50 YEARS: THAT DAY, JFK AND TODAY

Where were you fifty years ago today? If you were old enough to remember at all, then you undoubtedly remember where you were on Friday November 22, 1963 at 12:30 pm central standard time.

I was at a desk, two from the rear, in the left most row, in Mrs. Hollingshead's first grade class. Each kid had their own desk, and they were big, made out of solid wood and heavy. They had to be heavy, of course, because they were going to protect us when we ducked and covered from a Soviet nuclear strike. There were, as there were in most elementary school classrooms of the day, a large clock and a big speaker on the wall up above the teacher's desk.

I can't remember what subject we were working on, but the principal's voice suddenly came over the loudspeaker. This alone meant there was something important up, because that only usually occurred for morning announcements at the start of the school day and for special occasions. The voice of Mr. Flake, the principal, was somber, halting and different; perhaps detached is the word. There was a prelude to the effect that this was a serious moment and that the teachers should make sure that all students were at their desks and that all, both young and old, were to pay attention.

There had occurred a tragic and shocking event that we all needed to know about. Our attention was required.

Then the hammer fell and our little world literally caved in.

President John Fitzgerald Kennedy had been assassinated. Shot and killed in Dallas Texas. Then without a moment's pause, we were told that the nation was safe, Vice-President Johnson was in charge, the government was functioning and that we need not have any concerns about our own safety. We were not at war.

Twenty four some odd little hearts stopped, plus one from Mrs. Hollingshead. You could literally feel the life being sucked out of the room like air lost to a vacuum. Many of us began looking out the window, because no matter what Mr. Flake said, if our President was dead, we were at war and the warheads were coming. They had to be in the sky. They were going to be there.

Unlike the hokey color coded terror alerts, ginned up fear mongering of Bush/Cheney, Ashcroft and Ridge, and today the terroristic fearmongering of Keith Alexander, James Clapper, Mike Rogers and Dianne Feinstein, things were dead nuts serious at the height of the cold war. If President Kennedy had been killed, we were at war; the missiles were on their way. Had to be. Looking back, the school officials and teachers had to have been as devastated and afraid as we were, yet they were remarkable. They kept themselves in one piece, held us together, talked and comforted us into calm.

We had not been back in class from lunch break for long; it was still early afternoon in the west. Before the announcement was made, the decision by the school officials had been made to send us home. The busses would be lined up and ready to go in twenty minutes. Until then there would be a brief quiet period and then the teachers would talk to us and further calm the situation. Then off we would go to try to forge a path with our families, who would need us as much as we needed them.

Except for me and a handful of other kids. My mother was an educator and was not at home, so I

and a few other similarly situated kids were kept at school until we could be picked up. Somehow it wasn't right to be inside, so we all, along with another teacher, Mrs. Thomas, went outside and sat underneath a large palm tree in front of the school. We talked about how it could be that our President, our hero, our king, was dead. Maybe he wasn't really dead, maybe it was all a mistake. Maybe Soviet troops were on their way; possibly tanks. This kind of excited me and the other boys; we perked up at this thought, tanks were cool. The Russians probably had awesome tanks. Each minute that passed made us feel a little better because there were no missiles in the sky. That was a good sign.

In about half an hour, maybe an hour, I don't know any more, my mother drove up and off we went. My mother was also reassuring. It was good to be with her; mom saying it would all be alright meant a lot. Once home, we ate and sat dumbstruck and transfixed in front of the Curtis Mathes console television the rest of the afternoon and night. We watched Walter Cronkite on CBS and Chet Huntley and David Brinkley on NBC. These men were giants of news and journalism; to say that they don't make them like that anymore is a understatement of untold proportion. Things slowly, but surely, stabilized; but it took awhile. A long while.

Well, that was my day fifty years ago. What was your day? Take a moment and reflect back and share with those of us that know the traumatic event, and help those who are younger to understand what the day was like. The palpable sorrow. The sinking, abiding fear. The comfort of teachers, friends and family. And what it means to you today, on this anniversary.

The last time I wrote this basic post, five years ago today, I ended with, inter alia, these words:

> There may be another Kennedy like figure in our midst, Barack Obama. He stands to assume office in a similarly, albeit it from different factors, troubled time.

> The world roils and America's existence hangs in the lurch; not from Soviet missiles, but our own selfishness, avarice and stupidity.

Well, that was hopelessly idealistic, and not yet tempered by knowledge of the real Obama that would govern, as opposed to the false "Hope and Change" guy who captured the imagination and dreams of liberals and well meaning people throughout the land. We sit in a different posture today.

