

# MICHAEL HAYDEN, TROLL EXTRAORDINAIRE

"Intelligence agencies often act on the edges of executive prerogative and move forward based on a narrow base of lawfulness and limited congressional notification," says Michael Hayden, the guy who oversaw Bush's illegal wiretap for 2.5 years before the full Gang of Eight first got adequately briefed, and who never briefed Congress on CIA's assassination program.

In the same piece, Hayden hails media editors who ceded to his requests to hold or adjust a story.

So, how do we limit the damage? Well, journalists will have to expand the kind of sensitivities to the national welfare that some already show. In those calls I made to slow, scotch or amend a pending story, most on the other end of the line were open to reasonable arguments. In one case a writer willingly changed a reference that had read "based on intercepts" to "based on intelligence reports," somewhat amazed that that change made much of a difference. (It did.)

But then insists the UndieBomb 2.0 story – for which AP editors had made precisely those kinds of concessions – was right to be investigated because John Brennan's push back to it exposed a mole.

The two prominent cases being debated were indeed serious leaks, because they touched upon sources, not just information.

In the case of the Associated Press report on a Yemen-based bomb plot, the source had apparently penetrated an al Qaeda network and there were hopes that

he could continue to be exploited.

[snip]

And, since the Yemen source appears to have actually been recruited by a liaison partner, the impact of a leak goes far beyond our own service. In that same talk with bureau chiefs, I pointed out that several years before 9/11, one chief of station reported that a press leak of liaison intelligence had “put us out of the (Osama) bin Laden reporting business”.

In both stories, investigations were in order. Journalists, of all people, should understand the need to protect sources and relationships.

As the LAT story Hayden links to says clearly, “The AP did not mention the informant in its report.” And, as I laid out some weeks back, to believe our mole was going to return, the former head of the CIA would have to believe that AQAP shows great tolerance for recruits who fuck up and then return right after high ranking operatives get drone killed.

Because to maintain that claim, you’d have to explain how an AQAP operative who had been entrusted with the latest version of Ibrahim al-Asiri’s UndieBomb sometime in early April, had left (at least as far as Sanaa), had not apparently succeeded in his mission (which was, after all, meant to be a suicide bombing), could return to AQAP without the UndieBomb and infiltrate even further than he had the first time.

“Oh, hi, AQAP gatekeeper” – their story must imagine the mole saying as he returned to AQAP – “I’ve both failed in my mission and somehow lost the bomb you gave me, but based on that would you be willing to let me spend some quality time with even higher-ranking AQAP

operatives?"

In short, Hayden appears to have decided it'd be a good idea to ignore the facts, good sense, and his own history so as to suggest that the Obama Administration is worse than the reasonable old Bush Administration.

But the investigations have been very aggressive and the acquisition of journalists' communications records has been broad, invasive, secret and—one suspects—unnecessary.

A quick survey of former Bush administration colleagues confirmed my belief that a proposal to sweep up a trove of AP phone records or James Rosen's e-mails would have had a half-life of about 30 seconds in that administration.

Just ignore the fact that the government was asking people questions about James **Risen's** phone contacts – indicating they had probably doing just what the Obama Administration did to the AP reporters, only without telling him – before Obama took over.

But here's my favorite part:

The government may also want to adjust its approach to enforcement. The current tsunami of leak prosecutions is based largely on the Espionage Act, a blunt World War I statute designed to punish aiding the enemy. It's sometimes a tough fit. The leak case against former National Security Agency employee Thomas Drake collapsed of its own overreach in 2011.

Perhaps in many of these cases the best approach is not through the courts or the Department of Justice.

Remember, Drake was investigated for telling a

journalist about Hayden's own boondoggle that cost many times what NSA's existing better solution cost. There is virtually no way the investigation against him didn't rely, in part, on Hayden's own testimony.

And now, 6 years after the investigation into Drake started in earnest, Hayden suggests Drake shouldn't have been criminally investigated at all.

Hayden can afford that very belated generosity, of course. He's been profiting off the same kind of boondoggles Drake tried to expose for years now.

I mean, sure, the main jist of what Hayden says is true: the Administration is pursuing leaks far too aggressively. But coming from a guy who has long benefitted from the Executive Branch asymmetric abuse of secrecy, he's not exactly the right person to be making the point.

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## **JOURNALISTS: ERIC HOLDER BELIEVES YOU'RE PROBABLY A CRIMINAL BUT WON'T CHARGE YOU**

As I noted the other day, Eric Holder seems intent on calling journalists whom he believes are co-conspirators in a criminal leak something else.

Which is why I think this detail, from Politico's leaks-about-a-meeting-about-leaks story, is the most telling I've seen on the Holder meeting.

"The guidelines require a balance between law enforcement

and freedom of the press, and we all argued that the balance was out of kilter, with the national security and law enforcement interests basically overwhelming the public's right to get information," one journalist at the meeting said. "The language concerning 'aiding and abetting' comes out of the Privacy [Protection] Act, and they discussed trying to revise that language so that reporters don't need to be defined as co-conspirators in order to execute search warrants."

This is a reference to part of the Privacy Act that prohibits the government from seizing media work product unless it is connected to a crime (see [pages 5 ff](#) for how it affected the James Rosen warrant application). After claiming Rosen was aiding and abetting a violation of the Espionage Act and therefore his emails could be seized, the FBI then said that since he was potentially criminally liable, he should not get notice. In other words, the aiding abetting was an investigative tactic DOJ used to get around protections put into place just for someone like Rosen.

And DOJ's solution for abusing a protection meant to protect someone like Rosen is apparently to simply redefine the law, so it can overcome those protections without having to accuse Rosen of being a criminal.

The outcome would remain the same; DOJ would just avoid saying mean things about people associated with powerful media outlets.

