# THE IRANIAN PLOT: BANK TRANSFERS OF MASS DESTRUCTION

I'm sorry, but I'm having a really difficult time taking this latest terrorist plot seriously. Not just because the story is so neat, tying together all the enemies—the drug cartles and Iran—we're currently supposed to hate, but because it elicited such comical lines from Eric Holder and NY US Attorney Preet Bharara about assassinating other government's officials (like, say, Qaddafi's son) and doing battle on other country's soil (like, say, the entire world) and not taking sufficient precautions to prevent civilian casualties.

But just to unpack what the government claims it found, here's the amended complaint.

The big action that, the government suggests, proves the case involves two bank transfers:

> On or about August 1, 2011, MANSSOR ARBABSIAR, a/k/a "Mansour Arbabsiar," the defendant, caused an overseas wire transfer of approximately $49,960 to be sent by a foreign entity from a bank located in a foreign country to an FBI undercover bank account (the "UC Bank Account"). Before reaching the UC Bank Account, the funds were transferred through a bank in Manhattan, New York.
>
> On or about August 9, 2011, ARBABSIAR caused an overseas wire transfer of approximately $49,960 to be sent by a foreign entity from a bank located in a foreign country to an FBI undercover bank account (the "UC Bank Account"). Before reaching the UC Bank Account, the funds were transferred through a bank in Manhattan, New York.

And based on those transfers, one unsuccessful

attempt to enter Mexico, and a lot of talk between an informant and one of the defendants, we've got another terrorist plot.

Admittedly, there's a backstory to how that $100,000 got transferred.

As the FBI tells it, back in May, Manssor Arbabsiar traveled to Mexico to meet with a guy he thought was a member of Los Zetas but was instead a narcotics convict-turned-informant I'll call "Narc." As always with these narratives, the FBI doesn't explain how Arbabsiar happened to choose Los Zetas for his hit squad, as implausible as that is. It says only that Arbabsiar's cousin told him that people "in the narcotics business … are willing to undertake criminal activity in exchange for money." How plausible would a drug hit on the Saudi Ambassador be? Furthermore, don't Iranians have their own more subtle ways of working?

Nevertheless, we're led to believe it is plausible and not at all overdetermined that the cousin of an Iranian spook would launder their assassination through a Mexican drug cartel.

In their first meeting, Narc offered up that he was skilled in the use of C4. This is important, because unless you have explosives, you can't charge that someone wanted to use WMD. Semi-automatics or poison—which might be more apt weapons to assassinate a Saudi Ambassador (particularly since at one point Arbabsiar specified he'd prefer no civilian casualties)—legally don't offer the same benefits. In fact, in spite of the fact that Arbabsiar is alleged to have originally sought to have the Ambassador kidnapped or killed, and said, "it doesn't matter" in response to Narc's offer to shoot or bomb the Ambassador, Arbabsiar still got that magic WMD charge.

Note, that first meeting took place on May 24. There were other meetings in June and July. It's only a later meeting—a July 14 meeting—that the complaint first describes as being taped. That's important not just because these earlier

conversations always tend to be illuminating (the complaint notes that Arbabsiar "explained how he came to meet" Narc but doesn't provide that detail), but also because those earlier, possibly untaped conversations describe the other targets.

> Prior to the July 14, 2011 meeting, CS-1 had reported that he and ARBABSIAR had discussed the possibility of attacks on a number of other targets. These targets included foreign government facilities associated with Saudi Arabia and with another country, and these targets were located within and outside of the United States.

These include, according to reports, Israel.

The complaint makes a point to repeatedly provide "proof" that Ababsiar's plot was paid for by the Iranian government.

> This is politics, so these people [ARBABSIAR's co-conspirators in Iran] they pay this government . . . he's got [ARBABSIAR's cousin has got] the, got the government behind him . . . he's not paying from his pocket.

And the complaint describes Narc describing the fictional plot that Arbabsiar was going to pay for. Narc had all the touches: a fictional restaurant, frequented by fictional Senators, and hundreds of other diners. Just so as to provide Arbabsiar with an opportunity to say he was okay with the death of those fictional Senators, if it had to happen that way.

But here's the thing I really don't get.

This complaint charges Arbabsiar and Ali Gholam Shakuri, who is apparently a Colonel in the Quds force. But the whole plot was originally conceived of by his cousin (called "Individual 1" or "Iranian Official 1" in the complaint), who is a Quds General "wanted in America." In

addition, Arbabsiar spoke with another high-ranking Quds official. His cousin provided him the money for the plot, and directed him to carry it out.

And the FBI has evidence of the cousin's involvement; as part of Arbabsiar's confession (he waived the right to lawyer), he said,

> men he understood to be senior Qods Force officials were aware of and approved, among other things, the use of [Narc] in connection with the plot; payments to [Narc]; and the means by which the Ambassador would be killed in the United States and the casualties that would likely result.

So the FBI had a Quds general directly implicated by his own cousin in a terrorist attack in the US, and another senior Quds official at least tangentially involved. But they don't indict those two, too? (Note, Fran Townsend just tweeted that Treasury imposed sanctions on these guys; will update when I get that information. Update: see below.)

The complaint may suggest they had an entirely different plan. After Arbabsiar was arrested on September 29, the FBI had him call Shakuri on several different occasions—October 4, October 5, and October 7. Claiming to be in Mexico has guarantor for the remaining 1.4 million promised for the hit, Arbabsiar told Shakuri—the complaint describes, "among other things"—that Narc wanted more money. Shakuri refused to give it to him, reminding him that he was himself the guarantee Narc would get paid. Before Abrbabsiar purportedly went to Mexico, Shakuri had warned him not to go.

All this suggests the FBI was after something else—though it's not clear what. The obvious thing is that they would use Arbabsiar as bait to get first Shakuri and possibly his cousin.

But I also note that the complaint refers to the cousin and the other Quds officer as men

Arbabsiar knew to be Quds officers—as if they might be something else.

In any case, this indictment seems like a recruitment gone bad. If so, should we really have told the world we're using Los Zetas members we flipped to try to recruit Iranian spies?