There is still hope; but the real change, whether on authoritarian government, government surveillance, financial reform, liberal judicial philosophy, environmental protection, income inequality, and a host of other critical concerns still is yet to be seen.

On the fiftieth anniversary of one of our worst days, let there be hope for better ones ahead.

[Most all of this post was taken from a previous one I did five years ago. I cannot kick the vivid memories I have of November 22, 1963 as a child. It is still all I think of when I think of this day. It is that seared into who, and what I am. So, absent a few additions, it is set forth again herein]

LAVABIT AND THE DEFINITION OF US GOVERNMENT HUBRIS

Well, you know, if you do not WANT the United States Government sniffing in your and your family's underwear, it is YOUR fault. Silly American citizens with your outdated stupid piece of paper you call the Constitution.

Really, get out if you are a citizen, or an

American communication provider, that actually respects American citizen's rights. These trivialities the American ethos was founded on are "no longer operative" in the minds of the surveillance officers who claim to live to protect us.

Do not even think about trying to protect your private communications with something so anti-American as privacy enabling encryption like Lavabit which only weakly, at best, even deigned to supply.

Any encryption that is capable of protecting an American citizen's private communication (or even participating in the TOR network) is essentially inherently criminal and cause for potentially being designated a "selector", if not target, of any number of searches, whether domestically controlled by the one sided ex-parte FISA Court, or hidden under Executive Order 12333, or done under foreign collection status and deemed "incidental". Lavabit's Ladar Levinson knows.

Which brings us to where we are today. Let Josh Gerstein set the stage:

> A former e-mail provider for National Security Agency leaker Edward Snowden, Lavabit LLC, filed a legal brief Thursday detailing the firm's offers to provide information about what appear to have been Snowden's communications as part of a last-ditch offer that prosecutors rejected as inadequate.
>
> The disagreement detailed in a brief filed Thursday with the U.S. Court of Appeals for the Fourth Circuit resulted in Lavabit turning over its encryption keys to the federal government and then shutting down the firm's secure e-mail service altogether after viewing it as unacceptably tainted by the FBI's possession of the keys.

I have a different take on the key language from

Lavabit's argument in their appellate brief though, here is mine:

> First, the government is bereft of any statutory authority to command the production of Lavabit's private keys. The Pen Register Statute requires only that a company provide the government with technical assistance in the installation of a pen- trap device; providing encryption keys does not aid in the device's installation at all, but rather in its use. Moreover, providing private keys is not "unobtrusive," as the statute requires, and results in interference with Lavabit's services, which the statute forbids. Nor does the Stored Communications Act authorize the government to seize a company's private keys. It permits seizure of the contents of an electronic communication (which private keys are not), or information pertaining to a subscriber (which private keys are also, by definition, not). And at any rate it does not authorize the government to impose undue burdens on the innocent target business, which the government's course of conduct here surely did.
>
> Second, the Fourth Amendment independently prohibited what the government did here. The Fourth Amendment requires a warrant to be founded on probable cause that a search will uncover fruits, instrumentalities, or evidence of a crime. But Lavabit's private keys are none of those things: they are lawful to possess and use, they were known only to Lavabit and never used by the company to commit a crime, and they do not prove that any crime occurred. In addition, the government's proposal to examine the correspondence of all of Lavabit's customers as it searched for information about its target was both beyond the scope of the

> probable cause it demonstrated and inconsistent with the Fourth Amendment's particularity requirement, and it completely undermines Lavabit's lawful business model. General rummaging through all of an innocent business' communications with all of its customers is at the very core of what the Fourth Amendment prohibits.

The legal niceties of Lavabit's arguments are thus:

> The Pen Register Statute does not come close. An anodyne mandate to provide information needed merely for the "unobtrusive installation" of a device will not do. If there is any doubt, this Court should construe the statute in light of the serious constitutional concerns discussed below, to give effect to the "principle of constitutional avoidance" that requires this Court to avoid constructions of statutes that raise colorable constitutional difficulties. Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150, 156–57 (4th Cir. 2010).