But the letter Principal Assistant Deputy Attorney General Peter Kadzik sent to answer Bob Goodlatte and Jim Sensenbrenner's questions about Eric Holder's testimony about whether he ever prosecuted a journalist makes it clear he thinks James Rosen probably is a criminal, regardless of what he calls it.

When the Department has initiated a criminal investigation into the unauthorized disclosure of classified information, the Department must, as it does in all criminal investigations, conduct a thorough investigation and follow the facts where they lead. Seeking a search warrant is part of an investigation of potential criminal activity, which typically comes before any final decision about prosecution. Probable cause sufficient to justify a search warrant is different from a decision to bring charges for that crime; probable cause is a significantly lower burden of proof than beyond a reasonable doubt, which is required to obtain a conviction on criminal charges.

Note the slippage here: Kadzik says the standard for a probable cause warrant is different than the standard for charging, then says a probable cause warrant is different from the standard for convicting.

What Kadzik is implicitly suggesting is that while DOJ might think Rosen was a criminal co-conspirator, they'd never win their case against him. So they never considered charging him.

I joked some weeks ago that journalists should take solace in all this: Obviously, Eric Holder holds them in precisely the same category as banksters, those who are guilty of a crime but that DOJ chooses not to charge with one.

This letter seems to support this.

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# MANNING PROSECUTION: I DON'T THINK THE GOVERNMENT'S REPORT SAYS WHAT IT CLAIMS IT DOES

Kevin Gosztola reports that the government plans to use a document Bradley Manning is alleged to have accessed as part of its proof that he knew he'd be leaking any further information to al Qaeda and other enemies by leaking it to WikiLeaks.

Morrow revealed a new aspect of the case against Manning, namely that they believed because Manning had accessed an Army intelligence report on the "threat" posed by WikiLeaks he would have known that WikiLeaks was valuable to the nation's enemies. It is an argument that essentially uses his decision to access the report against him. (Keep in mind the government maintains he should never have read this report.)

The report itself is actually ambiguous about whether or not our adversaries were using WikiLeaked data. It both presents it as a possibility that we didn't currently have intelligence on, then presumes it.

(S//NF) Will the Wikileaks.org Web site be used by FISS, foreign military services, foreign insurgents, or terrorist groups to collect sensitive or classified US Army information posted to the Wikileaks.org Web site?

(S//NF) Will the Wikileaks.org Web site

be used by FISS, foreign military services, or foreign terrorist groups to spread propaganda, misinformation, or disinformation or to conduct perception or influence operations to discredit the US Army?

[snip]

(S//NF) It must be presumed that Wikileaks.org has or will receive sensitive or classified DoD documents in the future. This information will be published and analyzed over time by a variety of personnel and organizations with the goal of influencing US policy. In addition, it must also be presumed that foreign adversaries will review and assess any DoD sensitive or classified information posted to the Wikileaks.org Web site. [my emphasis]

But I'm more interested in three other things Manning would have learned from that document. First, he'd have learned from this paragraph that the way to make sure someone didn't fulfill his "obligation to expose alleged wrongdoing within DoD through inappropriate venues" is not training about the appropriate venues to expose DOD wrongdoing, but via better info security – that is, by ensuring that alleged wrongdoing remains secret.

(U//FOUO) The unauthorized release of DoD information to Wikileaks.org highlights the need for strong counterintelligence, antiterrorism, force protection, information assurance, INFOSEC, and OPSEC programs to train Army personnel on the proper procedures for protecting sensitive or classified information, to understand the insider threat, and to report suspicious activities. In addition, personnel need to know proper procedures for reporting the loss, theft, or compromise of hard or soft copy documents with sensitive information or classified information to



the appropriate unit, law enforcement, or counterintelligence personnel. Unfortunately, such programs will not deter insiders from following what they believe is their obligation to expose alleged wrongdoing within DoD through inappropriate venues. Persons engaged in such activity already know how to properly handle and secure sensitive or classified information from these various security and education programs and has chosen to flout them.

And of course, the INFOSEC DIA believed was the answer to potential exposure of alleged wrongdoing is precisely the INFOSEC that the Army had failed to achieve 18-24 months later, when Manning was leaking this material, the INFOSEC DOD refused to implement even after a real adversary had inserted malware into our computers in Iraq via use of removable media, the same means Manning used to get this information.

If this document is proof Manning should have known (the conflicting statements notwithstanding) that leaking to WikiLeaks would amount to leaking to our adversaries, it's also proof that DOD knew they had an INFOSEC problem that might lead to leaked information, one they pointedly didn't address.

But I'm also amused by one of the case studies in the danger of leaked WikiLeaks information: that it might be used to suggest DOD is getting gouged by our contractors working on JIEDDO, our counter-IED program.

(S//NF) The author of the above-mentioned article incorrectly interprets the leaked data regarding the components and fielding of the Warlock system, resulting in unsupportable and faulty conclusions to allege war profiteering, price gouging and increased revenues by DoD contractors involved in counter-IED development efforts.

Mind you, the claim that JIEDDO contractors were robbing us blind is a conclusion shared by some very respected defense reporters.

Launched in February 2006 with an urgent goal – to save U.S. soldiers from being killed by roadside bombs in Iraq – a small Pentagon agency ballooned into a bureaucratic giant fueled by that flourishing arm of the defense establishment: private contractors.

An examination by the Center for Public Integrity and McClatchy of the Joint Improvised Explosive Device Defeat Organization revealed an agency so dominated by contractors that the ratio of contractors to government employees has reached six to one.

As well as by GAO itself.

In other words, while this internal report claimed WikiLeaks inaccurately concluded that JIEDDO was a boondoggle, in fact WikiLeaks' conclusion might have been one of the earliest indications of a problem later confirmed by other outlets, that JIEDDO was a boondoggle.

