

FIRST THEY CAME FOR JAMES RISEN ...

I don't mean to suggest the journalism world did not object to the three subpoenas James Risen got in the Jeffrey Sterling case. They did.

But today's news that Fox's James Rosen was accused of being an "Aider or Abettor" to Stephen Jin-Woo Kim's alleged crime of leaking information on Korea is just part of a progression. (See also WaPo's story which broke this.)

"I believe there is probable cause to conclude that the contents of the wire and electronic communications pertaining to the SUBJECT ACCOUNT [the gmail account of Mr. Rosen] are evidence, fruits and instrumentalities of criminal violations of 18 U.S.C. 793 (Unauthorized Disclosure of National Defense Information), and that there is probable cause to believe that the Reporter has committed or is committing a violation of section 793(d), as an aider and abettor and/or co-conspirator, to which the materials relate," wrote FBI agent Reginald B. Reyes in a May 28, 2010 application for a search warrant.

The search warrant was issued in the course of an investigation into a suspected leak of classified information allegedly committed by Stephen Jin-Woo Kim, a former State Department contractor, who was indicted in August 2010.

The Reyes affidavit all but eliminates the traditional distinction in classified leak investigations between sources, who are bound by a non-disclosure agreement, and reporters, who are protected by the First Amendment as long as they do not commit a crime.

[snip]

As evidence of Mr. Rosen's purported culpability, the Reyes affidavit notes that Rosen and Kim used aliases in their communications (Kim was "Leo" and Rosen was "Alex") and in other ways sought to maintain confidentiality.

"From the beginning of their relationship, the Reporter asked, solicited and encouraged Mr. Kim to disclose sensitive United States internal documents and intelligence information.... The Reporter did so by employing flattery and playing to Mr. Kim's vanity and ego."

"Much like an intelligence officer would run an [sic] clandestine intelligence source, the Reporter instructed Mr. Kim on a covert communications plan... to facilitate communication with Mr. Kim and perhaps other sources of information."

After all, in January 2011 (which was actually after this affidavit, but appeared 10 months before this affidavit was unsealed), DOJ argued that when Jeffrey Sterling leaked information to James Risen about a dangerous plot to deal nuke blueprints to Iran, his actions were worse than what DOJ called "typical espionage."

The defendant's unauthorized disclosures, however, may be viewed as more pernicious than the typical espionage case where a spy sells classified information for money. Unlike the typical espionage case where a single foreign country or intelligence agency may be the beneficiary of the unauthorized disclosure of classified information, this defendant elected to disclose the classified information publicly through the mass media. Thus, every foreign adversary stood to benefit

from the defendant's unauthorized disclosure of classified information, thus posing an even greater threat to society.

Then, in March 2011, DOD charged Bradley Manning with aiding the enemy because he leaked a bunch of stuff to us.

In other words, during a period from May 2010 through January 2011, Eric Holder's DOJ was developing this theory under which journalists were criminals, though it's just now that we're all noticing this May 2010 affidavit that lays the groundwork for that theory.

Maybe that development was predictable, given that during precisely that time period, the lawyer who fucked up the Ted Stevens prosecution, William Welch, was in charge of prosecuting leaks (though it's not clear he had a role in Kim's prosecution before he left in 2011).

But it's worth noting the strategy – and the purpose it serves – because it is almost certainly still in effect. FBI Special Agent Reginald Reyes accused Rosen of being a criminal so he could get around the Privacy Protection Act protections for media work product (See pages 4 and following), which specifically exempts “fruits of a crime” or “property ... used [] as a means of committing a criminal offense.” Then he further used it to argue against giving notice to Fox or Rosen.

Because of the Reporter's own potential criminal liability in this matter, we believe that requesting the voluntary production of the materials from Reporter would be futile and would pose a substantial threat to the integrity of the investigation and of the evidence we seek to obtain by the warrant. (29)

While the AP's phone records weren't taken via a warrant, it would be unsurprising if the

government is still using this formula – journalists = criminals and therefore cannot have notice – to collect evidence. Indeed, that may be one reason why we haven't seen the subpoena to the AP.

Of course, this is not just about journalists. In this schema, providing information about what our government is doing in our name to citizens constitutes a crime.

This criminalization of journalism is a fundamentally anti-democratic stance.

OBAMA'S HEADLONG RUSH TO COUNTERTERRORISM TRANSPARENCY

By my count, Thursday will be the 100th day since Obama promised, in his State of the Union Address delivered February 12, "to engage Congress to ensure not only that our targeting, detention and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world."

Back then there were, officially at least, just a handful of Gitmo detainees on hunger strike. And it's possible – if DOJ used the two 45-day gags on subpoenas they permit themselves – a subpoena seizing the phone records for 21 AP phone lines had already been issued.