And, later in the pleading:

> By those lights, this is a very easy case. Lavabit's private keys are not connected with criminal activity in the slightest—the government has never accused Lavabit of being a co-conspirator, for example. The target of the government's investigation never had access to those private keys. Nor did anyone, in fact, other than Lavabit. Given that Lavabit is not suspected or accused of any crime, it is quite impossible for information known only to Lavabit to be evidence that a crime has occurred. The government will not introduce Lavabit's private keys in its

> case against its target, and it will not use Lavabit's private keys to impeach its target at trial. Lavabit's private keys are not the fruit of any crime, and no one has ever used them to commit any crime. Under those circumstances, absent any connection between the private keys and a crime, the "conclusion[] necessary to the issuance of the warrant" was totally absent. Zurcher, 436 U.S., at 557 n.6 (quoting, with approval, Comment, 28 U. Chi. L. Rev. 664, 687 (1961)).

What this boils down to is, essentially, the government thinks the keys to Lavabit's encryption for their customers belong not just to Lavabit, and their respective customers, but to the United States government itself.

Your private information cannot be private in the face of the United States Government. Not just Edward Snowden, but anybody, and everybody, is theirs if they want it. That is the definition of bullshit.

[Okay, big thanks to Darth, who generously agreed to let us use the killer Strangelovian graphic above. Please follow Darth on Twitter]

FURTHER IMPLICATIONS OF UNDIEBOMB II LEAKER GUILTY PLEA

As you have likely heard by now, a former FBI agent has agreed to plead guilty to leaking material about the second underwear bomb attempt to reporters in May of 2012. Charlie Savage of the New York Times has the primary rundown:

> A former Federal Bureau of Investigation

> agent has agreed to plead guilty to leaking classified information to The Associated Press about a foiled bomb plot in Yemen last year, the Justice Department announced on Monday. Federal investigators said they identified him after obtaining phone logs of Associated Press reporters.
>
> The retired agent, a former bomb technician named Donald Sachtleben, has agreed to serve 43 months in prison, the Justice Department said. The case brings to eight the number of leak-related prosecutions brought under President Obama's administration; under all previous presidents, there were three such cases.
>
> "This prosecution demonstrates our deep resolve to hold accountable anyone who would violate their solemn duty to protect our nation's secrets and to prevent future, potentially devastating leaks by those who would wantonly ignore their obligations to safeguard classified information," said Ronald C. Machen Jr., the United States attorney for the District of Columbia, who was assigned to lead the investigation by Attorney General Eric H. Holder Jr.
>
> In a twist, Mr. Sachtleben, 55, of Carmel, Ind., was already the subject of a separate F.B.I. investigation for distributing child pornography, and has separately agreed to plead guilty in that matter and serve 97 months. His total sentence for both sets of offenses, should the plea deal be accepted by a judge, is 140 months.

Here is the DOJ Press Release on the case.

Here is the information filed in SDIN (Southern District of Indiana). And here is the factual basis for the guilty plea on the child porn

charges Sachtleben is also pleading guilty to.

So Sachtleben is the leaker, he's going to plead guilty and this all has a nice beautiful bow on it! Yay! Except that there are several troubling issues presented by all this tidy wonderful case wrap up.

First off, the information on the leak charges refers only to "Reporter A", "Reporter A's news organization" and "another reporter from Reporter A's news organization". Now while the DOJ may be coy about the identities, it has long been clear that the "news organization" is the AP and "Reporter A" and "another reporter" are AP national security reporters Matt Apuzzo and Adam Goldman (I'd hazard a guess probably in that order) and the subject article for the leak is this AP report from May 7, 2012.

What is notable about who the reporters are, and which story is involved, is that this is the exact matter that was the subject of the infamous AP phone records subpoenas that were incredibly broad – over 20 business and personal phone lines. These subpoenas, along with those in the *US v. Steven Kim* case collected against James Rosen and Fox News, caused a major uproar about the sanctity of First Amendment press and government intrusion thereon.

The issue here is that Attorney General Eric Holder and the DOJ, as a result of the uproar over the AP and Fox News discovery abuse, grudgingly announced new guidelines in a glossy six page document released on July 12, 2013 to much fanfare. The DOJ promised to, in the future:

> …utilize such tools only as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecution.

However the sentiment so proudly expressed by DOJ in July seems more than a little faint with

the emphasis they placed yesterday on only being able to solve the UndieBomber II leak case because:

> Sachtleben was identified as a suspect in the case of this unauthorized disclosure only after toll records for phone numbers related to the reporter were obtained through a subpoena and compared to other evidence collected during the leak investigation.