Even by 2009, Manning might have read this document and concluded that WikiLeaks had served precisely the outcome it claimed, exposing wrongdoing.

Finally, check out some of these classification marks, including the questions about whether or not our adversaries might exploit publicly available information bolded above. Not conclusions, mind you, but questions (intelligence gaps, really).

That's a secret we have to keep from our allies? Really?

No. It's not. It's an example of rampant overclassification.

To sum up: not only doesn't this report assert that leaking to WikiLeaks amounts to leaking to

our adversaries; on the contrary, the report identifies that possibility as a data gap. But it also provides several pieces of support for the necessity of something like WikiLeaks to report government wrongdoing.

Update: Swapped in Gosztola's corrected post on CIA/Army Intel document.

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## NAVY V. EGAN, NOT JUST BRANZBURG V. HAYES, NEEDS FIXED

Today, 340 new journalists will join the 10 or so who have been covering the Bradley Manning prosecution closely for the last several years; his trial starts today at Fort Meade.

Expect to see a bunch of essays on secrecy to mark the beginning of the trial.

This one, in which Steven Coll calls for the Supreme Court to revisit the Branzburg v. Hayes decision that established a spirit but not a law protecting press sources, has already generated a lot of attention.

In the long run, to rebalance the national-security state and to otherwise revitalize American democracy, the United States requires a Supreme Court willing to deepen protections for investigative reporters, as the majority in Branzburg would not.

Among some other minor factual inaccuracies (including what the AP UndieBomb 2.0 leak was originally about), it includes this claim.

[Obama's] longest-serving advisers are disciplined and insular to a fault; press leaks offend their aesthetic of

power.

While I agree Obama's advisors are insular to a fault, and agree they revel in an aesthetic of power, they do not despise all press leaks. Even aside from the typical policy debate leaks of classified information, the White House has long reveled in "leaking" classified information to selected members of the press, to get the information out there on its own terms. The tactic is not new – it is precisely the AI cut-out approach the Bush Administration used to get us into the Iraq War. But the Obama Administration may have expanded its use (that is actually the reason Republicans in Congress were demanding investigations of the leaks that followed the AP story, the ones that, unlike the AP, exposed our mole).

Which is why Coll proposes an inadequate solution to what I agree is the key problem.

Obama inherited a bloated national-security state. It contains far too many official secrets and far too many secret-keepers—more than a million people now hold top-secret clearances. Under a thirty-year-old executive order issued by the White House, the intelligence agencies must inform the Justice Department whenever they believe that classified information has been disclosed illegally to the press. These referrals operate on a kind of automatic pilot, and the system is unbalanced. Prosecutors in Justice's national-security division initially decide on whether to make a criminal case or to defer to the First Amendment. The record shows that in recent years the division has been bent on action.

I'm not opposed to establishing clearer laws about when a journalist's sources may be protected. But that can be used – as Dick Cheney tried to use it – as a screen for his exposure

of Valerie Plame. Protecting journalists' sources will not only protect real whistleblowers, but it will also protect the system of official leaks that both Bush and Obama have used to accrue power and avoid accountability.

So not only is fixing *Branzburg v. Hayes* not enough to fix our "unbalanced ... bloated national security state," it doesn't get at the underlying problem

As a threshold measure, journalists should be calling for the limitation or repeal of the Espionage Act, which is the real stick Obama is using to cut down on unsanctioned leaks. It's bad enough for whistleblowers to risk losing their clearance, and with it, a well-compensated livelihood. But as soon as you start talking extended prison sentences, as soon as you start accusing whistleblowers of being worse than an enemy's spy because they shared damning information with the public generally, that's going to silence unsanctioned leaks.

Just as importantly, this entire structure of abuse of power rests on a different SCOTUS decision, *Navy v. Egan*, which gives the Executive absolute control over security clearances (and therefore the less powerful leverage usually wielded against whistleblowers, the ability to strip their clearance), but which has been interpreted by Bush and Obama to give the Executive unfettered authority to determine what is secret and what is not. This decision – which is precisely what David Addington told Scooter Libby he could rely on to justify outing Plame on Cheney's order – is also what the Obama Administration cited when it refused to litigate *al-Haramain* and in so doing granted the Bush Administration impunity for illegal wiretapping. The Executive's claim to have unlimited authority to decide what is secret and not is also what prevents the Senate Intelligence Committee from declassifying the torture report on its own authority. It is also the basis for the authority to stall releasing video of US

helicopters gunning down a Reuters team to Reuters under FOIA, which led to Manning leaking it to WikiLeaks himself.

The Obama and Bush Administrations have claimed that no one – not Congress, not the Courts – has the authority to review their arbitrary use of secrecy to accrue more power. That claim is an expansive reading of *Navy v. Egan*, but thus far not one anyone has challenged before SCOTUS. And that is what has enabled them (with the limited exception of the Plame outing) to avoid all consequences for their asymmetric use of leaks.

So, yes, it would be useful if SCOTUS decided that journalists and others engaging in legitimate investigation can protect sources, especially when investigating national security. But until the underlying system – the Executive's claim that it can abuse secrecy to protect itself – is changed, secrecy will remain a cancer rotting our democracy.

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## **CLASSIFICATION GAMES HIDING THE AFGHAN DEFEAT**

Amidst all the discussion of the Administration's crack-down on leaks, two details have made it clear the Administration is using its own abuse of classification to hide reports of our impending defeat in Afghanistan.

### **Administration leaks to enforce and protect our pro-corruption policy**

One of those comes from Sarah Chayes, the former Stanley McChrystal advisor. She was last seen on the pages of this blog complaining about CIA support for corruption in Afghanistan. In a new piece, she offers one of the most interesting takes on the Administration's pursuit of leaks.