Update: This Treasury release explains who the other Quds officers are.

> Here are the allegations Treasury made as justifications for the new sanctions designations:
>
> **Manssor Arbabsiar**
>
> Arbabsiar met on a number of occasions with senior IRGC-QF officials regarding this plot and acted on behalf of senior Qods Force officials – including his cousin Abdul Reza Shahlai and Shahlai's deputy Gholam Shakuri – to execute the plot. During one such meeting, a $100,000 payment for the murder of the Saudi ambassador was approved by the IRGC-QF. After this meeting, Arbabsiar arranged for approximately $100,000 to be sent from a non-Iranian foreign bank to the United States, to the account of the person he recruited to carry out the assassination.
>
> **Qasem Soleimani**
>
> As IRGC-QF Commander, Qasem Soleimani oversees the IRGC-QF officers who were involved in this plot. Soleimani was previously designated by the Treasury Department under E.O. 13382 based on his relationship to the IRGC. He was also designated in May 2011 pursuant to E.O. 13572, which targets human rights abuses in Syria, for his role as the Commander of the IRGC-QF, the primary conduit for Iran's support to the Syrian General Intelligence Directorate (GID).

> **Hamed Abdollahi**
>
> Abdollahi is also a senior IRGC-QF officer who coordinated aspects of this operation. Abdollahi oversees other Qods Force officials – including Shahlai – who were responsible for coordinating and planning this operation.
>
> **Abdul Reza Shahlai**
>
> Shahlai is an IRGC-QF official who coordinated the plot to assassinate the Saudi Arabian Ambassador to the United States Adel Al-Jubeir, while he was in the United States and to carry out follow-on attacks against other countries' interests inside the United States and in another country. Shahlai worked through his cousin, Mansour Arbabsiar, who was named in the criminal complaint for conspiring to bring the IRGC-QF's plot to fruition. Shahlai approved financial allotments to Arbabsiar to help recruit other individuals for the plot, approving $5 million dollars as payment for all of the operations discussed.

Update: Max Fisher also thinks this stinks.

> But, for all the plausibility that Iran might be willing to blow up a Saudi ambassador, it's not at all apparent what they would gain from it. Iran has never been shy about sponsoring terrorism, but only when it was within their interests, or at least their perceived interests. It's hard to see how they could have possibly decided on a plot like the one that Holder claimed today.
>
> What would it really mean for Iran if the Saudi ambassador to the U.S. were killed in a terrorist attack in Washington? The U.S.-Saudi relationship has been bad and getting worse since the

> start of the Arab Spring, with the Saudi monarchy working increasingly against the democratic movements that the U.S. supports. A senior member of the royal family even threatened to cut off the close U.S.-Saudi relationship if Obama opposed the Palestinian statehood bid, which he did. If the U.S. and Saudi Arabia really broke off their seven-decade, oil-soaked romance, it would be terrific news for Iran. Saudi Arabia depends on the U.S. selling it arms, helping it with intelligence, and overlooking its domestic and regional (see: Bahrain) abuses.
>
> If the U.S.-Saudi alliance fell apart, the Shia-majority Islamic Republic of Iran would have an easier time pushing its regional influence against Saudi Arabia, especially in some of the crucial states between the two: Iraq, Bahrain, and the United Arab Emirates. Iran would be able to reverse its increasing regional isolation and perhaps flip some Arab leaders from the U.S.-Saudi sphere toward its own. The best part of this, for Iran, is that it probably wouldn't even have to do anything: the U.S.-Saudi special relationship, if it collapses, would do so without Iran having to lift a finger. The dumbest thing that Iran could possibly do, then, would be stop the collapse, to find some way to bring the U.S. and Saudi Arabia back together. For example, by attempting to blow up the Saudi ambassador to the U.S. on American soil.

# THE UBER-PLOT: IRAN, MEXICAN DRUG CARTELS, KOCH BROTHERS, AND REPUBLICANS

This plot has it all: an informant posing as a member of a Mexican drug cartel, Iranians targeting Saudis in DC's streets, and even its own "Operation" name already.

> FBI and DEA agents have disrupted a plot to commit a "significant terrorist act in the United States" tied to Iran, federal officials told ABC News today.
>
> The officials said the plot included the assassination of the Saudi Arabian ambassador to the United States, Adel Al-Jubeir, with a bomb and subsequent bomb attacks on the Saudi and Israeli embassies in Washington, D.C.
>
> [snip]
>
> The new case, called Operation Red Coalition, began in May when an Iranian-American from Corpus Christi, Texas, approached a DEA informant seeking the help of a Mexican drug cartel to assassinate the Saudi ambassador, according to counter-terrorism officials.

You couldn't make up a more convenient plot if you tried!

But I'm going to push it further. As Bloomberg reported last week, the Koch Brothers have illegally traded with Iran, selling them petrochemical equipment Iran needs to keep pumping oil to pay the state's bills. So doesn't think make the Koch Brothers accessories to this alleged terrorist plot?

Further, the Koch brothers are dumping big money into Republican causes. So doesn't that mean the Republican Party is being funded by terrorists?

That's the way material support laws work, after all, at least if you're a brown person.

Ah well, I assume everyone will ignore the corporations (which include JP Morgan Chase) that have been doing business with Iran and instead march off towards the next war.

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# CNN: ONLY BROWN PEOPLE CAN BE LONE WOLVES

Just in time for the 9/11 fearmongering season, CNN comes out with this ridiculous article on lone wolf terrorists.

It starts by correctly identifying Khalid Aldawsari as a lone wolf (at least as far as is publicly known thus far). Piggybacking on an Obama comment, it then raises the example of Anders Behring Breivik, which leads to the following passage.

