secrets invocation.

But Carney's plaintive insistence that this ruling doesn't amount to rubber-stamping abusive federal powers make it sound like he doubts his own decision.

In struggling with this conflict, the Court is reminded of the classic dilemma of Odysseus, who faced the challenge of navigating his ship through a dangerous passage, flanked by a voracious six-headed monster, on the one side, and a deadly whirlpool, on the other. Odysseus opted to pass by the monster and risk a few of his individual sailors, rather than hazard the loss of his entire ship to the sucking whirlpool. Similarly, the proper application of the state secrets privilege may unfortunately mean the sacrifice of individual liberties for the sake of national security. El-Masri, 479 F.3d at 313 (“[A] plaintiff suffers this reversal not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security.”);

[snip]

Plaintiffs raise the specter of *Korematsu v. United States*, 323 U.S. 214 (1944), and protest that dismissing their claims based upon the state secrets privilege would permit a “remarkable assertion of power” by the Executive, and that any practice, no matter how abusive, may be immunized from legal challenge by being labeled as “counterterrorism” and “state secrets.” (Pls. Opp’n to Gov’t, at 20, 41–42.) But such a claim assumes that courts simply rubber stamp the Executive’s assertion of the state secrets privilege. That is

not the case here. The Court has engaged in rigorous judicial scrutiny of the Government's assertion of privilege and thoroughly reviewed the public and classified filings with a skeptical eye. The Court firmly believes that after careful examination of all the parties' submissions, the present action falls squarely within the narrow class of cases that require dismissal of claims at the outset of the proceeding on state secret grounds.

Carney, having been brought into the government's secret club is now complicit in choosing to sacrifice Muslims' First Amendment rights for the security of the nation.

Carney overstates the degree to which the government appears to be adhering to its own state secrets policy

That's made more interesting because Carney bases his acceptance of the government's state secrets invocation on part on their purported adherence to their own state secrets policy.

Second, even before invoking the privilege in court, the government must adhere to its own State Secrets Policy, promulgated by the Obama administration in a memorandum by the Attorney General in September 2009, effective October 1, 2009.

It's not at all clear the government does adhere to this policy. As a threshold matter, the policy "commits not to invoke the privilege for the purpose of concealing government wrongdoing." But this case almost certainly involves activities—the surveillance of Americans in part because of First Amendment protected activities—that were not permitted until the FBI's Domestic Investigations and Operations Guide made them permissible at the end of 2008. Thus, the state secrets invocation

serves, in part, to cover up the fact that FBI officers were spying on Muslims because they were Muslims at a time when that was prohibited by the department.

The policy also promises to refer credible allegations of wrong-doing—as this case involves—to Inspectors General for investigation. Maybe they are doing that. If so, they're not telling. DOJ wouldn't even tell Sheldon Whitehouse whether or not they were really following that practice, and the absence of any report on this matter suggests they didn't do so.

“The Department’s policy is not to disclose the existence of pending IG investigations. Consistent with that policy, we could not provide the number of cases, if any, that may have been referred to an IG pursuant to the Department policy on state secrets privilege.”

“However, to the extent IG investigations are undertaken, the Government has typically released public versions of final IG reports,” the DoJ reply stated.

No such public versions of final IG reports have been released in the Obama Administration, as far as could be determined.

Now, whether Carney is aware of these developments or not, he doesn't say. But he does admit that, even if DOJ violated its own state secrets policy (as they appear to have done), there's nothing he could do about it.

The Court cannot and does not comment on whether the Government has properly adhered to its State Secrets Policy, as this is internal to the Executive branch, and the Policy does not create a substantive or procedural right enforceable at law or in equity against

the Government. (See Holder Decl., Exh. 1 ¶ 7.)

Which says all you need to know about how much judges—particularly those who have been lied to on related issues—ought to take the state secrets policy requirements.

This case is the next step in FISA litigation

Carney may not have cited these recent developments in state secrets, but he is well aware of the latest developments in FISA law, because he points to the 9th Circuit's recent decision in *al-Haramain* in throwing out the plaintiffs' suit against the government on FISA grounds. Based on the 9th Circuit's holding that the government enjoys sovereign immunity even when it illegally wiretaps someone, Carney threw out the part of the suit against the government for all the allegedly illegal wiretaps used here. The part of the case that remains is against the FBI officers for illegal wiretapping people. We shall see what becomes of that.

Carney suggests the FBI now investigates people for radicalization

Finally, I wanted to point to one passage in which Carney speaks in very general terms about what Eric Holder said about the surveillance program. Speaking in hypotheticals, Carney explains the scope of what might be an adequate predicate for an investigation.

In the context of a counterterrorism investigation, subject identification may include information about persons residing in the United States or abroad, such as Afghanistan, Lebanon, the Palestinian Territories, Yemen, and other regions in the Middle East, whom law enforcement has and has not decided to investigate depending on their nexus to terrorist organizations, such as al Qaeda, the Taliban, Hezbollah, and Hamas. **Subjects and their associates may also be investigated because they are**

suspected of or involved in the recruitment, training, indoctrination, or radicalization of individuals for terrorist activities or fundraising for terrorist organizations. More directly, individuals subjected to counterterrorism investigations may be involved in plotting terrorist attacks. [my emphasis]

Recruiting, training, and fundraising terrorists are all crimes, especially under *Holder v. HLP*.