While her main point is that if reporters were as exposed as their sources to legal consequences for leaks, they might better judge the truly important leaks, she throws some fascinating details showing how broken the classification system is.

Far too much information is protected by unwarranted classification. It's hard to take a system seriously that places so many gigabytes of material that are not critical to national security under the same umbrella as the few nuggets that are. I've seen a New Yorker article included among prep documents for a National Security Council meeting stamped SECRET//NOFORN (meaning that only cleared U.S. citizens were allowed to read it).

[snip]

In September 2010, a flurry of coverage in major U.S. newspapers reported a supposed government decision on how corruption in Afghanistan would be handled. Perusing the articles with growing wonder, I looked down at a memo on my desk. Not only were passages quoted from it classified, the document was also watermarked DRAFT. No decision had been made yet because debate on the draft had not even reached the level of Cabinet secretaries. It was a classic Washington case of offensive leaking. For months, I was convinced that the perpetrator was the late Richard Holbrooke, then special representative to Afghanistan and Pakistan. But I kept asking reporters. Finally I traced the leak to a senior White House official, whose career has progressed untroubled.

She makes it very clear what the second example of classification abuse is. While she links to this early September 2010 WaPo article describing a decision to ignore

corruption in Afghanistan, in her own account of what happened, she points to mid-September as the period when it became clear top figures in the Administration had bought off on supporting corruption in exchange for “progress” towards wiping out the Taliban.

Effectively, Chayes is suggesting that a top White House figure effectively won the debate in support of ignoring corruption in Afghanistan by leaking a draft classified decision as a fait accompli. Given her suggestion that this person’s career has “progressed,” it’s a safe bet that it is one of the people – like current National Security Advisor Tom Donilon, current CIA Director John Brennan, or current Deputy National Security Advisor Ben Rhodes – who got promoted since this leak.

Chayes doesn’t provide much guidance about which New Yorker article was classified SECRET and used in a National Security Council meeting, but I’m betting it was this Dexter Filkins article that rehearses the same issues of corruption. As I’ve noted, while the NYT (where Filkins had recently departed) only hinted at how badly the collapse of the Kabul Bank implicated Hamid Karzai’s corrupt administration, Filkins provided extensive details. The Filkins article, like the earlier series of articles, arises out of the decision to capitulate to CIA bagman Muhammad Zia Salehi’s blackmail to avoid prosecution.

Salehi telephoned Karzai from his jail cell. “He told Karzai, ‘If I spend one night in jail, I’ll bring the whole thing down,’ ” the Western official recalled.

Out of fear Salehi would “bring the whole thing down,” it seems, the Obama Administration chose to abuse the classification system to ignore – while hiding the true extent of – the corruption of our Afghan partners.

**Selective protection of CIA’s efforts to**



## **convince our allies to remain in Afghanistan**

Meanwhile, one of the things the government convinced Bradley Manning trial judge Denise Lind to keep secret even after it had been inadvertently released once appears to relate to CIA's efforts to shore up support for the Afghan War among our European allies.

Alexa O'Brien makes a compelling argument that one of the witnesses who will testify to the harm allegedly caused by Manning's leaks in secret is Robert Roland. She further argues that Roland will testify about 2 CIA Red Cell Memos, one of which strategizes how to ward off political opposition to the Afghan War of the kind that got our coalition partners in the Netherlands ousted (the other, which I wrote about here, pertains to concerns that other countries will figure out we export terrorism). The analysis of the memo itself is rather unsophisticated; it argues if we emphasize the benefit for women of our continued presence in Afghanistan and the support one poll showed Afghans had for our presence, it'll be enough to keep French and German voters in line.

But I guess it is rather embarrassing to have CIA's reflections, however naive, on how to counter democratic opposition to war out there. And I suppose Roland's identity might have been protected until whatever reviewer missed it in one of Manning's defense filings.

At this point, however, both are public. Yet Roland's identity and the CIA reports are being treated with far more sensitivity than far more damning State reports that will be discussed publicly.

Ah well. The report I want to see is the CIA plan to shore up support for the Afghan war as it becomes more and more clear the war serves only to prop up the crooks the CIA has been bribing for 12 years.

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# PRESS FREEDOM: IT DEPENDS ON WHAT THE MEANING OF THE WORD “IS” IS

As we get further away from last week's what's-new-is-old counterterrorism speech, I'm increasingly convinced all that happened was the Administration yoked the word “continuing” onto the word “imminent” and declared an entirely new standard that just happens to replicate the existing one.

Which is why I think this detail, from Politico's leaks-about-a-meeting-about-leaks story, is the most telling I've seen on the Holder meeting.

“The guidelines require a balance between law enforcement and freedom of the press, and we all argued that the balance was out of kilter, with the national security and law enforcement interests basically overwhelming the public's right to get information,” one journalist at the meeting said. “The language concerning ‘aiding and abetting’ comes out of the Privacy [Protection] Act, and they discussed trying to revise that language so that reporters don't need to be defined as co-conspirators in order to execute search warrants.”

This is a reference to part of the Privacy Act that prohibits the government from seizing media work product unless it is connected to a crime (see pages 5 ff for how it affected the James Rosen warrant application). After claiming Rosen was aiding and abetting a violation of the Espionage Act and therefore his emails could be

seized, the FBI then said that since he was potentially criminally liable, he should not get notice. In other words, the aiding abetting was an investigative tactic DOJ used to get around protections put into place just for someone like Rosen.

And DOJ's solution for abusing a protection meant to protect someone like Rosen is apparently to simply redefine the law, so it can overcome those protections without having to accuse Rosen of being a criminal.

The outcome would remain the same; DOJ would just avoid saying mean things about people associated with powerful media outlets.