> The president told CNN's Wolf Blitzer: "When you've got one person who is deranged or driven by a hateful ideology, they can do a lot of damage, and it's a lot harder to trace those lone wolf operators." He pointed to the case of Anders Breivik, who went on a bombing and shooting rampage in July in Norway, killing 77 people. No evidence has been uncovered linking Breivik to other conspirators.
>
> **A growing wave**
> The Norway attack and the Aldawsari case show how modern technological tools, especially the availability of vast amounts

> of information useful for bomb making and targeting, have made lone terrorists more dangerous than ever before.
>
> In the last two years, eight of the 14 Islamist terrorist plots on U.S. soil involved individuals with no ties to terrorist organizations or other co-conspirators.
>
> These included plans to blow up buildings in Illinois and Texas in September 2009, the November 2009 Fort Hood shootings allegedly carried out by U.S. Army Maj. Nidal Hasan, an alleged plot to bomb a tree-lighting ceremony in Portland in November 2010, and another aimed at blowing up an Army recruiting station near Baltimore the following month.

As a threshold matter, while "no evidence has been uncovered" thus far that ties Breivik to others, Norwegian investigators are just getting around to interviewing some of the people mentioned in Breivik's manifesto and the prosecutor does "not rule out the possibility" he had accomplices.

But what's more troubling about this passage is the way it mentions Breivik to support the claim that "lone terrorists [are] more dangerous than ever before," but then completely ignores the problem of any right wing terrorism save Breivik's! Given that Aldawsari was nowhere close to actually making a bomb, and given that the only actually executed attack mentioned in this passage (the article later mentions Abdulhakim Mujahid Muhammad, a Muslim convert who killed one soldier at an Army recruiting center) is that of Nidal Hasan, a man trained by the US Government who relied on nothing more than readily accessible guns, it's not clear that technology is making these Islamic terrorists all that more dangerous.

Indeed, the article ignores that almost every single attack it describes here was solved—but also created in part—by the FBI. It was not the

Internet that taught Mohamed Osman Mohamud how to make a bomb. It was the FBI.

Which supports the conclusion that the US Government—whether it be the Army or the FBI—is the thing making Islamic "lone wolves" more dangerous, not technology. Not that I believe that is or necessarily has to be the case (though while we're talking our dangerous government I will mention the still unsolved anthrax attack), but it is what CNN's evidence supports.

Yet, as the example of Breivik does show, apparent lone wolves can be dangerous. So why does CNN let this assertion stand?

> A senior U.S. counter-terrorism official told CNN that lone assailants have been responsible for every deadly terrorist attack in the West since June 2009, when a U.S. servicemen was shot dead outside a recruiting station in Arkansas by a convert to Islam, Abdulhakim Mujahid Muhammad.

The stat is almost meaningless in any case; what this counter-terrorism official spewing nonsense under cover of anonymity really means is that there have been exactly two "deadly terrorist attacks" committed by Muslims in the US since June 2009, Muhammad's and Hasan's, and both happened to be lone wolves.

But this senior counter-terrorism official appears to be ignorant of or ignoring other deadly terrorist attacks, such as Scott Roeder's killing of George Tiller (the attack actually happened on May 31, 2009, and the DOJ investigated, but did not charge, Roeder's accomplices in the anti-choice movement), James von Brunn's attack on the Holocaust Museum, Jerry and Joseph Kane's attack on a police station, or Jared Lee Loughner's attack on Gabby Giffords. Sure, some of these count as lone wolves (others as organized members of right wing terrorist groups), but it seems these attacks—as well as the other right wing terrorist attacks that did not result in

death—deserve to be part of this discussion, not least because it in part supports CNN's discussion of how reading extremist materials online may radicalize potential terrorists.

And then, finally, there's CNN's uncritical invocation of informants.

> Counter-terrorism analysts say that outreach by U.S. law enforcement into Muslim communities is key in providing early warnings of threats. U.S. law enforcement agencies have also kept a watchful eye over individuals who may be moving toward violent extremism. Warning signs include ties individuals may have developed with known Islamist radicals or online interaction through jihadist websites.
>
> Undercover agents and informants have also played a key role in helping the FBI and other U.S. law enforcement agencies uncover threats. The New York Police Department has developed the most extensive informant network in the country and has the largest number of undercover police officers assigned to terrorism cases. It has also developed a Cyber Intelligence Unit in which undercover "cyber agents" track the online activities of suspected violent extremists and interact with them online to gauge the potential threat they pose.

I'll respond to CNN's approving mention of the NYPD's spy system by reminding, again, that it failed to find the two most dangerous terrorists, Faisal Shahzad and Najibullah Zazi, in spite of ties to Zazi's imam.

But I'll also suggest that if this effort remains focused primarily on Muslims it will continue to miss the MLK Day bombers, the George Roeders, and indeed, the Breiviks of the world.

CNN's biggest piece of evidence that apparent lone wolf terrorists can be dangerous is the lethality of Breivik's attack. But the entire article takes the example of a right wing terrorist as justification to otherwise ignore

the problem of right wing terrorism.

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# IN LAST TWO YEARS, FBI DEVELOPED INTRUSIVE FILES ON 77,100 INNOCENT AMERICANS

Charlie Savage has a story reporting on the number of assessments the FBI opened in the last two years that turned into preliminary investigations. It shows that over the period, the FBI has conducted assessments of 77,100 Americans whom they determined were not a cause for concern. Their investigations of 3,315 others turned into preliminary investigations.

> Data from a recent two-year period showed that the bureau opened 82,325 assessments of people and groups in search for signs of wrongdoing. Agents closed out most of the assessments, the lowest-level of F.B.I. investigation, without finding information that justified a more intensive inquiry.
>
> [snip]
>
> The disclosure, covering March 25, 2009, to March 31, 2011, focused on assessments, which an agent may open "proactively or in response to investigative leads" and without first having a particular factual basis for suspecting a target of wrongdoing, according to the F.B.I. manual. Former Attorney General Michael Mukasey issued guidelines for the bureau creating that category in 2008.
>
> During an assessment, agents may use a limited set of techniques, including searching databases about targets, conducting surveillance of their movements

> and sending a confidential informant to an organization's meetings. But to use more intrusive techniques, like secretly reading e-mail, agents must open a more traditional "preliminary" or "full" investigation. Such inquiries require agents to first have a greater reason to start scrutinizing someone: either an "information or allegation" or an "articulable factual basis" indicating possible wrongdoing.
>
> According to the data, during the 2009-11 period agents opened 42,888 assessments of people or groups to see whether they were terrorists or spies. A database search in May 2011 showed that 41,056 of the assessments had been closed. Information gathered by agents during those assessments had led to 1,986 preliminary or full investigations.
>
> The data also showed that agents initiated 39,437 assessments of people or groups to see whether they were engaged in ordinary crime. Of those, 36,044 had been closed, while 1,329 preliminary or full investigations had been opened based on the information gathered.