Hard to see how such pointed braggadocio is not a not so subtle notice that DOJ considers anything they deem a "national security" related leak, which is about everything to the Obama Administration, to be fair game for investigation and discovery of reporters and news organizations, both on a business and personal level, as was done here with respect to Apuzzo, Goldman and the AP. Once again, the Obama Administration PR show belies what it is doing, and will do in practice.

The second thing of note about yesterday's announcement is that it has all the markings of finality, and I am informed that indeed such is the case and no further charges are forthcoming. Now, as to Sachtleben, that is fair; the government has him cold through phone and email records, travel records and his admission of guilt in a signed information where he flat out said he was no whistleblower by admitting that he:

> did not believe that he was exposing government waste, fraud, abuse, or any other kind of government malfeasance or misfeasance.

So Sachtleben is cooked, and that is all well and good. But if this is all over, what about the "other" leak that was part of the mid May 2012 leakfest, i.e. the one that *really was* a dangerous affront to operational security concerns. You know, the one where the Saudi

agent (double agent?) who acquired UndieBomb II was burned.

The Saudi agent story was not part of Apuzzo and Goldman's original reporting and was by all appearances first broken by ABC and Richard Clarke after participating in a background phone call by, who else, John Brennan, and then LA Times, CNN, NYT and a host of others in succession picked up the ball and ran with it. It is unclear whether AP had the story too and, if so, whether any part of it came from Sachtleben. There is no mention of the Saudi agent, the story of his work, possible involvement in the al-Quso drone strike, or any indication that Sachtleben could have garnered that information, contained in the DOJ press release and criminal information.

In fact, the reports on the Saudi agent consistently referred to what appears to be a Saudi official as a leaker, but with confirmations, which themselves are clear leaks, from multiple Obama Administration officials. One of said officials clearly leaking what was still classified information was none other than John Brennan. The leaker who was subsequently installed as head of the CIA. One leaker gets prison, and the other gets a promotion to CIA director. But that is how the Obama Administration hypocritically rolls.

So, what of the Obama Administration officials chattering to the press, both in the first instance, and as confirmation sources regarding UndieBomb II plot and the Saudi operation? What about the Saudi leaker? For that matter, what about the government sources that confirmed the AP information from Sachtleben? What about the sources, some clearly Administration based, for the CNN, LA Times and ABC reports? While many of them are undoubtedly the same individuals, all of those seem to be swept under the rug by Sachtleben's plea, even though he is obviously but one part of the equation. And by all appearances, Sachtleben is far from the most damaging part.

In fairness, Josh Gerstein relates this:

> The court papers in Sachtleben's case don't describe precisely what damage his leak caused, nor do they make any reference to an informant or double agent being endangered. However, a U.S. official said prosecutors haven't put all the details in the public documents in order to avoid compounding the damage.

That is a pretty vague and unsatisfactory answer to the pertinent questions. The damage is already done, Brennan and others did part of it and answers better than just the Sachtleben wrap are due.

Next, there is the issue of the "investigative" work the DOJ is so proud of in its press release and criminal complaint on Sachtleben. Remember, DOJ collected on *20 different phone lines* alone including multiple AP bureau offices, and business, home and cell numbers of AP reporters. That is pretty much the main backbone for AP governmental and national security reportage. Add in the additional collection on their email and text records.

The full scope of the collection is delineated in paragraphs 5, 8, 9, 11, 13 and 14 of the criminal information. And the phone and email collection was not just metadata, but as the above described paragraphs make clear, full content too. Since these subpoenas were after the fact, that means the vaunted NSA storage database was likely used. How many "hops" were made off of the AP lines? (Remember, 3 hops off of one person making 40 calls can be 2.5 million people).

Frankly one hop off the lot of the AP phones could yield a massive number of targets, and the most precious ones to First Amendment journalism. This post is long enough without going into specifics of the surveillance implications from the collection on the AP and

its top reporters, but suffice it to say the implications to, and chilling effect on, governmental and national security reportage is immense.

Lastly, there is the presumptive regularity that must be given to the stated timing of the national security prong of the case against Sachtleben vis a vis the child porn prong. But take a look at the end of Charlie Savage's report in the NYT:

> As it turns out, the contractor was about to take a trip to Quantico. On May 2, he visited the lab where the underwear device was being examined, it said, and soon called the reporter.
>
> Two and a half hours later, the court filing said, two A.P. reporters began calling government officials saying they knew that the United States government had intercepted a bomb from Yemen and that the F.B.I. was analyzing it.
>
> The next day, May 3, 2012, law enforcement agents in Indiana, working on an unrelated case involving the distribution of child pornography on the Internet, obtained a search warrant for Mr. Sachtleben's house, court filings show. They seized his computers on May 11.