And note, from the reports I've seen thus far, none of these crack journalists seem to have suggested to DOJ that even the way it was using the Espionage Act to go after sources (many of whom are whistleblowers) is a dangerous misapplication of statute, just like calling James Rosen a co-conspirator is. That is, DOJ's use of the Espionage Act to give the clearance system more teeth than it was meant to have seems to have escaped these media representatives' notice.

Ah well. If they had raised DOJ's abuse of the Espionage Act, DOJ would just do what they appear to intend to do with its abuse of Privacy Act restrictions: redefine the terms and proceed as they had been.

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## **TORQUEMADA PURSUED SUSPECTED MUSLIMS, NOT JOURNALISTS**

In an article flattering Eric Holder's sense of remorse once he realized how inappropriate it was to claim a journalist engaging in flattery

might be a co-conspirator in a leak, Daniel Klaidman quotes a Holder friend explaining that the Attorney General doesn't see himself as some kind of Torquemada figure pursuing journalists.

But for Attorney General Eric Holder, the gravity of the situation didn't fully sink in until Monday morning when he read the *Post's* front-page story, sitting at his kitchen table. Quoting from the affidavit, the story detailed how agents had tracked Rosen's movements in and out of the State Department, perused his private emails, and traced the timing of his calls to the State Department security adviser suspected of leaking to him. Then the story, quoting the stark, clinical language of the affidavit, described Rosen as "at the very least ... an aider, abettor and/or co-conspirator" in the crime. Holder knew that Justice would be besieged by the twin leak probes; but, according to aides, he was also beginning to feel a creeping sense of personal remorse.

[snip]

As attorney general, a position at the intersection of law, politics, and investigations, Holder has been at the center of partisan controversy almost since taking office. But sources close to the attorney general says he has been particularly stung by the leak controversy, in large part because his department's—and his own—actions are at odds with his image of himself as a pragmatic lawyer with liberal instincts and a well-honed sense of balance—not unlike the president he serves. **"Look, Eric sees himself fundamentally as a progressive, not some Torquemada out to silence the press,"** says a friend who asked not to be identified. [my emphasis]

Granted, the Torquemada metaphor was Holder's friend's, not his own. And granted, Holder's DOJ has worked to avoid the kind of Muslim-bashing people like Peter King have called for (though his DOJ has also slow-walked its investigation into NYPD's profiling of Muslims and allowed FBI to engage in similar behavior).

But the reference to Torquemada highlighted how limited this remorse is – just to investigations involving journalists, not Muslims, for example – and how thin Holder's apparent understanding of the problem remains.

This passage, on how DOJ's prosecutorial zeal led it to interpret actions that might have a completely innocent explanation, could apply to individuals well beyond journalists, including especially Muslims and whistleblowers, but also hackers and protestors.

Prosecutors tend to have a somewhat insular mindset, not always able to see clearly beyond the walls of their cases. They are often dogged investigators, trained to vacuum up as much evidence as possible to sustain convictions in courts of law. That sometimes means taking maximum advantage of every law and procedural rule. It also can mean seeing every activity of those in their sights through a more sinister lens than may be justified.

Rosen had set up fairly elaborate methods to try to obscure his relationship with his source. He used pseudonyms to communicate with him and simple coded messages to indicate when they should talk. As Rosen's activities were scrutinized in the department's National Security Division, his behavior may have looked more to prosecutors like an espionage case than what it truly was: a journalist reporting on sensitive national-security matters, while trying to protect the identity of his source. Prosecutors even seized on Rosen's use

of “flattery” and his playing to the “ego and vanity” of his source as a reason for suspicion, a stunning conflation of basic reporting guile with spycraft.

The government’s pursuit of “national security,” after all, has criminalized just about any behavior aiming to reclaim some measure of privacy. And under Holder, DOJ has expanded its ability to use First Amendment protected activities as a predicate to investigate someone.

Prosecutorial zeal affects not just journalists, but potentially all Americans.

So, too, does Holder apparently misunderstand where the zeal for leak prosecutions comes from.

As an explanation, if not a justification, Justice officials say that the department’s leadership had come under withering pressure to investigate leaks from both within the intelligence community and Congress. On multiple occasions, Holder fielded calls from the CIA director and other top officials demanding leak investigations. Meanwhile, Congress was also on Holder’s case to staunch the leaks in national-security cases. On December 3, 2009—just a few months before he approved the affidavit in the Fox case—Holder, FBI director Robert Mueller, and director of national intelligence Dennis Blair were hauled before a secret session of the Senate Intelligence Committee to explain why they weren’t punishing more leakers. For its part, the White House never discouraged aggressive probes to find and punish leakers.

On the political front, at least, the zeal comes from the degree to which the Administration engages in sanctioned leaks which effectively

institutionalize an information tyranny that corrupts democracy.

As for the demands from unnamed CIA Director(s) to investigate leaks? Obama's CIA Directors have included the guy who outed Shakeel Afridi, the guy who as of a few weeks ago still under investigation for leaking classified information to his mistress, and the guy who played a key role in outing a mole into AQAP.

Ultimately, Holder's remorse should be about prosecutorial overreach generally, not just overreach ensnaring journalists. Sadly, most targets of prosecutorial overreach don't have the ability to cause political problems like press organizations do.

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## **THE REASON HOLDER RECUSED IN UNIDIEBOMB 2.0 PROBABLY RELATES TO REASONS HE THINKS IT'S SO BAD**

A lot of people are responding furiously with what should not be news: that Eric Holder approved the warrants in the investigation into Fox report James Rosen's story.

Attorney General Eric Holder signed off on a controversial search warrant that identified Fox News reporter James Rosen as a "possible co-conspirator" in violations of the Espionage Act and authorized seizure of his private emails, a law enforcement official told NBC News on Thursday.