The FBI would like to spin this as good news. Some of these investigations, Valerie Caproni explains in the story, would have been full-blown preliminary investigations in the past. But, as Mike German points out, the FBI is keeping records of all these searches.

The threat assessment conducted on Antiwar.com provides a really good example of what this means, even though it dates to an earlier period. That assessment—conducted in April 2004—fell under slightly different categories than the ones that generated these data. Nevertheless, the general guidelines (what FBI Agents could do to investigate these people) are roughly similar.

And what we saw in the threat assessment was the collection (and dissemination) of information

that tied incidences of First Amendment protected activities of other people—an explosives suspect surfing the web, antiwar activists handing out literature at a peaceful protest—to criminal investigations. The result flips the notion of criminality on its head for the way other people's potential criminal behavior gets lumped onto Antiwar's free speech.

The Antiwar.com threat assessment also shows what this kind of assessment means in reality. The FBI searched somewhere between 2-4 public databases for information on Eric Garris and Justin Raimondo that they don't want even to even admit searching publicly (they've exempted the disclosure under investigative techniques exemption).

Finally, the Antiwar.com threat assessment shows the kind of logic the FBI uses to advance to the next level: it found that Raimondo uses his middle name, that Antiwar.com posted a publicly available document (the watch lists showing terrorist suspects), and that some unsavory characters like white supremacists and explosives suspects had read their work. And from that—partly because Antiwar.com relies on donations for funding—the FBI decided it had sufficient basis to conduct a preliminary investigation into whether Garris and Raimondo are spies.

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# ROBERT MUELLER: CIVIL LIBERTIES DON'T NEED A "FRESH" REVIEW

This exchange last Thursday between Senator Al Franken and FBI Director Robert Mueller was frustrating enough—Senator Franken's questions were the only ones on civil liberties Mueller faced, and the Director seemed pretty miffed to

be questioned on the subject in the first place.

But I'm even more troubled by the exchange now that we've learned about the FBI's new investigative guidelines that allow, among other things, database searches without any record and new powers to coerce informants.

After all, Mueller's response to Franken's concern about NSLs boasted that they had implemented a compliance system for NSLs and "other areas" where FBI might "fall into the same habits." (What do you suppose those other areas are? Is he addressing FISC concerns?)

> But perhaps as important if not more important, we set up a compliance program to address not just [National] Security Letters, but other areas such as National Security Letters where we could fall into the same, the same pattern, or habits. And so the National Security Letters I believe we addressed appropriately at the time, and it was used as a catalyst to set up a compliance program that addresses a concern in other areas comparable to what we had found with regard to National Security Letters.

Getting rid of the records on database searches would seem to eliminate any compliance system. And Mueller knew he was planning to do so (as did, I presume, Franken) when he gave this answer.

And in response to Franken's question about infiltration of mosques and peace groups, Mueller assured Franken that FBI complied with its own guidelines.

> I'm not certain it needs a fresh, a fresh, uh, look because I'm very concerned whenever those allegations arise. I will tell you that I believe that in terms of surveillances of religious institutions we have done it appropriately and with appropriate

> predication under the guidelines in the applicable statutes, even though there are allegations out there to the contrary. I also believe that when we have undertaken investigations of individuals expressing their First Amendment rights, we have done so according to our internal guidelines and the applicable statutes. And so, whenever these allegations come forward, I take them exceptionally seriously, make sure our inspection division or others look into it to determine whether or not we need to change anything. And I will tell you that addressing terrorism, and the responsibility to protect against attacks, brings us to the point where we are balancing day in and day out civil liberties and the necessity for disrupting a plot that could kill Americans and it's something that we keep in mind day in and day out.

But of course, FBI is about to change those guidelines, making it easier for the Agents to attend political meetings undercover and track innocent people. And it doesn't much matter if FBI complies with its own guidelines if those guidelines support abusive investigations. Mueller is basically insisting that he doesn't need to reconsider FBI's actions because FBI complies with its own guidelines and therefore the underlying guidelines themselves don't need any more scrutiny.

And that canard about balancing civil liberties with the necessity of disrupting a plot (there's zero evidence of course, that the FBI's surveillance of peace groups has any tie to a plot, save against political speech)? Not only is this not a zero sum game, but the FBI doesn't take similar civil liberties-infringing actions to disrupt right wing plots.

When he was gently, respectfully challenged to defend his civil liberties record, Mueller instead resorted to that same old terror fear-

mongering. Given the new permissive guidelines, such an attitude is even more troubling.

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# FBI ASPIRES TO BE THE STASI

Charlie Savage describes changes the FBI is making to its Domestic Investigations and Operations Guide. On its face, the changes he describes are downright bad. The changes allow FBI agents to:

- Make a database "assessment" search of a group or person "proactively" without making a record of that search
- Tail people during a "proactive" assessment more than once
- Search a potential informant's trash to gather information to use to force the informant to snitch for the government
- Attend up to five meetings of a group undercover
- Eliminate extra supervision of investigations of politicians or journalists if they are witnesses, not suspects, in the investigation
- Eliminate such protection altogether for "low-profile" blogs

These new rules allow all sorts of fishing expeditions of people based on nothing more than a lead. Moreover, it would make it easy for the FBI to surveil targets with almost no evidence against them until they could be trumped up on some crime.

To some degree they feel like an effort to clean up past illegal activity (as the FBI did with its exigent letters program).

But consider how much worse these guidelines are in consideration of what else we know, or suspect.

We suspect, after all, that our government collects generalized databases of geolocation using Section 215. Since that information need only be "relevant" to a foreign intelligence investigation, it may well include records on all of us.