Once again, very convenient how it all came together. I am sure it all happened legitimately like the government claims, but it certainly would be a lot easier to bite off on fully if the government's propensity for "parallel construction" of cases were not known (and, no, it is not only the DEA who uses the technique).

The above are but some of the key questions and implications arising from yesterday's announcement by the DOJ of the wrapping up of the UndieBomb II investigation by the charging of Donald Sachtleben. It is a convenient end for the government, but a rather unsatisfying one

for the intelligence of the public.

THE RETURN OF THE NFL: IT'S ON!!!

[Hey there Lugnuts!! We are having a fundraiser here at Emptywheel. Help the effort out! We have been really hesitant about doing this in the past. To the best of my recollection, we have not done one at all since leaving FDL. Marcy will not toot her own horn, but I will. The level, depth, independence, and rationality, of what Ms. Wheeler does makes most "Main Stream" and other "blogs" look feeble. And it is not just her, Jim White, Rayne and, occasionally, I who also contribute. This is a valuable forum. We live for you, but we also need your help. To the extent you can give it, it would be remarkably well placed, and much appreciated. Thank you!]

I have been being heckled about this Trash Talk stuff forever. Marcy is just cranky jonesing for football and Jim White thinks the Devil Rays count. But this ain't called "Trash Talk" for nothing you know. Pre-season fake football and baseball in the swamps are not enough. Nosirree. Not in a sophisticated joint like this.

But there was a little smattering of real college football last Saturday, so there was primordial Trash. But, now, my friends, there is REAL, professional grade, NFL football in the queue. Let it be known, unless I meet a bigger margarita pitcher and burrito that looks like this tomorrow night, there will by Saturday morning be additional MAJOR LEAGUE Trash for the weekend. NCAA, NFL and the F1 Circus at Monza (yes, that really may be the bigger story worldwide. Formula One rules; get used to it).

But, tonight, there are two games on the

schedule. The biggest, of course, is a replay of last season's AFC Divisional Playoffs between the Denver Broncos and Baltimore Ravens. Ought to be a great game. Despite what the naysayers say, Peyton Manning's arm is turning bionic in its incredible strength. The Bronco's, however, are a bit wounded with Elvis Dumervil now on the Ravens and Von Miller suspended for the first six games. The Ravens have also lost a LOT of weight from last year's Superbowl team, including Ray Lewis and Ed Reed. As much as the media and fans have always focused on Ray Lewis, I cannot help but believe the absence of Ed Reed, one of the most incredible ball hawks in the history of the NFL, is every bit as big a loss. Broncos are at home and are PISSED about that last minute loss last year to the Ravens. My money is on Peyton and the ARM OF HULK.

Secondarily, and I, (maybe you?) will probably have to DVR this, but the ASU Sun Devils are opening their season tonight at 10:00 pm EST against Sacramento State. Okay, this won't be much of a game. But, GO DEVILS!!

That's it for now. More later as promised. This is the best blog in the world, if I do say so from my completely neutral perch! Rock and roll my friends. Today's music is by Government Mule. Because Donkos and Peyton rock….and, because, the US Government, collectively, are a bunch of War Pigs.

OPERATION BALLSACK LABOR DAY FOOTBALL TRASH TALK

Hello. Is there anybody in there? Just nod if you can hear me.

I am not sure how well the Trash Talk Machine is greased after such egregious neglect. But, we

can only do what we do, and carry on. And those skilz have NOT been forgotten jack. So saddle up cowboys and cowgirls.

You would think being a blogger is an easy, Cheetos filled, lifestyle. Not the case. It is hard work, hard work I tell ya. I have suffered the indignation of Marcy and Jim yammering about wanting “trash this” and “trash that”. Weeeeellllllll that is so much SPAM! So, as I said earlier, it’s not easy, you know. I get no respect!

To make a quick comment on the title of this 2013 football season opening trash, shit is truly fucked up and bullshit. We have Mr. Constitutional Nobel Scholar President agitating to make unilateral bizarrely unnecessary war on Syria….apparently because he screwed up and drew a moronic “red line” in the sand and now has to prove he actually has bolas, in addition to stupidity and hubris. The man who when seeking votes to be elected in 2007-2008 claimed war without Congressional assent was wrong, and whose Vice-Predident called such unsanctioned war bullshittery and an “impeachable offense”, now insists without the UN, without the Brits, and with a coalition of effectively one (one who were previously described as “cheese eating surrender monkeys” not that long ago in American lore). But that is where we are now. Which is why the best name for this clusterfuck is “Operation Ballsack“. Yes, it is all about Obama’s balls, and his desperate need to prove he actually has a primordial pair.