[snip]

Holder previously said he recused

himself from the AP subpoena because he had been questioned as a witness in the underlying investigation into a leak about a foiled bomb plot in Yemen. His role in personally approving the Rosen search warrant had not been previously reported.

DOJ policy requires Attorney General sign-off on such warrants and subpoenas, Holder has no apparent reason to recuse in this case, so we should have all expected he signed off on them.

To be clear, I don't defend the warrant to get Rosen's emails; the claims he conspired in a leak are terribly dangerous. So I won't defend Holder for having approved the warrant in the least.

But people seem to be suggesting that because Holder approved the Rosen warrant, he could have approved the UndieBomb 2.0 subpoena, so must be dodging some issue by recusing.

Consider a few basic details. First, the UndieBomber 2.0 mole reportedly infiltrated AQAP up to a year in advance, which would put him in Yemen, at least, if not AQAP, before Anwar al-Awlaki was killed September 30, 2011. And UndieBomber 2.0 was eventually working with Fahd al-Quso, who had a role – perhaps a more dominant role – in some of the attacks used to justify Awlaki's killing, including UndieBomb 1.0 and the toner cartridge plot.

As I noted, for some reason DOJ did not implicate Fahd al-Quso in Umar Farouk Abdulmutallab's sentencing memo 2 months before the UndieBomb 2.0 "plot" was "thwarted," even though he clearly had a role in the earlier UndieBomb plot. But to the extent that sentencing memo was about providing a public justification for the Awlaki killing (and it was billed as such when it was rolled out), then it would have gone through review if not have been developed in the Attorney General's office, as that's where everything else on transparency on



the Awlaki killing went (and probably still goes, up to Wednesday's letter on the topic).

In other words, to the extent that an operation to get either Ibrahim al-Asiri or Quso would be tied up with the at that point recent killing of Awlaki, the AG's office would be involved (and all that assumes things went down generally as the government claims it does; the AG's office could be far far more involved, and therefore exposed by the leak, in a number of other scenarios).

Then there's the question of the security theater rolled out for the Osama bin Laden anniversary, the "scores" of Air Marshals sent to Europe to prevent a threat that had already been rolled up. While the implementation of such security would be directed primarily out of Department of Homeland Security, the decision to deploy it likely involved discussions of the President's entire national security team, including Eric Holder.

And all this makes sense. The only way the UndieBomb 2.0 leak could have anywhere near the gravity Eric Holder claims it does (even though the claimed reasons for its seriousness appear totally bogus) is if this kind of high level operation and deception were going on.

Which really ought to raise more questions about why the Administration (or Holder) panicked so much about the leak in the first place.

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## **WHY WOULD THE US SHIELD FAHD AL-QUSO IN FEBRUARY 2012 BUT**

# DRONE KILL HIM IN MAY 2012?

On February 10, 2012, the government went out of its way to hide Fahd al-Quso's ongoing involvement in terrorist attacks against the US. Three months later, on May 6, 2012 – the day before the AP published its story about CIA thwarting an UndieBomb attack – the government killed Quso in a drone strike.

## **DOJ's narrative of UndieBomb 1.0 hides Quso's role in it**

On February 10, 2012, as part of his sentencing, DOJ submitted a narrative telling one version of how Umar Farouk Abdulmutallab attempted to bomb Northwest Flight 253 over Detroit. In it, the government tied Abdulmutallab (who, after all, had pled guilty to a conspiracy to commit terrorism) to three AQAP figures: It claimed Anwar al-Awlaki, among other things, gave Abdulmutallab his final instructions that the attack be directed at a US plane and the bomb be set off over US soil. It explained how AQAP bomb-maker Ibrahim al-Asiri constructed the bomb and personally trained Abdulmutallab on its use. And it noted that while Abdulmutallab was training with AQAP, he met Samir Khan who (the narrative helpfully noted in a footnote) would go on to publish Inspire.

The narrative DOJ submitted on February 10 did not mention Fahd al-Quso by name.

## **Watering trees with UndieBomber 1.0**

That's odd, because Quso reportedly did play a role in Abdulmutallab's attack. According to a March 2011 AP story, Quso may have been the last person Abdulmutallab met with before he set off on his attack.

**Before Abdulmutallab set off on his mission, he visited the home of al Qaeda manager Fahd al-Quso to discuss the plot and the workings of the bomb.**

Al-Quso, 36, is one of the most senior al Qaeda leaders publicly linked to the Christmas plot. His association with al Qaeda stretches back more than a decade to his days in Afghanistan when, prosecutors said, bin Laden implored him to “eliminate the infidels from the Arabian Peninsula.”

From there he rose through the ranks. He was assigned the job in Aden to videotape the 1998 suicide bombing of the USS Cole, which killed 17 sailors and injured 39 others, but fell asleep. Despite the lapse, he is now a mid-level manager in the organization. Al-Quso is from the same tribe as radical U.S.-born cleric Anwar al-Awlaki, who had an operational role in the botched Christmas attack.

In December, al-Quso was designated a global terrorist by the State Department, a possible indication that his role in al Qaeda’s Yemen franchise has grown more dangerous.

Al-Quso was indicted on 50 terrorism counts in New York for his role preparing for the Cole attack and served more than five years in prison in Yemen before he was released in 2007. On the FBI’s list, al-Quso ranks behind only bin Laden and his deputy Ayman al-Zawahiri among the most sought-after al Qaeda terrorists.

**After meeting with al-Quso, Abdulmutallab left Yemen** in December 2009 and made his way to Ghana, where he paid \$2,831 in cash for a round-trip ticket from Nigeria to Amsterdam to Detroit and back. [my emphasis]

Indeed, Abdulmutallab’s tie to Quso is one of the only aspects of Abdulmutallab’s trip in Yemen that has been independently verified.