After Obama promised more transparency on drones and other counterterrorism programs, Members of Congress continued to have to demand minimal transparency. On February 20, Rand Paul sent his

third request for that information. On February 27, House Judiciary Chairman Bob Goodlatte repeated that Committee's request to see OLC's drone targeting memos; he also expressed anger that the Administration had refused to send a witness to the hearing.

On March 7, Eric Holder hinted that we would "will hear from the President in a relatively short period of time" on drones and transparency and counterterrorism. On March 8, guards at Gitmo shot non-lethal bullets at detainees. The following day US conducted a drone strike in Pakistan, one of two strikes that month.

On March 11, Progressive Members of Congress sent a letter asking for information on drone targeting.

On April 9, McClatchy reported that most drone strikes had hit low level militants, contrary to public claims; it also revealed the intelligence reports themselves were false.

On April 10, the House Judiciary Committee finally threatened to subpoena the OLC memos authorizing the killing of an American citizen; that was at least the 23rd request for such information from Congress. A week later the Committee would finally get a promise to see just those memos, memos squarely within the Committee's oversight jurisdiction.

On April 13, the military locked down Gitmo, effectively depriving most detainees of the human company they had enjoyed for years. On that day, 43 men were hunger striking.

On April 14, Samir Haji al Hasan Moqbel described, in a NYT op-ed, "I've been on a hunger strike since Feb. 10 and have lost well over 30 pounds. I will not eat until they restore my dignity." That same day, the US launched one of two drone strikes in Pakistan that month.

On April 15, the Tsarnaev brothers attacked the Boston Marathon, reportedly in retaliation for treatment of Muslims in Afghanistan and Iraq.

April 17, a US drone struck the Yemeni village of a Yemeni, Farea al-Muslimi, already scheduled to testify before the Senate Judiciary Committee about how drones turn Yemenis against the US.

On April 21, the number of hunger strikes at Gitmo reached 84 – over half the men there. Six days later, on April 27, that number reached 100. Three more men have since joined the hunger strike.

As those numbers were growing, on April 25, Dianne Feinstein called on Obama to transfer those detainees who have been cleared. On April 30, Obama renewed his promise to close Gitmo. The next day, the White House made clear that the moratorium preventing almost half the detainees, men who have been cleared for transfer, to return home to Yemen, remained in place.

On May 10, the AP learned that DOJ had seized phone records from 21 phone lines with no notice, potentially exposing the sources of up to 100 journalists.

On May 16, in a hearing querying whether Congress should eliminate or expand the September 18, 2001 Authorization to Use Military Force, Assistant Defense Secretary Michael Sheehan testified the war on terror would last at least 10-20 more years. He also said DOD won't be taking over CIA's side of the drone war anytime soon.

Saturday, a drone strike killed at least 4 thus far unidentified men in Yemen.

Which brings us to Thursday when, the WaPo details, Obama will give a speech telling us once again the drone strikes are legal, his desire to close Gitmo is real, and leaks his new CIA Director exacerbated are serious. He will, apparently, also tell us how he plans to make his counterterrorism plan look more like what he promised it would look like 4 years ago.

President Obama will deliver a speech
Thursday at the National Defense

University in which he will address how he intends to bring his counterterrorism policies, including the drone program and the military prison at Guantanamo Bay, Cuba, in line with the legal framework he promised after taking office.

In the interim between when he promised this transparency and when he'll start to sort of deliver it (but not, apparently, any actions to close Gitmo), about 7% of his second term will have passed.

Some of the delay, apparently, comes from the need to address the issues that have been festering during the delay.

Obama was prepared to deliver the speech earlier this month, but it was put off amid mounting concerns over a prisoner hunger strike at Guantanamo Bay and more recently the Justice Department leaks investigation – both of which the revised speech may address.

But otherwise, it appears it has taken 100 days to be able to craft a speech good enough to make his paranoia about secrecy and lip service to human rights in counterterrorism look like something else.

Ah well, at least they've sharply curtailed drone strikes while they've been writing a speech.

AP PRESIDENT FOCUSES ON WHITE HOUSE

CLAIMS ABOUT OBL ANNIVERSARY THREATS

A lot of people are pointing to this Bob Schieffer interview of AP President Gary Pruitt because, later in the interview, Pruitt claims seizing the AP's records without narrowing the scope or notifying the AP is "unconstitutional." While that might make an interesting – though probably unsuccessful – argument if the AP takes this to court (note, Schieffer also asked whether the White House was trying to intimidate the AP, which seems the only basis for making a claim about constitutionality), I actually wanted to point to how Pruitt described the leak.

He emphasizes something that I pointed to here: the AP believed (or now says it believed) this was newsworthy because the White House had repeatedly said the government knew of no credible threat tied to the anniversary.

Pruitt: It was a very big story. And while the Justice Department hasn't told us this is the case, we know there's an announced public investigation to leaks in this case the focus was on this story. It was a story that only AP had. AP obtained knowledge that the US had thwarted an al Qaeda plot to place a bomb on an airliner bound for the United States. And it was round about the one, the year anniversary of the killing of Osama bin Laden.