These new rules would allow the FBI to search such a database without recording that search. Aside from the obvious invitation for abuse—some agent wondering whether his girlfriend was hanging out with his best friend—it also eliminates the evidence that the FBI used such a controversial technique as geolocation as the premise for further investigation. It makes it easier for the FBI to investigate someone because of nothing more than who they know.

Then there's the new rules allowing the FBI to conduct investigations of what a journalist "witnessed" without supervision. Remember that after the FBI decided James Risen had "witnessed" a leak of classified information, they collected his business records and emails, collecting much of the evidence they needed to indict Jeff Sterling. This rule would seem to virtually eliminate any real protection for journalists' sources.

Finally, there's the invitation to snoop through a potential informant's trash. As I have pointed out, as far back as 2002, the government explicitly described using FISA to collect information, even on potentially unrelated

crimes like rape, on potential informants so they could blackmail them into serving as snitches. Taken together, these rules would allow the FBI to search through existing databases (potentially including telecommunications metadata showing who a person communicated with and hung out with, as well as some financial information) to find potential snitches. The agent could search those databases with no apparent limits or record. And then the agent could sift through the potential informant's trash to get the evidence to blackmail him to become an informant.

These rules seem ripe to snare a bunch of totally innocent people in the FBI's investigative web. And even if it doesn't, it may well serve to increase the paranoia of average people.

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# USING DOMESTIC SURVEILLANCE TO GET RAPISTS TO SPY FOR AMERICA

The reauthorization of the PATRIOT Act focused a lot of attention on the fact that the Administration is interpreting the phrase "relevant to an authorized [intelligence] investigation" in Section 215 of the PATRIOT Act very broadly. As Ron Wyden and Mark Udall made clear, the government claims that phrase gives it the authority to collect business records on completely innocent people who have no claimed tie to terrorism.

There's something that's been haunting me since the PATRIOT reauthorization about how the government has defined intelligence investigations in the past. It has to do with

Ted Olson's claim—during the In Re Sealed Case appeal in 2002—that the government ought to be able to use FISA to investigate potential crimes so as to use the threat of prosecuting those crimes to recruit spies (and, I'd suggest, informants). When Olson made that claim, even Laurence Silberman (!) was skeptical. Silberman tried to think of a crime that could have no imaginable application in an intelligence investigation, and ultimately came up with rape. But Olson argued the threat of a rape prosecution might help the Feds convince a rapist to "help us."

> OLSON: And it seems to me, if anything, it illustrates the position that we're taking about here. That, Judge Silberman, makes it clear that to the extent a FISA-approved surveillance uncovers information that's totally unrelated – let's say, that a person who is under surveillance has also engaged in some illegal conduct, cheating –
>
> JUDGE LEAVY: Income tax.
>
> SOLICITOR GENERAL OLSON: Income tax. What we keep going back to is practically all of this information might in some ways relate to the planning of a terrorist act or facilitation of it.
>
> **JUDGE SILBERMAN: Try rape. That's unlikely to have a foreign intelligence component.**
>
> **SOLICITOR GENERAL OLSON: It's unlikely, but you could go to that individual and say we've got this information and we're prosecuting and you might be able to help us**. I don't want to foreclose that.
>
> JUDGE SILBERMAN: It's a stretch.
>
> SOLICITOR GENERAL OLSON: It is a stretch but it's not impossible either. [my emphasis]

Olson went on to claim that only personal revenge in the guise of an intelligence investigation should be foreclosed as an improper use of FISA.

> JUDGE SILBERMAN: In your brief you suggested only that the face of the application indicated something was wrong. I don't quite understand what would be wrong though. The face of the application, suppose the face of the application indicated a desire to use foreign surveillance to determine strictly a domestic crime, that would be — but then you wouldn't have an agent, you wouldn't have an agency. You must have some substantive requirement here if significant purpose is given its literal meaning, you must have some logic to the interpretation of that section which falls outside of the interpretation of an agent of a foreign power.
>
> SOLICITOR GENERAL OLSON: And I suppose if the application itself revealed that there was a purpose to take personal advantage of someone who might be the subject of an investigation, to blackmail that person, or if that person had a domestic relationship and that person was seeing another person's spouse or something like that, if that would be the test on the face of things. In other words, I'm suggesting that the standard is relatively high for the very reason that it's difficult for the judiciary to evaluate and secondguess what a high level executive branch person attempting to fight terrorism is attempting to do.

This is not just Ted Olson speaking extemporaneously. The government's appeal actually makes its plan to use FISA-collected information to recruit spies (and informants), in the name of an intelligence investigation,

explicit:

> Although "foreign intelligence information" must be relevant or necessary to "protect" against the specified threats, the statutory definition does not limit how the government may use the information to achieve that protection. In other words, the definition does not discriminate between protection through diplomatic, economic, military, or law enforcement efforts, other than to require that those efforts be "lawful." 50 U.S.C. 1806(a), 1825(a). Thus, for example, where information is relevant or necessary to recruit a foreign spy or terrorist as a double agent, that information is "foreign intelligence information" if the recruitment effort will "protect against" espionage or terrorism.
>
> [snip]
>
> Whether the government intends to prosecute a foreign spy **or recruit him as a double agent (or use the threat of the former to accomplish the latter)**, the investigation will often be long range, involve the interrelation of various sources and types of information, and present unusual difficulties because of the special training and support available to foreign enemies of this country. [my emphasis]

Ultimately, the FISA Court of Review rejected this broad claim (though without discounting the possibility of using FISA to get dirt to use to recruit spies and informants explicitly).