Huh? Oh, wait! This was supposed to be football Trash Talk wasn’t it?!?!

Yikes, better get to that then. Last night was a pretty exciting open to the NCAA 2013 schedule. The ‘Ole Ball Coach Spurrier and the ‘Cocks did not seem all that animated, but still clocked a fairly solid NC Tarheel team. Looked like Vady was gonna take a bite off the ‘Ole Miss Rebels, but Ole Miss tailback Jeff Scott let loose with a 75 yard TD romp with 1:07 left, giving the Rebels a 39-35 last minute win. Good stuff. In

other news, Lane Kiffen proves the question of why he has not been fired yet is still very salient by coaching a narrow win for Tommy Trojan over the Rainbows. Mighty Troy barely made it over the Rainbows. Yay. If that is all USC has, even the Sun Devils are going to wax them this year (a game I will be attending by the way). also, from Friday night, let me just say that Sparty has some VERY sticky fingered defenders. Look out B1G.

Well, what else is up I wonder? Hmmmm, appears some fella named “Manziel” was suspended half a game for something. Guess it wasn’t anything bad, cause Dez Bryant got suspended a whole season for eating dinner with Neon Deion Sanders. I sign my name on things a lot too. I get paid to do so. Not sure who would sign thousands of items for zip, nuthin, free. Apparently the crack investigators and accountability specialists at the NCAA found no problem though. And you KNOW how sane they are, cause they banned Penn State from all bowls for four years without having any NCAA violation whatsoever present. Ugh.

Alright. Games. Real ones are being played this weekend. Battle manufactured where it should be. Naturally. By a nerd at ESPN instead of that fake Operation Obama Ballsack baloney.

The game of the weekend looks to be Georgia at Clemson. These are two top ten worthy teams, if not potential national championship contenders. Special players abound everywhere on both teams, including Sammy Watkins the super receiver for the Tigers, and Tajh Boyd his quarterback. For the Bulldogs, Aaron Murray may be the best QB in the conference, and that includes Johnny Football. Awesome game to have so early. Alabama hosting Virginia Tech is another unusual one to start off with. The Tide will roll them, but there could be a struggle. should be a way better game than the Tide expected.

Honorable mentions goes to TCU and LSU in neutral Texas, Boise State/Washington and Cal versus Northwestern. Tell us what you have and

why!

The one other thing I want to address is the noggins of the NFL. As you may have heard, there was a settlement this week, and it heavily favored the NFL. The craven plantation owners admitted nothing, gave up no liability findings, and gave up a ridiculously cheap total sum as hard settlement. By the time lawyer's fees and mandatory testing etc. is deducted, it is criminal how little was gotten for a class of at risk humans. Down the road, if these class members live, they and their representatives will be screaming bloody murder. Here is an outrageously great article laying out the factors, and doing so with the tart and sarcastic truth it deserves

This long Labor Day weekend's music is from the one, the only, Ms. Linda Ronstadt. I have a real affinity for Linda, and haver seen her numerous times including a couple of very special ones. If there has ever been a better pure female vocal talent, I am not sure I have seen it. Pure, and with a range to die for. The singing voice may be silenced, but Linda is rocking on and fighting for the causes she believes in. And they are, and always have been, great, and the right, ones. Oh, also, in case you didn't notice, she had a backup band on the first video. Chuck Berry, Keith Richards, Robert Cray and some other chaps. The second is the band she normally toured with (including Waddy Wachtel – but with Mike Botts on drums instead of Russ Kunkel, who I always saw) and, trust me, they were absolutely killer, and *very* cool people to boot.

That's it for now. Let Willis, and one and all, rock this joint. We are Livin In The USA. All things considered, it is still pretty fucking grand. Enjoy the holiday weekend my friends.

BRADLEY MANNING'S SENTENCE, PAROLE AND APPEAL IMPLICATIONS

On Monday I laid out the dynamics that would be in play for the court in considering what sentence to give Bradley Manning in light of both the trial evidence and testimony, and that presented during the sentencing phase after the guilty verdict was rendered. Judge Lind has entered her decision, and Bradley Manning has been sentenced to a term of 35 years, had his rank reduced to E-1, had all pay & allowances forfeited, and been ordered dishonorably discharged. This post will describe the parole, appeal and incarceration implications of the sentence just imposed.