Schieffer: So this was good news?

Pruitt: This was very good news. **But strangely, at the same time, the Administration, through the Press Secretary and the Department of Homeland Security were telling the American public that there was no credible evidence of a terrorist plot related to the anniversary of the killing of Osama**

bin Laden. So that was misleading to the American public. We felt the American public needed to know this story.

Schieffer: You got this story, at first the people that gave it to you asked you to hold it for a certain time.

Pruitt: Yeah, so what happened was we got this story, we went to the government – the White House, intelligence agencies. They said, “there’s a national security risk if you run this, if you go with this story at this time.” We respected that. We acted responsibly. Withheld the story. We held it for five days. On the fifth day, we heard from high officials in two parts of the government that the national security issues had passed. And at that point we released the story.

Schieffer: Am I correct in saying that when you decided finally to release it then you got word that the White House did not want it released because they wanted to announce it themselves?

Pruitt: The White House wanted to, wanted us to hold it another day because they wanted to announce this successful foiling of the plot.

Schieffer: So they didn’t want to get scooped?

Pruitt: I guess! They didn’t tell us their motive, but that certainly seemed that way to us. We didn’t think that was a legitimate reason for holding the story. The national security issues had passed, we released this story.

Schieffer: And if memory serves the top counterterrorism official at the White House went on television the next morning and told the story.

Pruitt: Yes. **The Administration was very**

aggressive in telling the story. [my emphasis]

What Pruitt is referring to, in part, is that Jay Carney introduced his April 26, 2012 press briefing by offering up the information that there were not threats tied to the OBL anniversary.

On a second matter, I just wanted to let you know that as part of his regular briefings on homeland security and counterterrorism, the President met today with members of his national security team to review the threat picture as we head into the anniversary of the bin Laden takedown.

At this time, we have no credible information that terrorist organizations, including al Qaeda, are plotting attacks in the U.S. to coincide with the anniversary of bin Laden's death. However, we asses that AQ's affiliates and allies remain intent on conducting attacks in the homeland, possibly to avenge the death of bin Laden, but not necessarily tied to the anniversary.

The President thanked his team and directed them to continue taking all necessary measures to protect the American people. [my emphasis]

Note the timing: this announcement came 2 days after Robert Mueller had an unscheduled 45-minute meeting in Yemen, where I suspect he picked up the UndieBomb that had been turned over several days earlier. So when Carney said this, UndieBomb 2.0 (to the extent it was a real plot in the first place) had already been rolled up.

And conflicting claims about threats must be what the AP told the White House was newsworthy, because – even though it played a fairly minor

part of the original AP story – it is what John Brennan emphasized when explaining why he had to have a conference call that would lead to Richard Clarke figuring out the plot was actually a sting.

I said there was never a threat to the American public as we had said so publicly, because we had inside control of the plot and the device was never a threat to the American public.

[snip]

I – I – what I’m saying is that we were explaining to the American public why that IED was not in fact a threat at the time that it was in the control of individuals. When – when we say positive control, inside control, that means that we (inaudible) that operation either environmentally or any number of ways. It did not in any way reveal any type of classified information. And I told those individuals and there are, you know, transcripts that are available of that conversation, “I cannot talk to you about the operational details of this whatsoever.”

I’m still not entirely **why** this was so sensitive to the White House. As I’ve noted, there were several possible ways for Brennan to explain the discrepancy away that wouldn’t have outed their insider.

I think there are several possibilities, which I’ll lay out in a follow-up post. But one detail seems clear: the question of whether and why the Administration was sending mixed signals about the anniversary threat is the bone of contention here.

DID AP LEARN ABOUT FAKE UNDieBOMB 2.0 BECAUSE REAL MARSHALS DEPLOYED TO PREVENT IT?

In my next post, I'm going to revisit this post, where I showed 372 days ago that at least one or two of the major early sources for the most damning information on UndieBomb 2.0 came from non-US based sources.

But before that, check out this passage from the ABC story that first revealed UndieBomb 2.0 was an inside job.

The plot appeared timed to coincide with the first anniversary of Osama bin Laden's death, but the bomber did not get as far as purchasing plane tickets or choosing a flight. **As ABC News first reported last week, the plot led the U.S. to order scores of air marshals to Europe to protect U.S.-bound aircraft.** Flights out of Gatwick Airport in England received 100 percent coverage, according to U.S. officials.

While I haven't been able to find the reporting in question [update: see below], at least according to the article, ABC had been told the previous week – around the same time the AP first learned about the purported UndieBomb 2.0 plot – that there was a massive effort on the part of the US Air Marshals to cover a bunch of US-bound planes ...

... that the Intelligence Community knew had no UndieBomb on board.