> **The government claims that even prosecutions of *non*-foreign intelligence crimes are consistent with a purpose of gaining foreign intelligence information**

> **so long as the government's objective is to stop espionage or terrorism by putting an agent of a foreign power in prison**. That interpretation transgresses the original FISA. It will be recalled that Congress intended section 1804(a)(7)(B) to prevent the government from targeting a foreign agent when its "true purpose" was to gain non-foreign intelligence information—such as evidence of ordinary crimes or scandals. See supra at p.14. (If the government inadvertently came upon evidence of ordinary crimes, FISA provided for the transmission of that evidence to the proper authority. 50 U.S.C. 1801(h)(3).) **It can be argued, however, that by providing that an application is to be granted if the government has only a "significant purpose" of gaining foreign intelligence information, the Patriot Act allows the government to have a primary objective of prosecuting an agent for a non-foreign intelligence crime. Yet we think that would be an anomalous reading of the amendment**. For we see not the slightest indication that Congress meant to give that power to the Executive Branch. **Accordingly, the manifestation of such a purpose, it seems to us, would continue to disqualify an application**. That is not to deny that ordinary crimes might be inextricably intertwined with foreign intelligence crimes. For example, if a group of international terrorists were to engage in bank robberies in order to finance the manufacture of a bomb, evidence of the bank robbery should be treated just as evidence of the terrorist act itself. But the FISA process cannot be used as a device to investigate wholly unrelated ordinary crimes. [my emphasis]

Understand what this exchange meant in 2002: the

government claimed that it could use FISA to collect information on people that they could then use to persuade those people to become spies or informants. That all happened in the context of broadened grand jury information sharing under PATRIOT Act. Indeed, the FISA application in question was submitted **at almost exactly the same time** as OLC wrote a still-secret opinion interpreting an "implied exception" to limits on grand jury information sharing for intelligence purposes.

> [OLC] has concluded that, despite statutory restrictions upon the use of Title III wiretap information and restrictions on the use of grand jury information under Federal Rule of Criminal Procedure 6(e), the President has an inherent constitutional authority to receive all foreign intelligence information in the hands of the government necessary for him to fulfill his constitutional responsibilities and that statutes and rules should be understood to include an implied exception so as not to interfere with that authority. See Memorandum for the Deputy Attorney General from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Effect of the Patriot Act on Disclosure to the President and Other Federal Officials of Grand Jury and Title III Information Relating to National Security and Foreign Affairs 1 (July 22, 2002);

It seems possible the government was hoping to take grand jury allegations, use FISA to investigate them, and in turn use what they found to recruit spies and informants. The one limit—and it is a significant one—is that the government would first have to make a plausible argument that the potential target in question was an agent of a foreign power.

Of course, at precisely that same time—and apparently unbeknownst to Ted Olson (I have

emailed Olson on this point but he did not respond)—the government was using new data mining and network analysis approaches to establish claimed ties between Americans and al Qaeda. And the bureaucracy Royce Lamberth and James Baker had implemented to prevent such claimed ties to form the basis for FISA applications—an OIPR chaperone for all FISA applications—was rejected by the FISCR in this case. So while FISA required the government show a tie between a target and a foreign power, there was little to prevent the government from using its nifty new data mining to establish that claim. And remember, NSA twice explicitly chose not to use available means to protect Americans' privacy as it developed these data mining programs; it made sure it'd find stuff on Americans.

(Interesting trivia? Olson used the phrase "lawful" to describe the limits on what FISA allows the President to do at least 6 times in that hearing.)

Moreover, while the FISCR ruling held (sort of—but probably not strongly enough that John Yoo couldn't find a way around it) that the government couldn't use FISA to gather dirt to turn people into spies and informants, it never actually argued the government couldn't use other surveillance tools, including the PATRIOT Act, to dig up dirt to use to recruit spies and informants, at least not in this FISCR ruling. The limit on using FISA for such a purpose came from court precedents like Keith, not any apparent squeamishness about using government surveillance to dig up dirt to recruit spies.

The Senate Intelligence Committee presumably had what was supposed to be a meeting on the government's very broad interpretation of data it considers "relevant to an authorized [intelligence] investigation" today. We know that one of the concerns is that the government claims it can use Section 215 to collect information on people with no ties to terrorism. Ted Olson's claim we could use FISA to recruit

informants make me wonder how they're using the information they collect on people with no ties to terrorism. After all, the ability to collect bank records on someone—or geolocation—might provide an interesting evidence with which to embarrass them into becoming an informant.

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# FBI'S HACKER-INFORMANTS

The Guardian uses an eye-popping stat from a hacker journalist—that a quarter of all hackers are FBI moles—to cement a a story about the FBI infiltrating hacker groups.

> The underground world of computer hackers has been so thoroughly infiltrated in the US by the FBI and secret service that it is now riddled with paranoia and mistrust, with an estimated one in four hackers secretly informing on their peers, a Guardian investigation has established.
>
> Cyber policing units have had such success in forcing online criminals to co-operate with their investigations through the threat of long prison sentences that they have managed to create an army of informants deep inside the hacking community.
>
> [snip]
>
> So ubiquitous has the FBI informant network become that Eric Corley, who publishes the hacker quarterly, 2600, has estimated that 25% of hackers in the US may have been recruited by the federal authorities to be their eyes and ears. "Owing to the harsh penalties involved and the relative inexperience with the law that many hackers have,

> they are rather susceptible to intimidation," Corley told the Guardian.

The number **is** eye-popping. But there are two details about the story I want to note. First, it suggests that the FBI is recruiting its hacker-informants after catching them hacking. Oddly, though they consider Adrian Lamo among the hackers-moles they describe (indeed, the only one they name), they don't question whether he just turned Bradley Manning in, or whether he was a more formal informant. Moreover, they don't note that drug abuse, not hacking, would have been the potential crime Lamo committed in the weeks preceding his turning Manning in.

Also, note what kind of recruiting the story doesn't address? DOD recruiting. Are all these hackers going straight from FBI to work in DOD's cyberwars? Or is DOD recruiting a different set of hackers?

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# WAR, INTELLIGENCE, LAW AND FOREVER

There are a number of oddly coinciding legal issues that I wanted to pull together into one post.

**The Administration Fudges the War Powers Act**

First and most obviously, today is the day the 60-day grace period for Libya under the War Powers Act expires. Obama should, by law, have to go to Congress to get sanction for our third war against a Muslim country.

Mind you, Congress isn't going to make the President do that.