Initially, as previously stated, Pvt. Manning was credited with the 112 days of compensatory time awarded due to the finding that he was subjected to inappropriate pre-trial detention conditions while at Quantico. Pvt. Manning was credited with a total 1294 days of pre-trial incarceration credit for the compensatory time and time he has already served since the date of his arrest.

Most importantly at this point, Manning was sentenced today to a prison term of 35 years and the issue of what that sentence means – above and beyond the credit he was given both for compensatory time and time served – is what is critical going forward. The following is a look at the process, step by step, Bradley Manning will face.

The first thing that will happen now that Judge Lind has gaveled her proceedings to a close is the court will start assembling the record, in terms of complete transcript, exhibits and full docket, for transmission to the convening authority for review. It is not an understatement to say that this a huge task, as the Manning record may well be the largest ever produced in a military court martial. It will be a massive undertaking and transmission.

At the same time, the defense will start preparing their path forward in terms of issues they wish to argue. It is my understanding that Pvt. Manning has determined to continue with David Coombs as lead counsel for review and appeal, which makes sense as Coombs is fully up to speed and, at least in my opinion, has done a fantastic job. For both skill and continuity, this is a smart move.

The next step will be designation of issues to raise for review by the "convening authority". In this case, the convening authority is Major General Jeffrey Buchanan, who heads, as Commanding General, the US Army's Military District of Washington. This step is quite different than civilian courts, where a defendant proceeds directly to an appellate court.

The accused first has the opportunity to submit matters to the convening authority before the convening authority takes action – it's not characterized as an "appeal," but it's an accused's first opportunity to seek relief on the findings and/or the sentence. According to the Manual for Courts-Martial, Rule for Court-Martial 1105:

> (a) In general. After a sentence is adjudged in any court-martial, the accused may submit matters to the convening authority in accordance with this rule.
>
> (b) Matters which may be submitted.
> (1) The accused may submit to the

> convening au thority any matters that may reasonably tend to af fect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. The convening authority is only required to consider written submissions.
> (2) Submissions are not subject to the Military Rules of Evidence and may include:
> (A) Allegations of errors affecting the legality of the findings or sentence;
> (B) Portions or summaries of the record and copies of documentary evidence offered or intro duced at trial;
> (C) Matters in mitigation which were not avail able for consideration at the court-martial; and
> (D) Clemency recommendations by any mem- ber, the military judge, or any other person. The defense may ask any person for such a recommendation.

Once the convening authority has the full record and the defense has designated its matters for review, Buchanan will perform his review and determine whether any adjustments to the sentence are appropriate, and that will be considered the final sentence. At this point, the only further review is by a traditional appeal process.

Generally, the level of appellate review a case receives depends on the sentence as approved by the convening authority. After the approval of the sentence, cases in which the sentence includes death, a punitive discharge (bad conduct, dishonorable discharge, or dismissal), or confinement for one year or greater (and Manning's sentence certainly fits that criteria) are automatically referred to the service (in this case the Army) Court of Criminal Appeals (ACCA) for review. In Bradley Manning's case, only some counts will be eligible for appeal, the ones for which Judge Lind convicted him of after "deliberation". Appeal on the counts

Manning voluntarily pled guilty to prior to trial was waived.

The ACCA will be responsible for reviewing the entire case and has, pursuant to Article 66, UCMJ, the responsibility to:

> …affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines on the basis of the entire record, should be approved.

That statutory requirement to find law and fact "correct" is significant; the ACCA could decide not to sustain a conviction on a particular offense even if not challenged on appeal. The ACCA "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the court-martial saw and heard the evidence."

In addition to the ACCA's review, military appellate counsel, unless waived, are provided to the accused at no cost. Bradley Manning will likely already have David Coombs, but due to the complexity, it can be anticipated there will also be military counsel participating as well. The appellate counsel may raise specific legal issues to the court for resolution.

After the ACCA, the decision may be appealed to the Court of Appeals for the Armed Forces and thereafter to the United States Supreme Court. Military appellate counsel are continued to be provided at no cost until all the appeals have been exhausted. See generally Subchapter IC, Post-Trial Procedure and Review of Courts-Martial (10 USC §§ 860-876) and Chapter XII of the Rules for Courts-Martial.