Indeed, according to this CNN report, the UndieBomb itself had been recovered around April 20, 10 days before the US Marshals started

covering 100% of the US-bound flights from Gatwick. [Update: Scott Kinney notes there are only 4 flights from Gatwick a day.]

One source told CNN that the device was recovered around April 20, more than a week before the first anniversary of the killing of Osama bin Laden, and was then handed over to the United States for forensic analysis.

And I've long suspected that Robert Mueller picked up the UndieBomb on April 24 when he made an unannounced visit to Yemen for a 45-minute meeting.

Now, this is potentially damning news for the Administration's story for two reasons.

First, if this timeline is correct, the Administration mobilized hundreds and hundreds [update: ABC uses "scores"] of Air Marshals to defend against a threat that they knew had been mitigated over a week earlier.

Oh yeah – and those hundreds and hundreds ["scores"] of Air Marshals sent to Europe to defend against an AQAP air attack that the Marshals believed was scheduled to take place around the anniversary of Osama bin Laden's death on May 1? You don't suppose any of them would go to the press to debunk the Administration's claims that there had been no credible threat on the anniversary? I can just imagine it: "The White House was lying when it claimed there was no threat on May 1. I know because I worked 72-hours straight because we had information there was going to be an AQAP hit on planes," they might say to an ABC or an AP reporter. Which is, of course, precisely the spin the AP had in their story,

The operation unfolded even as the White House and department of homeland security assured the American public that they knew of no al-Qaida plots against the US around the anniversary of bin Laden's death.

Which is, in turn, the reason John Brennan freaked out so badly he gave Richard Clarke the hint that ultimately led to the infiltrator being exposed.

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Moreover, if there really were hundreds [“scores”] of Air Marshals sent to Europe to protect against a threat the IC knew didn’t exist, you don’t suppose any of them would be among the 550 people the FBI has interviewed in this case?

It sure would explain why there were so many people read into a secret that is supposed to be one of the most important secrets ever.

If, in fact, ABC’s reference is correct, if in fact they had reported the previous week that all flights from Gatwick had Air Marshals on board, if in fact those Air Marshals were on board, it would explain a great deal about this story.

Update: On April 30, around 10 days after the US

recovered the UndieBomb (which was never described as a cavity bomb), ABC had this report:

DIANE SAWYER (ABC NEWS)

(Off-camera) Good evening. As we come on the air, ABC News has learned that US authorities are studying a new terror threat tonight, members of al Qaeda using body bombs, explosives that have been surgically implanted in their bodies to evade security. Tomorrow, it will be the one-year anniversary of Osama bin Laden's death, making this week a time of heightened concern on the ground and in the sky. And ABC's chief investigative correspondent Brian Ross is here with these new details. Brian?

BRIAN ROSS (ABC NEWS)

(Off-camera) Diane, well, tonight American and European authorities tell ABC News, they fear al Qaeda will use these so-called body bombs to target Americans overseas and US flights coming in from overseas.

GRAPHICS: SECURITY WATCH

BRIAN ROSS (ABC NEWS)

(Voiceover) As a result, **security at several airports in the United Kingdom and elsewhere in Europe and the middle east has been substantially stepped up, with a focus on US carriers. And additional federal air marshals have been shifted overseas in advance of this week's anniversary of the bin Laden raid.** The plot is not so far fetched. Medical experts say there is plenty of room in the stomach area for surgically implanted explosives.

DOCTOR MARK MELROSE (URGENT CARE
MANHATTAN)

The surgeon would open the abdominal

cavity and literally implant the explosive device in and amongst the internal organs.

BRIAN ROSS (ABC NEWS)

(Off-camera) Right in there?

DOCTOR MARK MELROSE (URGENT CARE
MANHATTAN)

Right in between the intestines, the liver and the stomach. [my emphasis]

And the following day – on the anniversary of the OBL killing – they replayed the report.

So ABC clearly reported Air Marshals had been deployed in response to this threat that had been mitigated 10 days earlier.

Did our government send hundreds of Air Marshals to Europe to make this fake UndieBomb claim credible?

Update: Here's what National Security Council sent out after the AP published their story on May 7 of last year.

The President was first informed about the plot in April by his Homeland Security and Counterterrorism Advisor John Brennan, and he has received regular updates and briefings as needed from his national security team. While the President was assured that the device did not pose a threat to the public, he directed the Department of Homeland Security and law enforcement and intelligence agencies to take whatever steps necessary to guard against this type of attack. The disruption of this IED plot underscores the necessity of remaining vigilant against terrorism here and abroad. The President thanks all intelligence and counterterrorism professionals involved for their outstanding work and for serving with the extraordinary skill and

commitment that their enormous responsibilities demand. [my emphasis]

Note the statement admits Obama ordered “Homeland Security” (which includes TSA which includes the Air Marshals); it just doesn’t say they got deployed a week after the UndieBomb got picked up.

DID TOMMY VIETOR HANG OUT CIA ON UNDIEBOMB 2.0?