But just to be safe, the Administration is going to conduct some kind of legal hocus pocus to make sure it can claim it isn't violating the

WPA.

> A variety of Pentagon and military officials said the issue was in the hands of lawyers, not commanders. Several officials described a few of the ideas under consideration.
>
> One concept being discussed is for the United States to halt the use of its Predator drones in attacking targets in Libya, and restrict them solely to a role gathering surveillance over targets.
>
> Over recent weeks, the Predators have been the only American weapon actually firing on ground targets, although many aircraft are assisting in refueling, intelligence gathering and electronic jamming.
>
> By ending all strike missions for American forces, the argument then could be made that the United States was no longer directly engaged in hostilities in Libya, but only providing support to NATO allies.
>
> Another idea is for the United States to order a complete – but temporary – halt to all of its efforts in the Libya mission. Some lawyers make the case that, after a complete pause, the United States could rejoin the mission with a new 60-day clock.

My money, given the way that the OLC wrote a memo retroactively justifying the first several weeks of the war that culminated with us ceding control to NATO (and for other reasons), is that we'll choose option A; we'll pretend that we're just conducting a very expensive unfunded intelligence operation in support of our NATO allies and call that good.

**Congress Tries to Force Obama to Fight the Forever Whereever War**

Then there's the Republicans efforts to rewrite the AUMF in the spending bill, which would make it a lot easier to pass without a lot of debate and certainly without concerted attention to it. Ben Wittes has been orchestrating a debate on this topic over at Lawfare (here, here, here, here, here, here, and here).

There are a couple of elements to this. First, the belief by both the right and left that the Administration has already exceeded the terms of the Afghan AUMF by striking at groups that either didn't exist in 2001 or didn't support the 9/11 attacks. If we're right, it would mean such things as drone strikes in Yemen are legally questionable. And for those who believe we must use drones in Yemen and Somalia, it seems clear we must rewrite or expand the AUMF to incorporate these new targets.

In addition, there's the question of detention. I believe that we are close to sufficiently achieving the objectives in the 2001 AUMF that it might require Obama to base the detention of Gitmo detainees on something more permanent. McKeon would like to institutionalize Obama's preferred indefinite detention, but by endorsing detention going forward, might invite further indefinite detention.

There are probably some other things our government is doing under the guise of war that we don't know about (but that McKeon presumably does and endorses).

But for the moment, let's assume that the forever whereever war authorizes the President to continue to make up the rules of this war as he goes forward, with no defined end point.

And, as Adam Serwer implies, McKeon is doing this not via free-standing statute (which is what he first tried), but on the spending bill, making it much harder to oppose.

> But the country never made that decision—the country made the decision to go to war against the perpetrators of the 9/11 attacks. That's why I think

> that this new AUMF shouldn't be something that gets tucked into a spending bill—it's the kind of thing that the American people need to consider carefully. I suspect public opinion is probably on McKeon's side here, but at the very least, a separate vote on a new AUMF would have the advantage of sanctioning this larger conflict in a more public and accountable manner. More importantly, we could be having a conversation of what the end of the "war on terror" is supposed to look like.

This is, in other words, the head of the House Armed Services Committee acting where he has greatest powers, in mapping out how DOD can spend money, to institutionalize the authority of the President to evolve the terms of the war against terrorists as he goes on.

**PATRIOT without Sunset**

At the same time as one corner of Congress is acting at the area of its strength, another corner of Congress is acting with typical cowardice. John Boehner, Mitch McConnell, and Harry Reid are pushing a vote on Monday to extend the PATRIOT Act another 4 years, until June 1, 2015.

Mind you, it might not be just their idea. This is the kind of thing Obama might encourage (though the Administration reportedly backed some, but not all, reforms on the table). This is a way for everyone involved—except for the liberals and handful of TeaParty candidates who will oppose the bill—to just endorse the status quo rather than acknowledge that PATRIOT has some real problems as well as some unnecessary authorities.

And so, with each new extension of a PATRIOT sunset, the myth that it actually will ever sunset gets weaker and weaker.

I'm interested in this development, though, for several reasons. Aside from detention and any secret stuff McKeon knows about and the Afghan-turning-into-Pakistan war, many of the key measures we use to fight terrorism are surveillance related. So at one level, with the never-sunsetting PATRIOT Act, we're seeing the creeping permanence of the war on terror from an intelligence perspective, too, though by Congressional cowardice rather than Congressional strength.

**The Osama bin Laden Strike**

All of this is taking place against the background of Osama bin Laden's death which, in a more noble era, would have steeled our elected representatives to reassess our war against terrorists.

The OBL death is interesting from this front for two other reasons, though.

First, the means. Rather than kill OBL with a drone strike, which (as Robert Chesney observes) the Administration seems to be tying to a war power, we took him out with JSOC operating under the auspices of CIA. We feel free to use JSOC in a variety of locales that are no declared wars. But doing it under Leon Panetta's direction maintained the legal fiction that DOD operates exclusively in Afghanistan while CIA manages everything in Pakistan.

But it appears that fiction largely serves Pakistan's benefit. In defending the legality of OBL's killing (something I don't contest), Harold Koh emphasizes the AUMF and not—as he might have—the September 17, 2001 Finding that authorizes CIA to capture and detain (and kill, if it came to that) top al Qaeda leaders.

> By enacting the AUMF, Congress expressly authorized the President to use military force "against … *persons* [such as bin Laden, whom the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 …in order to prevent

> any future acts of international terrorism against the United States by such … persons" (emphasis added). Moreover, the manner in which the U.S. operation was conducted—taking great pains both to distinguish between legitimate military objectives and civilians and to avoid excessive incidental injury to the latter—followed the principles of distinction and proportionality described above, and was designed specifically to preserve those principles, even if it meant putting U.S. forces in harm's way. Finally, consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.

In other words, Koh could have made either an intelligence or a war justification for the killing (both of which, IMO, would have been legally more sound than the hocus pocus they're pulling in Libya). He chose to go the AUMF route. That's not surprising (we're not supposed to talk about that 2001 Finding, you know). But I find it worth noting.

