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.

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.

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 –
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> 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.

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?

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.

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.
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> 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?

OBAMA'S DOJ ADVOCATED LYING TO

JUDGES IN JUNE 2009

Back in 2006, a bunch of Islamic groups FOIAed the FBI to find out what kind of records the FBI had on them. The FBI blew the request off, so in 2007, the groups sued. When the groups got their data, they complained the FBI had improperly labeled much of the files as outside the scope of their request and in the case of CAIR, clearly not provided all the documents it had. Upon review, Judge Cormac Carney realized the government had lied to him about what was in the documents and the reasons they withheld information. His opinion in response, first written in 2009, was just rewritten in unclassified form and released. It's a remarkable glimpse into the government's disdain for separation of powers.

Much of Carney's ruling responds to a government brief dated June 19, 2009 that remains sealed. But Carney's ruling makes it pretty clear what the government argued. It suggests the government took Subsection 552(c) of FOIA—which allows the government to withhold information on ongoing criminal investigations, informant identities, or national security—and argued that it permitted the government to lie not only to plaintiffs in a FOIA suit, but also to the judge overseeing the suit.

> Subsection (c) thus applies in the rare circumstance in which identifying the basis for withholding information or even disclosing the existence of a record could itself compromise an ongoing criminal investigation, the identity of a confidential informant, or classified foreign intelligence or international terrorism information. Id. In this limited context, the FOIA authorizes an agency to withhold information from a requester without disclosing its basis for doing so. Id. Nothing in Subsection (c), however, allows an agency to withhold information

> from the Court.

Carney's ruling goes on to make clear that the government used a 1986 Ed Meese memo interpreting this exemption—stating that the government could tell a FOIA requester that no responsive records exist—and argued that Meese had condoned telling a court that no responsive records exist.

> The Government's policy is to inform a requesting party that there are no records in instances in which the agency determines that "disclosure of the very existence of the records in question 'could reasonably be expected to interfere with enforcement proceedings,'" or "the mere act of invoking Exemption 7(D) in response to a FOIA request tells the requester that somewhere within the records encompassed by the scope of his particular request there is reference to at least one confidential source," or "the very existence or nonexistence, is itself a classified fact." Id. at 20–21, 23, 25.
>
> Despite its broad interpretation of the law enforcement exemptions and the new Section 552(c) exclusions, the Attorney General's Memorandum does not condone lying to the Judiciary. To the contrary, the Attorney General's Memorandum prohibits such conduct.

And finally, Carney's ruling makes it clear that the government argued that even filing an in camera filing telling the judge that it had withheld records under this subsection would compromise national security.

> Filing an in camera declaration concurrently with its public filings would not have compromised national security, and the Government's argument to the contrary is simply not credible.

All of which leads to this true, but seemingly outdated, conclusion from Carney.

> 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.

Now, aside from the fact that this ruling makes it clear that the Obama DOJ wrote a filing in June 2009 that advocated lying to judges, the suit is interesting for several reasons. As EFF notes, the revelation that the FBI lied on this FOIA response may suggest it has done so in other FOIA suits. And who know? We know Obama's DOJ submitted several versions of revised declarations in the al-Haramain case in 2009; so it's possible they were advocating lying to judges in that case, too.

But it's also interesting for what it says about the underlying case. As I noted, the most obviously incomplete response that led to this suit came in the case of CAIR and Hussam Ayloush, the Executive Director of CAIR in LA. Originally, the FBI gave them a single document each, which was simply not credible given the amount of FBI surveillance of CAIR that had already been made clear.

Just as importantly, even as the government told CAIR it had just one document on it, CAIR was getting increasingly involved in a suit representing the Islamic Center of Irvine (that

Center was not a party to this FOIA, though the Islamic Centers of San Gabriel Valley and Hawthorne were, and the suit makes it clear the informant reported on eight other mosques in Orange County and that Monteilh was part of a "broader surveillance program") in a suit regarding an FBI informant's violations of their civil rights.

> An ex-con, Monteilh began working for the FBI in 2003. In 2006, he was asked to infiltrate the popular Islamic Center of Irvine, where he started attending prayers five times a day and donning an Islamic robe.
>
> In May 2007, Monteilh recorded a conversation in a car with two worshipers, in which Monteilh suggested blowing up buildings. In the tape, one man agrees with Monteilh. But a few days after the conversation, the two worshipers contacted the Los Angeles chapter of the Council on American-Islamic Relations and reported Monteilh as a potential terrorist. Other worshippers told mosque leaders that they were scared of Monteilh and felt as though he was trying to entrap them. In June 2007, the mosque obtained a restraining order against the informant.
>
> His relationship with the FBI deteriorated shortly afterwards and, after threatening to go public, Monteilh says he signed a non-disclosure agreement in exchange for $25,000. In December 2007, Monteilh was arrested on a grand-theft charge and went to jail for 16 months.