The same day that the White House released 94 pages of Benghazi emails, which not only show that most at CIA supported the talking points used by the Administration but also include annotations of the CIA roles involved that reveal far more about CIA’s structure than any FOIA response I’ve ever seen, Tommy Vietor went on the record about UndieBomb 2.0 with both the WaPo and MSNBC. It appears he did so to reinforce the fear-mongering language Eric Holder used (though like Holder, Vietor doesn’t explain why John Brennan got a promotion after contributing to such a damaging leak). He said this to WaPo.

Vietor said that it would be a mistake to dismiss the unauthorized disclosure because al-Qaeda failed to carry out its plot.

“We shouldn’t pretend that this leak of an unbelievably sensitive dangerous piece of information is okay because nobody died,” he said.

But the WaPo account also seems to serve (like the Benghazi email dump does) to place blame on

CIA.

It answers a question I hinted at yesterday: whether the CIA and White House were on different pages on what to do with the AP story. Reportedly, after AP had given the CIA time to kill Fahd al-Quso (the WaPo doesn't mention that was the purpose of the delay), CIA's Mike Morell told the AP the security issue had been addressed, but asked for one more day. As AP considered that request, the White House overrode that discussion.

Michael J. Morell, the CIA's deputy director, gave AP reporters some additional background information to persuade them to hold off, Vietor said. The agency needed several days more to protect what it had in the works.

Then, in a meeting on Monday, May 7, CIA officials reported that the national security concerns were "no longer an issue," according to the individuals familiar with the discussion.

When the journalists rejected a plea to hold off longer, the CIA then offered a compromise. Would they wait a day if AP could have the story exclusively for an hour, with no government officials confirming it for that time?

The reporters left the meeting to discuss the idea with their editors. Within an hour, an administration official was on the line to AP's offices.

The White House had quashed the one-hour offer as impossible. AP could have the story exclusively for five minutes before the White House made its own announcement. AP then rejected the request to postpone publication any longer.

This must be the crux of the animosity here. CIA

told AP the danger had passed (though according to some reports, our informant was still in Yemen). At that point, the AP should have and ultimately did feel safe to publish. But then the White House made this ridiculous request, effectively refusing to let AP tell this story before the White House had a shot at it.

Which is why this claim, from Tommy Vietor, is so absurd.

But former White House national security spokesman Tommy Vietor, recalling the discussion in the administration last year, said officials were simply realistic in their response to AP's story. They knew that if it were published, the White House would have to address it with an official, detailed statement.

"There was not some press conference planned to take credit for this," Vietor said in an interview. "There was certainly an understanding [that] we'd have to mitigate and triage this and offer context for other reporters."

Jeebus Pete! If your idea of "mitigating and triaging" AP's fairly complimentary story is to make it far, far worse by hinting about the infiltrator, you're doing it wrong!

Vietor, who presumably had a role in setting up the conference all at which Brennan tipped off Richard Clarke (though according to Brennan, he did not sit in on the call), insists to MSNBC that telling someone we had "inside control" of this plot does not constitute a gigantic clue that the entire plot was just a sting.

Tommy Vietor, then chief national security spokesman for the White House, disputed the idea that Brennan disclosed sensitive details in his background briefing and said it was "ridiculous" to equate Brennan's use of the phrase "inside control" with having an

“informant.”

It’s a nonsense claim, of course. Someone fucked up the “mitigating and triaging” process, and that’s what made this leak so dangerous, not AP’s initial story. But, presumably because AP didn’t let White House tell the official story before they reported their scoop (and did they plan on telling us all we had inside control on the op if they got to tell the story first?!?), the AP has, as far as we know, borne the brunt of the investigation into the leak.

For the moment let me reiterate two more details.

It appears that Vietor is blaming CIA for the way this went down. And guess what? The guy who blathered about “inside control” has now taken over the CIA.

Then there’s this. Eric Holder noted yesterday that the investigation into David Petraeus for leaking classified information – understood to be limited to his mistress Paula Broadwell, mind you – is ongoing. That means the FBI interview he had on April 10 was not sufficient to answer concerns about his involvement in leaking classified information.

It’s interesting this is coming down to a conflict between White House and CIA, isn’t it?

DEAR ERIC HOLDER: YOU’RE DOING RECUSAL WRONG

Let me start this post by saying I think it is absolutely appropriate for Eric Holder to have recused himself from the UndieBomb 2.0 investigation, in part because – as someone read into the UndieBomb 2.0 operation, he was

interviewed by the FBI (though so was James Cole, who is now in charge of the investigation), and he turned over his own phone contacts to the FBI – but also because top Administration officials like John Brennan at least should be under close scrutiny in this investigation.

Nor do I think, in his recusal, Eric Holder did anything in bad faith. I have zero reason to believe Holder is tampering with this investigation, in any way shape or form.

But Jeebus, Holder is doing this entire recusal thing wrong.