But is “radicalization”? I don’t know the answer to that. But that seems to push the limits of even *Holder v. HLP*’s limits on First Amendment activities further than we’ve known.

SOME DATA POINTS ON MINH QHANG PHAM, AQAP’S GRAPHIC ARTIST OF MASS DESTRUCTION

On Friday, the government indicted Minh Quang Pham for material support of al Qaeda in the Arabian Peninsula. The indictment and the press release make it clear (though don’t say explicitly—though this report confirms it) that Pham’s primary alleged crime was helping Samir Khan produce *Inspire* magazine.

In or about April 2011, PHAM worked with a United States citizen (“American CC-1”) to create online propaganda for Al Qaeda in the Arabian Peninsula.

[snip]

[Pham] facilitated communications between al Qa’ida in the Arabian Peninsula and supporters; and provided

expert advice and assistance in photography and graphic design of media for al Qa'ida in the Arabian Peninsula.

Meaning CC-2 is Anwar al-Awlaki.

In or about April 2011, PHAM met with a United States citizen ("American CC-2") in Yemen.

Given the centrality of Pham's alleged association with Khan and Awlaki, consider the following chronology and the additional details below.

December 2010: Pham travels from the UK to Yemen.

March and April 2011: Pham carries a Kalashnikov.

April 2011: Pham works with Samir Khan and meets Anwar al-Awlaki.

"About" May 2011: UndieBomb infiltrator travels from UK to Yemen.

September 27, 2011: AQAP releases Inspire, Issue 7.

September 30, 2011: Khan and Awlaki killed in drone strike

December 2011: Pham returns to the UK; "Prior to his arrest [June 29, 2012], PHAM was held by British authorities in immigration custody."

Around April 20, 2012: UndieBomb 2.0 and his handler removed from Yemen.

May 3, 2012: AQAP releases Inspire Issues 8 and 9.

May 7, 2012: UndieBomb 2.0 revealed.

May 11, 2012: British role in recruiting UndieBomb 2.0 revealed.

May 26, 2012: False AQAP statement

released.

June 29, 2012: Pham arrested (presumably in Britain); indicted in US.

First, note that some of alleged acts—notably carrying a Kalashnikov—might require an inside source to learn.

Then consider you had someone coming from the UK to Yemen not long before the UndieBomb 2.0 infiltrator. Unlike UndieBomb 2.0, Pham appears to have decided to leave after his partner in propaganda, Khan, got killed. But then he appears to have been held in immigration custody for 6 months—which happens to cover the time UndieBomb 2.0 infiltrator and his handler were still in Yemen.

How interesting, too, that Pham is being tried here in the US, not in the UK (where the crimes are slightly different but where terrorist propaganda is even more criminalized than here, if I understand the law correctly). Why do you suppose they're trying him here and not in the UK, where he has just been held for 6 months?

Meanwhile, I've always been intrigued that the latest versions of Inspire were released between the time when UndieBomb 2.0 was whisked out of Yemen and the time first the purported plot, then UndieBomb 2.0's role in it, was revealed. Then, several weeks later, someone released a false AQAP announcement claiming AQAP had been infiltrated. Pham would have been in British custody during this period.

Finally, there's this rather interesting language. As a lot of indictments that fall under the federal terrorism statute do, this one has language on forfeiture under 18 USC 981. But note the way it phrases this language on forfeiture.

As a result of planning and perpetuating Federal crimes of terrorism against the United States ... defendant [] shall forfeit ... all right, title, and interest

in all assets, foreign and domestic,
affording a source of influence over al
Shabaab and AQAP.

This guy, presumably, doesn't have a whole lot
of financial goods to forfeit. Nevertheless, the
government is going to the trouble of seizing
all his interest in assets affording Pham
influence over al Shabaab and AQAP.

Those are, mind you, just data points. But some
fairly intriguing ones.

HESHAM ABU ZUBAYDAH DATES FBI INVESTIGATION OF MOHAMMED OSMAN MOHAMUD A YEAR EARLIER

The most recent hearing in the Mohammed Osman
Mohamud case provided the following details,
which the FBI claimed described the beginning of
their investigation into Mohamud.

February 2009: Samir Khan and Mohamud
start emailing

August 31, 2009: Mohamud's father, Osman
Barre, calls the FBI to say he's worried
his son is being brainwashed

Early November 2009: Mohamud
investigated in—but exonerated for—a
date rape allegation

December 2009: Mohamud and Amro Alali
exchange coded emails

The entire hearing was supposed to serve as the FBI's proof that the date rape allegations didn't mark the start of their interest in Mohamud—the Khan emails and Mohamud's father's call did.

Except that Jason Leopold's mammoth investigation into Abu Zubaydah's brother Hesham suggests the investigation started perhaps as much as a year before Samir Khan's emails.