Monteilh's role as an informant was exposed in February 2009. Cormac Carney is the judge assigned to this suit.

In other words, back in 2007 when the government was withholding information on informants from

CAIR and a bunch of southern California Islamic Centers, another Islamic Center and CAIR were exposing the offensive actions of what would turn out to be a FBI informant. And by the time the government claimed it could lie to Judge Carney in 2009, details of Monteilh's informant activities were already becoming clear. And by the time Judge Carney ended his revised opinion last month with the sentence,

> By disclosing that there are other documents that are responsive to Plaintiffs' request, Plaintiffs will not learn anything they do not already know.

Groups affiliated with the plaintiffs in the FOIA case had already submitted a complaint to Carney laying out the type of information the FBI used an informant in one Islamic group to collect and stating that the FBI told the informant that "every mosque in the area" was under surveillance.

Not only did the government claim it could lie to Article III judges. It did so to hide information that was already being exposed as improper.

Update: I've reread the complaint on the informant, and note that they discovered Monteilh through the arrest of Ahmed Niazi in February 2009. (See PDF 42-43) At his bail hearing, the FBI testified to information collected via a confidential informant, who was Monteilh. But what's particularly interesting is that when Monteilh was trying to elicit comments about violence, he did so with Niazi, who reported them to the cops and Hussam Ayloush. Ayloush reported him to the FBI. So Ayloush is actually named in this suit.

Also note: the reason Carney is presiding in the Monteilh suit is because it was determined to be a related case. The FBI subsequently tried to have this case transferred to the judge in Monteilh's suit against the FBI, but the judge in that case declined.

HOW MANY OTHER JOURNALISTS DOES THE FBI CONSIDER INFORMANTS?

Yesterday, the Center for Public Integrity revealed the contents of a secret FBI memo treating a top ABC journalist—who turned out to be Christopher Isham (currently CBS' DC bureau chief)—as a confidential source for a claim that Iraq's intelligence service had helped Timothy McVeigh bomb the Murrah Federal Building.

Isham claims he alerted the FBI about the story because there were indications there might be follow-on attacks.

> Christopher Isham, a vice president at CBS News and chief of its Washington bureau, later issued a statement denouncing the claims, revealing himself as the subject of the report. Mr. Isham, who worked for ABC News at the time of the bombing, said he would have passed information to the F.B.I. only to try to verify it or to alert the bureau to word of a possible terrorist attack.
>
> "Like every investigative reporter, my job for 25 years has been to check out information and tips from sources," Mr. Isham said in a statement released through a CBS spokeswoman. "In the heat of the Oklahoma City bombing, it would not be unusual for me or any journalist to run information by a source within the F.B.I. for confirmation or to notify authorities about a pending terrorist attack."

Only, it turns out that Vince Cannistraro—who

had told ABC the story while serving as a consultant for them and had, in turn, been told the tale by a Saudi General—had already told the FBI himself.

> That source, Vincent Cannistraro, a former Central Intelligence Agency official who was a consultant for ABC News at the time, said in an interview that Mr. Isham had done something discourteous, perhaps, but not improper.
>
> "I was working for ABC as a consultant," he said. "I was not a confidential source."
>
> Mr. Cannistraro added, however, that he would have preferred it if Mr. Isham had told him that he had passed along the tip. "I was not told that Chris was also going to talk to them. And he certainly didn't tell me."

Now, aside from Isham ultimately revealing that his story came from Cannistraro, it seems to me the ethical questions on the part of ABC and Isham are misplaced. Isham's call to the FBI to confirm or deny a tip really can't be faulted.

The problem seems to lie in two issues: how ABC treated Cannistraro, and how the FBI treated Isham.

First, Cannistraro fed ABC an inflammatory tip, apparently without confirming it. Given that he was a consultant to ABC, was it his job to second source that material? As it happens, since both Cannistraro and Isham reported the tip to the FBI, it worked like a stove pipe, giving the FBI the appearance of two sources when the story derived from the same Saudi General. And how much other bullshit did Cannistraro feed ABC over the years? It's not even necessary that Cannistraro do this deliberately—if sources knew he was an ABC consultant, particularly if they knew the information would be treated this way, it'd be easy to stovepipe further inflammatory

information right to the screens of the TV. And who owns the source relationship, then, the understanding that the source can be burned for planting deliberate, inflammatory misinformation designed to stoke an illegal war?

In other words, the way ABC treated Cannistraro as a consultant muddled journalistic lines in ways that may have led to less than responsible journalism.

It wouldn't be the first time networks' relationships with "consultants" had compromised their reporting.

And then there's the FBI. Anonymous sources are reassuring the NYT that Isham wasn't really treated as a snitch, even though the report that CPI has seems to treat him as such. This seems more like FBI trying to cover its tracks—reassure other journalists the FBI isn't typing up source reports every time a journalist calls the FBI for confirmation of a tip—than anything else. So how often does the FBI, having been asked to confirm information by a journalist, start an informant file on that tip?