That's true, first of all, because with a rabid Congress (at the time he recused from the investigation and now) accusing him of wrongly delegating this investigation to Ronald Machen in an investigation that could net incredibly powerful people as suspects, Holder did not write his recusal – or a delegation of authority of Attorney General powers – to James Cole, who is overseeing the investigation.

Now, Holder claims not to remember whether he memorialized his recusal in past cases, including the John Edwards investigation – the most high profile case in which he has recused. And though George Holding, who conducted that investigation and now represents the Raleigh, NC, area in Congress, was in the room, I'm not sure they clarified whether he had written anything down there, either. Holder was, however, very clear about what authorities he delegated to Patrick Fitzgerald when he investigated the John Adams Society, which led to the prosecution of John Kiriakou, having sent 3 letters (1, 2, 3) memorializing the limits of Fitz' authority.

I think part of the problem is that Holder didn't really appoint special counsels to investigate this matter, even while he made a big deal of appointing the people who – US Attorney for DC Ronald Machen's appointment rather than US Attorney for Eastern District of

VA Neil MacBride aside – would have been investigating it anyway. Dumb. Congress was screaming for some kind of formality, and Holder didn't establish that formality.

And then there's the journalist-subpoenaing precedent of the Plame investigation where Fitz several times got letters clarifying his authority. The first of those reads,

By the authority vested in the Attorney General by law, including 28 U. S .C. §§ 509, 510, and 515, and in my capacity as Acting Attorney General pursuant to 28 U.S.C. § 508, I hereby delegate to you all the authority of the Attorney General with respect to the Department's investigation into the alleged unauthorized disclosure of a CIA employee's identity, and I direct you to exercise that authority as Special Counsel independent of the supervision or control of any officer of the Department.

This came in handy later in the investigation when Libby's lawyers challenged Fitz' authority.

Then, Holder's recusal hasn't been very strict. Most troublingly, Eric Holder reviewed the letter James Cole sent to the AP (though Holder saw a draft which, according to his press conference, included things like details on the specific scope of the subpoena that don't appear in the final letter). NPR's Carrie Johnson asked him about this.

Johnson: Is that normal practice when you're recused from a case?

Holder: No, I just wanted to see the le—I saw I mean I saw saw the draft letter this morning. And I just wanted to have an opportunity to see what it looked like so I'd have at least some sense of the case in case there were things in the letter that I could talk about with the press.

Reviewing this letter – particularly before changes got made to it!! (changes which appear to have deprived the AP of full notice of the call record grab) – simply isn't appropriate for someone recused from the case!

Again, I'm not suggesting malice here.

But the AP has already – rightly, in my opinion – challenged whether DOJ complied with its own guidelines on media subpoenas. In particular, AP complained that they had not been given notice and an opportunity to cooperate. That's one of the guidelines that requires AG involvement.

Negotiations with the affected member of the news media shall be pursued in all cases in which a subpoena for the telephone toll records of any member of the news media is contemplated where the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the integrity of the investigation in connection with which the records are sought. **Such determination shall be reviewed by the Attorney General when considering a subpoena authorized under paragraph (e) of this section.**

Yet the guy who signed this subpoena and with it signed off on the claim that alerting AP to the subpoena would do grave damage to the investigation – James Cole – apparently has no piece of paper giving him authority to sign it.

If DOJ ultimately decides to charge the AP's sources, if that person has the kind of legal representation DC bigwigs often have, I fully expect them to challenge every bit of their prosecution. After all, by subpoenaing the AP, Cole claimed that DOJ could not get the information from any other source. So if AP's sources are indicted, they can rest assured that their prosecution went through this bottleneck of an Acting AG who had no paperwork to prove he had the authority to sign off on the claims he

was making to get information he was certifying was absolutely necessary to find them. And from this subpoena forward, everything else will be fruit of a tainted AG, at least if you've got fancy lawyers.

Dumb.

One last thing. Also in today's hearing, Holder admitted that it probably would have been a good idea to write down this recusal thing in public. Which, if they do ever charge AP's sources and if said sources have the resources to make this obvious challenge, they'll cite in court to document that **even the guy who delegated this authority** thinks it would be smarter if he did so in writing.

Seriously, this entire recusal process has been an own goal. As I said, I don't think DOJ is pulling anything fishy. But the entire point of recusing is to ensure there's proof nothing fishy happened. And in this case, DOJ has anything but.

THERE'S A PLACE FOR RESOLVING DISPUTES, AND THE ADMINISTRATION CHOSE NOT TO USE IT

As I was writing my flurry of posts on the AP call record seizure yesterday, former National Security Council Spokesperson Tommy Vietor and I were chatting about the facts of the case on Twitter. He disputes two of the AP's claims: that they held the story as long as the Administration wanted them to, and that the White House had planned an announcement.