In his book, *Dirty Wars*, Jeremy Scahill notes,

A local tribal leader from Shabwah, Mullah Zabara, later told me he had seen the young Nigerian at the farm of Fahd al-Quso, the alleged USS Cole bombing conspirator. "He was watering trees," Zabara told me. "When I saw [Abdulmutallab], I asked Fahd, 'Who is he?'" Quso told Zabara the young man was from a different part of Yemen, which Zabara knew was a lie. "When I saw him on TV [after the attack], then Fahd told me the truth." [first bracket original, second bracket mine]

Later in the book, Scahill reports that Zabara was assassinated this January by unknown killers.

#### **Is Fahd al-Quso Abu Tarak?**

The details of Quso's ties to Abdulmutallab – particularly that the Nigerian was watering trees on Quso's farm – make me wonder whether Quso isn't the person Abdulmutallab called Abu Tarak in his initial confession on Christmas Day 2009.

In his opening argument in the abbreviated Abdulmutallab trial, AUSA Jonathan Tukul described what Abdulmutallab initially confessed after he was captured. Along with all the things later attributed to Awlaki and Asiri, Tukul said Abdulmutallab described having daily talks with Abu Tarak about jihad.

He told the FBI that he and Abu-Tarak spoke daily about jihad and martyrdom and supported al-Qaeda and Osama bin Laden.

In a narrative on Abdulmutallab's commitment to jihad also submitted for the sentencing based on his personal reviews of Abdulmutallab's interrogation reports, DOJ expert Dr. Simon Perry suggested that Abdulmutallab was living

with Abu Tarak when in Yemen, though he says that was in Sanaa, not Shabwah.

While residing at Abu Tarak's residence in Sana, Yemen he was mainly confined to his residence and discouraged from any communication with the outside world (phone, email). During this period, UFAM spoke regularly with Abu Tarak and three other individuals who visited him daily, speaking with them about Jihad and martyrdom.

In any case, regardless of whether or not Quso is Abu Tarak, or whether Abu Tarak is an amalgam of AQAP figures, it seems clear that Quso played some role in Abdulmutallab's preparation.

And yet DOJ chose not to mention that this guy – who had been trying to attack the US since the October 12, 2000 USS Cole attack – was among the notable AQAP figures who prepared Abdulmutallab to attack the US.

#### **Was DOJ hiding that they knew how to infiltrate AQAP?**

Whatever Quso's role in UndieBomb 1.0, the implication of the timing is clear: he was central to the UndieBomb 2.0 plot. Indeed, it is almost certain that CIA asked AP to delay publishing their story to give time to kill Quso, who had just sent our mole off with another UndieBomb.

In other words, one plausible explanation for why DOJ did not confirm what other reports made clear is that it did not want to tip Quso off to what Abdulmutallab told them about him. That is, if they were already planning the op against him, they wouldn't want him to know they knew how Abdulmutallab had found him 2.5 years earlier.

That is just one possibility, of course.

But if that's the case – if DOJ obscured Quso's role in the government's most extensive accusations that Anwar al-Awlaki had an

operational role in targeting the US – then are the claims about Awlaki true?

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## THE LAUGHABLE CURRENTLY OPERATIVE AP PUSHBACK STORY

It has taken several days for the government – apparently, almost exclusively DOJ – to try to spin its secret seizure of AP call records. The new version of the government’s ever-evolving story is that the reason the AP story was so damaging was because it prevented CIA from using the mole to locate Ibrahim al-Asiri, AQAP’s bomb-maker.

Here’s how the guy who headed DOJ’s Office of Legal Policy until last year explained this on Friday.

About a year ago, someone within the government who had access to highly classified information about an intelligence operation in Yemen involving a double agent saw fit to talk about it with the Associated Press. When senior government officials learned that the Associated Press had this story and intended to publish it, those officials realized that the agent’s cover had been blown. Anxious for his safety, the officials prevailed on the AP to delay publication so that first the agent’s family and then the agent himself could be extracted to safety. The AP then published its story, which focused on thwarting a plot to use a new and improved underwear bomb to blow up an airplane bound for the United States.

What went completely without mention in the initial coverage was the fact that

thwarting this plot was not the objective of the ongoing undercover operation. Its true objective was to gain enough intelligence to locate and neutralize the master bomb builder, Ibrahim Hassan al-Ashiri, who works with an Al-Qaeda affiliate, Al-Qaeda in the Arabian Peninsula (AQAP). Penetrating AQAP is incredibly difficult. This double agent provided a rare opportunity to gain critical, life-saving information. Whoever disclosed the information obtained by the AP had not only put the agent's life and his family's life in danger. He also killed a golden opportunity to save untold more lives that now remain at risk due to al-Ashiri remaining at large.

Here's how three former high-ranking DOJ officials explained it in an op-ed today.

The United States and its allies were trying to locate a master bomb builder affiliated with Al Qaeda in the Arabian Peninsula, a group that was extremely difficult to penetrate. After considerable effort and danger, an agent was inserted inside the group. Although that agent succeeded in foiling one serious bombing plot against the United States, he was rendered ineffective once his existence was disclosed.

And here's how Walter Pincus reported it today.

Whoever provided the initial leak to the Associated Press in April 2012 not only broke the law but caused the abrupt end to a secret, joint U.S./Saudi/British operation in Yemen that offered valuable intelligence against al-Qaeda in the Arabian Peninsula.

One goal was to get AQAP's operational head, Fahd Mohammed Ahmed al-Quso. That

happened one day before the AP story appeared.

A second goal was to find and possibly kill AQAP bombmaker Ibrahim Hassan al-Asiri, whose first underwear device almost killed Prince Mohammed bin Nayef, Saudi Arabia's anti-terrorism chief.