After 9/11, public claims about his brother, and a failed American marriage, Hesham found it almost impossible to get citizenship, even after marrying another American woman. Finally, the FBI came to him and suggested if he turn informant, they would help him get his citizenship.

After he agreed, they showed him a bunch of pictures of people of attendees at the Masjed As-Saber mosque in Portland. Including, in 2008, Mohamud.

Hesham said he would do "whatever it takes" to "prove to you that I am a good person and fix my situation."

Gray called him two weeks later and they met again. She brought an envelope with about ten photographs. A majority were Somalis. But there were also photographs of Iraqis and Saudis, Hesham said.

Do you recognize any of these people?" Gray asked Hesham.

"Nope," he said.

"I'd like you to go to the mosque and find out what these people are up to," Gray said. "Find out if any of those people are helping terrorists."

"I will keep my eyes open," Hehsam said.

[snip]

Hesham said one of the photographs Gray showed him was of a young Somali named Mohamed Osman Mohamud who attended the

Masjed As-Saber mosque. Mohamud, who was the subject of an FBI sting operation, was arrested in November 2010 on terrorism charges for allegedly attempting to detonate what he believed was a car bomb at a Christmas tree lighting ceremony in Portland. Hesham said he recalls being shown a photograph of Mohamud in 2008, two years before that incident, when Mohamud was just 16.

Samir Kahn's success in leaving the US, when in similar circumstances other young men were stopped or prevented, has always been rather incredible. That's made worse by the fact that Khan was clearly being investigated by the FBI when he was allowed to leave the US (remember, even Mohamud wasn't allowed to go to Alaska for a summer job while he was being investigated).

But if Hesham's memory is correct, it shows several things. First, the FBI's currently operative story—which has changed several times already—would be proven incomplete again. Moreover, it might suggest that Khan (whose family got an apology when he died) had an ongoing relationship with the FBI after they allowed him to slip out of the US as they prevented so many others from doing.

And, finally, it would suggest the FBI first started targeting Mohamud well before he turned 18. It would suggest as a teenager, Mohamud withstood 2 years of that treatment before being entrapped trying to blow up the FBI's own bomb.

Again, all this rests on Hesham's memory. But his memory is utterly damning for the FBI's case against Mohamud.

PETER KING MAKES IT MORE CLEAR HE'S TARGETING THE AP, NOT LEAKERS

A real member of Congress might worry that the government is using double agents to expand wars in other countries without briefing the Gang of Eight, as required by law.

Not Peter King. He wants to investigate the AP's sources—but not, apparently, ABC's—to find out how the press learned something that had not been briefed properly.

Also: Peter King doesn't believe in scaring the American people. Just ginning up fear about one religion or ethnic group.

DID ANOTHER SAUDI DOUBLE AGENT “TIP” US OFF TO A “PLOT” AGAINST AMERICA?

ABC reports that the UndieBomber 2.0 plot revealed yesterday in breathless fashion was exposed by a double agent that—given that he delivered the bomb to Saudi Arabia—was presumably being run by the Saudis just like all the other men the Saudis have infiltrated into AQAP.

In a stunning intelligence coup, a dangerous al Qaeda bomb cell in Yemen was successfully infiltrated by an inside source who secretly worked for the CIA and several other intelligence

agencies, authorities revealed to ABC News.

The inside source is now “safely out of Yemen,” according to one international intelligence official, and was able to bring with him to Saudi Arabia the bomb al Qaeda thought was going to be detonated on a U.S.-bound aircraft.

So as happened when Jabir al-Fayfi revealed the toner cartridge plot, we can now celebrate the skill of our spooks without thinking too much about what it means that the Saudis are running this terror show. (Though at least we’ve reached the point where US outlets are reporting this, rather than just British outlets.)

But here are a few questions:

Have Republicans already claimed this guy was a “recidivist” Gitmo detainee, as they have with other double agents? That effectively gives them a two-fer on detainee exploitation, “proof” that Gitmo detainees are too dangerous to release, followed by “proof” that the terrorists are planning attacks (not to mention “proof” that the CIA has good intelligence on al Qaeda).

Was the “international intelligence official” who revealed this double agent to ABC Yemeni? The Yemenis leaked Jabir al-Fayfi’s role back in 2010. If they again leaked the involvement of this double agent, we might want to start asking ourselves whether they can be trusted to keep these double agents secret.

I argued that the decision to use signature strikes in Yemen seems like a Saudi-driven demand rather than a well-considered US decision. We apparently made that decision around the same time the US reportedly learned of this “plot.” If the Saudis were—as I suspect—running this double agent like all the other double agents we’ve infiltrated into AQAP, then did they “tip” this plot as a way to convince us to make what on its face looks like a boneheaded decision?

One more bit of possible irony to contemplate. Ibrahim al-Asiri—the AQAP bombmaker reportedly behind this plot—sent his own brother, Abdullah, out to assassinate Saudi Prince Mohammed bin Nayef back in 2009. The attempt failed. Since then, two of the men Nayef presumably infiltrated into AQAP have foiled Asiri's bomb plots. It sort of makes you wonder how Saudi double agents keep getting close enough to al-Asiri to foil his plots, doesn't it?