Now, as I have said in the past, I'm somewhat skeptical of the White House's claims, given that their story changed as the story was blowing up. Furthermore, the White House had done a big dog-and-pony show on a similar operation – the thwarting of the Toner Cartridge plot in 2010, which was also tipped by a Saudi infiltrator. So it is reasonable to believe they planned to do another one in 2012.

That said, note that the AP's latest version of this is rather vague about whom they were discussing the story with, referring only to "federal government officials," whereas previously they had referred to "White House and CIA" requests.

So there may well be some confusion about what happened, or it may be that David Petraeus' CIA was planning a dog-and-pony show that the White House didn't know about. No one seems to dispute, however, that the AP did consult with the White House and CIA, and did hold the story long enough to allow the government to kill Fahd al-Quso, all of which the Administration seems to have forgotten.

In short, behind the broad call record grab, there's a legitimate dispute about key details regarding how extensively the AP ceded to White House wishes before publishing a story the Attorney General now claims was the worst leak ever.

But there's a place where people go to resolve such disputes. It's called a court.

And as this great piece by the New Yorker's counsel, Lynn Oberlander on the issue notes, one of the worst parts of the way DOJ seized the AP records is that it prevented the AP from challenging the subpoena – and the details that are now being disputed – in court.

The cowardly move by the Justice Department to subpoena two months of the A.P.'s phone records, both of its office lines and of the home phones of individual reporters, is potentially a breach of the Justice Department's own guidelines. Even more important, it prevented the A.P. from seeking a judicial review of the action. Some months ago, apparently, the government sent a subpoena (or subpoenas) for the records to the phone companies that serve those offices and individuals, and the companies provided the records without any notice to the A.P. If subpoenas had been served directly on the A.P. or its individual reporters, they would have had an opportunity to go to court to file a motion to quash the subpoenas. What would have happened in court is anybody's guess—there is no federal shield law that would protect reporters from having to testify before a criminal grand jury—but the Justice Department avoided the issue altogether by not notifying the A.P. that it even wanted this information. Even beyond the outrageous and overreaching action against the journalists, this is a blatant attempt to avoid the oversight function of the courts.

I obviously don't know better than Oberlander what would have happened. But I do suspect the subpoena would have been – at a minimum –sharply curtailed so as to shield the records of the 94 journalists whose contacts got sucked up along with the 6 journalists who worked on the story.

Moreover, I think these underlying disputed facts – as well as the evidence that the gripe about the AP story (as opposed to the later stories that exposed MI5's role in the plot) has everything to do with the AP scooping the White House – may well have led a judge to throw out the entire subpoena.

If the AP had been able to present proof, after all, that the White House (or even the CIA) had told them the story wouldn't damage national security, then it would have had a very compelling argument that the public interest in finding out their source is less urgent than the damage this subpoena would do to the free press.

So I don't know what would have happened. But I do know it is a real dispute that may well have a significant impact on the subpoena.

And that's why we have courts, after all, to review competing claims.

Of course, the Obama Administration has an extensive history of choosing not to use the courts as an opportunity to present their case. Most importantly (and intimately connected to this story), the government has chosen not to present their case against Anwar al-Awlaki on four different occasions: the Nasser al-Awlaki suit, the Umar Farouk Abdulmutallab trial, the ACLU/NYT FOIAs, and now the wrongful death suit. This serial refusal to try to prove the claims they make about their counterterrorism efforts in Yemen doesn't suggest they're very confident that the facts are on their side.

Which may well be why DOJ chose to just go seize the phone contacts rather than trusting their claims to a judge.

I WONDER WHAT FAHD AL-QUSO THOUGHT OF THE AP'S UNIDIEBOMB 2.0 STORY?

It turns out Fahd al-Quso, whom the government alleged was Al Qaeda in the Arabian Peninsula's external operations director when he was killed

in a drone strike May 6 of last year, never lived to see the AP's UndieBomb 2.0 story, which presumably described a plot he masterminded. That's because he died during the time period AP was delaying publication at the government's request.

As part of its effort to show how ridiculous it is for the Administration to seize 20 phone lines of call records to investigate a story on which the AP ceded to White House requests, the AP released this timeline of Administration statements surrounding their UndieBomb 2.0 plot.

Most of the dates were previously known (and have appeared in my posts on the subject). But I believe this one—the date AP first went to the White House with the UndieBomb story—is new.

May 2, 2012: Federal government officials ask the AP to delay publishing a story about a foiled plot by al-Qaida's affiliate in Yemen to destroy a U.S.-bound airliner, which the AP had recently discovered. They cite national security concerns. The AP agrees to temporarily delay publishing until national security concerns are allayed.