And what is the relationship that evolves between the FBI and that source over the years? That is, if the FBI treats journalists who confirm information with them as sources, filing reports like this one that, if revealed, would reflect badly on the journalist, then what will the journalist do in the future when the FBI feeds him shit?

CHET UBER CONTACTED HBGARY BEFORE HE PUBLICIZED HIS ROLE IN

TURNING IN BRADLEY MANNING

A reader found a very interesting email among the HBGary emails: Chet Uber emailed—after having tried to call—HBGary CEO Greg Hoglund on June 23, 2010.

> Sir,
>
>
>
>
> I would like to speak to Mr. Hoglund. My name is Chet Uber
>
> and I was given his name by common associates as someone I should speak with.
>
> The nature of our work is highly sensitive so no offense but I cannot explain
>
> the details of my call. I was given a URL and a phone number. I was not given
>
> his direct line and every time I try to get an attendant you phone system
>
> disconnects me. Would you please forward him this email to him. The links below
>
> are new and as much information as we have ever made public.
>
>
>
>
>
> Sorry for the mystery but in my world we are careful about
>
> our actions and this is something interpreted as rudeness. I am being

> polite,
>
> > so any cooperation you can provide is greatly appreciated.

Uber copies himself, Mark Rasch, George Johnson, and Mike Tomasiewicz, and sends links to two stories about Project Vigilant, which had been posted on the two proceeding days.

In response to the email, Hoglund asks Bob Slapnick to check Uber out with someone at DOD's CyberCrime Center.

Chet Uber, as you'll recall, is the guy who held a press conference at DefCon on August 1 to boast about his role in helping Adrian Lamo turn Bradley Manning in to authorities. Mark Rasch is the former DOJ cybercrimes prosecutor who claims to be Project Vigilant's General Counsel and who says he made key connections with the government on Manning.

Mind you, the multiple versions of Uber's story of his involvement in turning in Manning are inconsistent. At least a couple versions have Lamo calling Uber in June, after Manning had already been arrested.

So there are plenty of reasons to doubt the Lamo and Uber story. And security insiders have suggested the whole Project Vigilant story may be nothing more than a publicity stunt.

Furthermore, this email may be more of the same. Uber may have been doing no more than cold-calling Hoglund just as he was making a big publicity push capitalizing on the Manning arrest.

But consider this.

Lamo's conversations with Manning have always looked more like the coached questions of someone trying to elicit already-suspected details than the mutual boasting of two hackers. Because of that and because of the inconsistencies and flimsiness of the Project Vigilant story, PV all looked more like a cover

story for why Lamo would narc out Bradley Manning than an accurate story. And Uber's email here and his DefCon press conference may well be publicity stunts. But then, that's what Aaron Barr's research on Anonymous was supposed to be: a widely publicized talk designed to bring new business. But a key part of the PV story was the claim that Adrian Lamo had volunteered with the group working on "adversary characterization."

> Uber says Lamo worked as a volunteer research associate for Project Vigilant for about a year on something called adversary characterization, which involved gathering information for a project on devising ways to attribute computer intrusions to individuals or groups. He helped define the roles, tools and methods intruders would use to conduct such attacks.

While it is described as more technical, that's not all that different from what Aaron Barr was doing with social media on Anonymous.

One more thing. Consider what DOJ has been doing since the time Lamo turned in Manning and now: asking social media providers for detailed information about a network of people associated with Wikileaks. That is, DOJ appears to have been doing with additional legal tools precisely what Barr was doing with public sources.

That's likely all a big coinkydink. But these security hackers all seem to love turning their freelance investigations into big publicity stunts.

THE PRIVATIZATION OF

CITIZEN INFORMANT NETWORKS

Remember the former JSOC guy in charge of Homeland Security for PA who hired an Israeli-connected private intelligence company to collect information on environmentalists and peace activists? Well, it will surprise none of you that they were comparing Rainforest Action Network to Al Qaeda and trying to set up their own network of people informing on US citizens.

> It turns out the homeland security office or its private consultant were doing more than just monitoring law-abiding citizens.
>
> They were comparing environmental activists to Al-Qaeda.
>
> They were tracking down protesters and grilling their parents.
>
> They were seeking a network of citizen spies to combat the security threats they saw in virtually any legal political activity.
>
> And they were feeding their suspicions not only to law enforcement, but to dozens of private businesses from natural gas drillers to The Hershey Co.

It was only a matter of time before the corporations running our country would equate—as ITRR did—embarrassing one of those corporations with terrorism.

And if that bugs you, just gorge yourself on some Hershey kisses. You can rest assured those Hershey kisses haven't been damaged by scary peace activists or environmentalists!