[snip]

Hitting targets in the United States is one of AQAP's goals. In association with Saudi intelligence, the CIA inserted a Saudi who convinced AQAP that he wanted to be a suicide bomber. Eventually he was outfitted with Asiri's newest device, which he was to use on a U.S. aircraft. **After the device was delivered to U.S. officials**, someone or several people leaked the information to the AP. [my emphasis]

Now, Pincus' story is generally balanced. Unlike the other two, he admits that Fahd al-Quso got killed while the AP held their story and that, in killing Quso, the government accomplished at least one objective of the mole's mission and did so thanks to AP's willingness to cede to government requests about this story. He also admits that before the AP ever came to the government with the story, the mole's UndieBomb had already been delivered to the US.

That chronology is important. And it is one backed by the government's official timeline (not to mention the CNN report that said the mole had turned over the bomb around April 20 and the report that Robert Mueller traveled to Yemen for an unscheduled 45 minute meeting on April 24). The day after the AP story, Jay Carney said that Obama had been informed about the plot in "early April."

Q Do you expect that he'll address at all – I know we got statements yesterday, but the Yemeni al Qaeda plot, do you think he will address that at all



in his remarks today?

MR. CARNEY: I don't expect him to address that issue in his remarks. I mean, I will say that he's certainly pleased with the success of our intelligence and counterterrorism officials in foiling the attempt by al Qaeda to use this explosive device. It is indicative of the kind of work that our intelligence and counterterrorism services are performing regularly to counter the threat posed by al Qaeda in general, and AQAP in particular.

So he was regularly – as you know, **he was made aware of this development in early April** and he was regularly briefed on it by John Brennan. [my emphasis]

The NSC's official statement on that day also said Obama had been informed of the plot in April.

So the government rolled up the plot in April – almost certainly by April 24 – and then the AP came to the CIA and White House with their story about a foiled plot on May 2.

It's that timing that undermines the claim that the government still hoped to use the mole to get at Ibrahim al-Asiri. Because to maintain that claim, you'd have to explain how an AQAP operative who had been entrusted with the latest version of Ibrahim al-Asiri's UndieBomb sometime in early April, had left (at least as far as Sanaa), had not apparently succeeded in his mission (which was, after all, meant to be a suicide bombing), could return to AQAP without the UndieBomb and infiltrate even further than he had the first time.

"Oh, hi, AQAP gatekeeper" – their story must imagine the mole saying as he returned to AQAP – "I've both failed in my mission and somehow lost the bomb you gave me, but based on that would you be willing to let me spend some quality time with even higher-ranking AQAP operatives?"

The government must believe AQAP has far worse counterintelligence than Asiri's longevity would seem to suggest. Alternately, they're just inventing stories right now to justify their seizure.

The CIA (and MI6 and the Saudis) may have hoped to infiltrate far enough to locate Asiri when the mole first infiltrated AQAP (though I wonder how much the \$5 million reward for killing Quso was used to motivate the mole, because millionaires are much harder to convince to risk their lives in such dangerous operations). But once Quso handed the mole a bomb and a mission – and according to the White House's own story, that happened before the AP ever came to them with the story – it's hard to imagine how they could still use him in any case.

Now all of that is not to say the story, as it developed, was not damaging. I'm completely sympathetic to claims that because subsequent stories – all follow-up stories to John Brennan's hints about us having an infiltrator – pissed off the Brits for exposing their role in the plot. I'm completely sympathetic to claims that the revelation that we had an infiltrator – all follow-up stories to John Brennan's hints – exposed the degree to which we are using infiltrators in AQAP. Though the prior exposure by Arabian peninsula sources of Mazin Salih Musaid al-Awfi and Jabir al-Fayfi, would have already have done at the time, as have Morton Storm's stories about trying to locate Anwar al-Awlaki have done subsequently. Moreover, Ansar al-Sharia's execution of three alleged spies in February 2012 shows that they were acutely worried about spies during precisely the time the mole in this case successfully infiltrated the group. I can also imagine that the revelation that we rolled up the plot because of an infiltrator and not because of Rapisan machines or some other technological surveillance might have exposed anyone who helped the mole infiltrate AQAP.

But damage from the revelation that we had a

mole in the plot all traces back to John Brennan's ill-considered push-back on the AP story, not from the AP story itself.

You know? John Brennan? The guy who got a big promotion nine months after sloppily exposing a mole? The guy who, as a result, now serves as the original classification authority for some of our nation's most sensitive secrets?

It's hard to believe that the harm from exposing the mole was so significant yet Obama nevertheless promoted the guy whose bad judgment and blabby mouth inadvertently led to that harm.

Now, maybe the AP story created different kinds of harms. Maybe AP scooping the White House prevented the White House from rolling out the story – as they had before with the toner cartridge plot – in a way that would have better fit their re-election narrative. Maybe it revealed that the government significantly ramped up security at the Osama bin Laden anniversary purely as a propaganda stunt (though if that's the case, the exposure of that ramp-up might count as genuine whistle-blowing). Maybe the AP story revealed that the harm the Administration was going to use to justify signature strikes in Yemen was just a Saudi sting, not a real danger. Maybe the AP story just alerted the government to transparency on its actions in Yemen, actions which might not withstand that kind of scrutiny.

There are a whole slew of possible harms – some that relate to US national security, some that relate to the political security of members of our national security establishment – that might arise from the AP story. But, particularly given the subsequent promotion of John Brennan, they can't logically be the ones these people are claiming.

Update: I can think of one detail that would make everything make sense. But it might also be far, far worse for the government if it's the case. More, in a follow-up post.

Update: According to the Times of London, the

mole and his handler were pulled from Yemen on April 20, 17 days before the AP published their story.