Which makes the timeline from that period look like this:

April 18: Greg Miller first reports on debate over signature strikes

Around April 20: UndieBomb 2.0 device recovered

Around April 22: John Brennan takes over drone targeting from JSOC

April 22: Drone strike that—WSJ reports, “Intelligence analysts [worked] to identify those killed” after the fact, suggesting possible signature strike

April 24: Robert Mueller in Yemen for 45 minute meeting, presumably to pick up UndieBomb

April 25: WSJ reports that Obama approved use of signature strikes

April 30: John Brennan gives speech, purportedly bringing new transparency to drone program, without addressing signature strikes

May 2: Government asks AP to delay reporting the UndieBomb 2.0 story, citing national security

May 6: Fahd al-Quso killed

May 7: Government tells AP the national security concerns have been allayed; AP reports on UndieBomb 2.0

May 8: ABC reports UndieBomb 2.0 was Saudi-run infiltrator

May 15: Drone strike in Jaar kills a number of civilians

While it was fairly clear in any case (and reporting had linked the UndieBomb 2.0 plot with Quso's death), this timeline makes it crystal clear.

The delay was about killing Fahd al-Quso.

And yet, even after the AP waited 5 days to break the story, allowing the government to drone kill a human being in the interim, the Administration still launched a witch hunt against the AP for a story that became damaging only after John Brennan ran his blabby mouth.

AP RESPONSE TO DOJ REVEALS THEY

COULDN'T HAVE HAD MOST DAMAGING INFO BRENNAN EXPOSED

The AP has a scathing reply to Deputy Attorney General's claim that the subpoena he signed fulfilled DOJ guidelines on scope and notice. Among other details, it reveals the AP only learned via Cole's letter that DOJ seized just portions of the call records of April and May 2012.

In addition, the AP makes the same point I keep making: the White House had told AP the risk to national security had passed and that it planned to release this information itself the next day.

Finally, they say this secrecy is important for national security. It is always difficult to respond to that, particularly since they still haven't told us specifically what they are investigating.

We believe it is related to AP's May 2012 reporting that the U.S. government had foiled a plot to put a bomb on an airliner to the United States. We held that story until the government assured us that the national security concerns had passed. Indeed, the White House was preparing to publicly announce that the bomb plot had been foiled.

The White House had said there was no credible threat to the American people in May of 2012. The AP story suggested otherwise, and we felt that was important information and the public deserved to know it.

Note what else is implied by the comment: the AP believed that the threat had posed a real threat, in contradiction to what the White House had been claiming at the time.

If they believed the plot was a real threat, though, then it means they didn't know it was just a Saudi manufactured sting. The AP didn't, apparently, know, the detail that Brennan's blabbing led to the reporting of, that the plot was really just a sting led by a British Saudi infiltrator.

The White House had several choices last year.

They could have quietly informed the AP that the threat had actually been thwarted a week or so before May 1, which is one basis for their claim they had no credible threats of terrorist attacks; that would have allowed CIA to claim credit for thwarting the attack without making John Brennan look like a liar.

They could have just shut up, and dealt with fairly narrow push-back amid the hails of glory for intercepting a plot. (Note, even I only realized how central the May 1 detail was to Brennan's pique now that I've read his confirmation testimony in conjunction with the original article.)

Or, in a panic, Brennan could do what he did, which led to the far more damaging details of this Saudi manufactured plot to be exposed.

It's pretty clear Brennan chose the worst possible option, and the ensuing outrage is the real reason why AP is being targeted.

**IF UNIDIEBOMB 2.0 IS
ONE OF THE WORST
LEAKS OF HOLDER'S
CAREER, WHY IS JOHN**

BRENNAN CIA DIRECTOR?

In a press conference today, Eric Holder didn't let refusal from the UndieBomb 2.0 leak investigation stop him from commenting on it. Among other things, he claimed this one of the most serious leaks he has seen since he started as a prosecutor in 1976.

This was a very serious leak. A very, very serious leak. I've been a prosecutor since 1976, and I have to say that this is among, if not the most serious, it is within the top two or three most serious leaks I've ever seen. It put the American people at risk. And that is not hyperbole. It put the American people at risk.

But here's the thing. According to his own sworn testimony, John Brennan had a key role in providing hints that led to the actually damaging parts of the leak.

I said there was never a threat to the American public as we had said so publicly, because we had inside control of the plot and the device was never a threat to the American public.

[snip]

I – I – what I'm saying is that we were explaining to the American public why that IED was not in fact a threat at the time that it was in the control of individuals. When – when we say positive control, inside control, that means that we (inaudible) that operation either environmentally or any number of ways. It did not in any way reveal any type of classified information. And I told those individuals and there are, you know, transcripts that are available of that conversation, "I cannot talk to you

about the operational details of this
whatsoever.”

Sure, Brennan claims this didn't amount to sharing classified information. But he could have just said the plot was actually rolled up on April 22. Instead, he let slip that we (actually, the British and Saudis) had inside control, which led Richard Clarke to figure out what had happened.

Even if DOJ doesn't consider Brennan a subject or target of this investigation (which is itself noteworthy), his part in the leak still shows really poor judgment and information security.

So if this leak was so damaging, why did a guy who had a central part in it get promoted?