I'm most interested in that approach because one route we could have gone, after OBL's death, was to commit to use JSOC raids rather than drones (which we have a history of doing without AUMF), as well as surveillance that works. We could have done most of what we're doing—save the

drones and the foreever detention—without an AUMF. (That's not saying I endorse using JSOC w/o a declared war, but it's what we do.) The way we think of OBL's death obviously doesn't institutionalize that choice, but it does prevent us from using this moment to rethink our approach to terrorism

**Altering the Nature of our Nation by Refusing to Think**

All of which, IMO, makes this a pretty remarkable moment. In several ways, we're about to endorse (either by apathy or aggressive choice) making our forever war permanent, not to mention the President's ability to just bomb wherever his OLC can invent a retroactive excuse for. Sure, we've been headed in this direction for a while. But at a moment we might have made another choice, we're doubling down.

Of course, it's not going to end up being a forever war.

The way we approach terrorism, generally, will in the medium term bump up against the reality that domestic right wing terrorists now may be more dangerous than Islamic terrorists, particularly the informant-induced "homegrown" terrorist we seem to be focusing on (plus, the warlovers want to make drug cartels terrorists as well). Eventually, everyone will become a terrorist, at which point Americans might finally get tired of sacrificing their liberty and privacy for a myth that some terrorists are worse than other organized criminals.

More importantly, we're going to go broke. Maybe not before Republicans strip our entire safety net to pay for the forever wars we'll be fighting. If that happens, we'll lose the forever wars because no one will be educated enough to fight the forever wards, to make and operate our fancy war toys. But ultimately we can't continue to add multi-billion dollar wars with no discussion, because we simply can't afford it.

In the meantime, though, our utterly failed

political system is just going to creep further and further away from our constitutional roots and towards a vastly different national security state.

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# REPORT ON ENTRAPMENT DESCRIBES PATTERN OF INFORMANT-CREATED "TERRORISM"

We've been writing a bit about Mohamed Osman Mohamud, the young Oregon man charged on WMD charges for allegedly trying to detonate an inert bomb the FBI helped him get. His attorneys are preparing an aggressive entrapment defense (those defenses almost never work, but there are some interesting factors in his case), arguing that Mohamud refused early entreaties to engage in violence yet the FBI kept pressing him to do so.

NYU's Center for Human Rights and Global Justice has just released a report mapping out the pattern of such cases. The report focuses on three NY-area cases—the Newburgh Four, the Fort Dix Five, and Shahawar Matin Siraj cases—to contextualize what is going on. It focuses on the role that informants play in these cases.

> In the cases this Report examines, the government's informants held themselves out as Muslims and looked in particular to incite other Muslims to commit acts of violence. The government's informants introduced and aggressively pushed ideas about violent jihad and, moreover, actually encouraged the defendants to believe it was their duty to take action

> against the United States. In two of the three cases, the government relied on the defendants' vulnerabilities—poverty and youth, for example—in its inducement methods. In all three cases, the government selected or encouraged the proposed locations that the defendants would later be accused of targeting. In all three cases, the government also provided the defendants with, or encouraged the defendants to acquire, material evidence, such as weaponry or violent videos, which would later be used to convict them.

Most powerfully, the report explains how these cases have affected the mens' families. For example, in the case of the Duka brothers, in which the informant testified on the stand that the Duka brothers had no knowledge of the alleged Fort Dix plot, their extended family has had their classic immigrant success story lives upended.

> The same night that the FBI arrested his sons, Ferik Duka was arrested and held in immigration detention for a month.187
>
> Amidst everything else, Dritan's family was summarily evicted from the apartment they had rented. Zurata recalls,
>
> "They [the landlord] said 'get out of the apartment these are terrorists.' They gave us three days' time to get our clothes. We had to get clothes from the apartment and bring them to our house, which was surrounded by news people. I had the truck, but nobody to drive, nobody to help."188
>
> After the eviction, Dritan's five children moved in with their grandparents and uncle Burim, where they've lived ever since. Without his brothers to run the roofing Burim dropped out of high school to support

> his remaining family members. Noting that his nieces and nephews are “like orphans now,” Burim said, “it’s me who supports them now… I basically support four families.”189 Shouldering a heavy burden for a 20-year old, Burim now runs one of the Dukas’ roofing companies; Ferik came out of retirement to run the other business.
>
> At the time of the arrests, the Dukas’ roofing companies had over $400,000 in contracts. These dried up almost immediately after the brothers were arrested. People who had worked with Ferik for more than a decade took their business elsewhere. Their biggest customer, the local fire department, called to say they had been warned by the government not to do business with the Dukas. Internet sites labeled their businesses as being “run by terrorists,”190 and they received harassing phone calls at their businesses. While they once dreamt of building four neighboring houses, one for each brother, today they are barely able to make ends meet.

And perhaps the most stunning detail is this description of the incitement a cop, Osama Eldawoody, used to get Shahawar Matin Siraj to accept his invitation to violence: Abu Ghraib.

> In April 2004, when the abuse of detainees by U.S. soldiers at Abu Ghraib216 first became public, Eldawoody seized on the opportunity to take things to the next level. Shahina explains that Eldawoody started showing Shahawar “awful, awful scary photos of Abu Ghraib and Guantanamo. If you show these pictures even to a non-Muslim, it’ll make them crazy. No one can bear these photos, Eldawoody showed Shahawar these photos and said, ‘it’s your duty as a Muslim to do jihad in response.’”217

> After months of Eldawoody's campaign, Shahawar finally crumbled when he was shown pictures of young Iraqi girls being threatened and raped; he told Eldawoody that they had to do something.218 Eldawoody then told him about a group called "The Brotherhood," with operatives in upstate New York who could help them.219 Then, in May 2004, Eldawoody told his handlers, "I believe it's time to record."220

Oh, okay. Use evidence of American crimes as a way to induce others to commit fake crimes. Only unlike all but a "few bad apples" convicted in those real crimes, the government will actually indict and convict in the fake crimes.

Do they not see how this is perverting the entire concept of justice?