The foregoing is the process that will play out in relation to court proceedings for Bradley Manning. But, as such is progressing, Mr. Manning will, of course, be incarcerated, and there will be factors to be considered in that regard as well. Manning will be sentenced to a

facility for confinement. The obvious location is Fort Leavenworth where he has been for some time already, although he will likely be moved out of pre-trial population and into general confinement population.

Some military prisoners can be transferred to a Federal Bureau of Prisons (FBOP) facility with the concurrence or direction of the Secretary concerned and agreement with the FBOP. Factors that are considered are: the prisoner's demonstrated potential for return to duty or rehabilitation, nature and circumstances of offenses, confinement file, status of legal appeals/proceedings, length and nature of sentence, age, and special circumstances (prisoner needs/interests of national security). At least at this point, there is no reason to believe Bradley Manning would be transferred to a civilian prison, although it is at least possible after all appeals are exhausted, which will not be for a very long time.

Once assigned to his facility, Mr. Manning will have a "sentence computation form" generated that will effectively control his confinement and eligibility for release going forward. Here is the template used for such computation. The form can be, and is, commonly updated as the prisoner serves his time, and the document is primarily an internal one as opposed to a public one. There is no set time period for initial production of the form, but it should happen pretty quickly after Manning's return to the permanent facility. Any number of things can cause adjustments to the form as time goes on, including any sentence relief granted by the convening authority, either initially or after alteration of the conviction status from appellate courts.

So, what about Bradley Manning's potential release date? This is where there is a HUGE difference in the UCMJ process from civilian process. As many know, the United States government has abolished "parole" for federal prison sentences. Instead, and this is now

common in many states too, federal prisoners must serve at least 85% of their imposed sentence, and only then are eligible for supervised release for the remaining time. Under the UCMJ, however, there is still an active and healthy parole system that is far more flexible and favorable to a defendant, especially one like Bradley Manning, who is sentenced to a long term.

Several programs exist within the military corrections process to allow prisoners to be released prior to serving their full sentence. These programs are: clemency, parole, mandatory supervised release (MSR), reenlistment, and restoration to duty. Prisoners do not have any right to clemency, parole, reenlistment, or restoration. These programs are administered by a Clemency and Parole Board (C&PB) on behalf of the Secretary concerned and only apply to military prisoners confined at military corrections facilities. Upon the unlikely event of permanent transfer to the Federal Bureau of Prisons, military prisoners may only be considered for clemency, restoration to duty, and reenlistment, the latter two of which are pretty inconceivable for Bradley Manning.

C&PB considers factors such as the nature and circumstances of the prisoner's offenses, the military and civilian history, the confinement file, personal characteristics of the prisoner (age, education, marital/family status, psychological profile), impact of prisoner's offense on victim and attempts at restitution, protection and welfare of society, and the need for good order and discipline in the military when determining whether a prisoner should be granted any of the above programs.

Parole is the conditional release from confinement of a prisoner under the guidance and supervision of a United States Probation Officer. This may be granted prior to the minimum release date and does not require the member to remain on parole until the adjusted maximum release date. Parole considerations

begin, upon request of the prisoner, if the sentence is less than 30 years after the member serves one-third of the confinement, but no less than 6 months. If the sentence is greater than 30 years, the prisoner must serve at least 10 years of confinement. The point at which the C&PB begins to consider the prisoner for these programs is dependent upon the sentence received. Specific details on how to calculate when a prisoner, such as Bradley Manning, is eligible for parole or MSR, see Department of Defense Instruction 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authority as well as the DOD Sentence Computation Manual.

MSR is the conditional release of a prisoner who has served the portion of the sentence to confinement up to the minimum release date from confinement. This type of release continues until the individual reaches the adjusted maximum release date unless the confinement term is altered by the military department through remission, revocation, etc. This is also served under the guidance and supervision of a United States Probation Officer.

Bradley will also be eligible for “good time credits” that will inure to his release favor assuming he is a model prisoner. Good time credit is time that is awarded for faithful observance of all rules and regulations and is subtracted from the prisoner’s adjusted maximum release date. The adjusted maximum release date is computed by adjusting the maximum release date to include administrative credit (pretrial confinement), judicial credit (credit ordered by a judge to a sentence of confinement), inoperative time, and crossing the International Date Line. Good time credit is calculated as 5-10 days per month off the top depending on the length of the approved sentence. In addition, a prisoner may receive up to an additional 8 days per month for work, participation in rehabilitation programs, and/or participation in education programs. If a prisoner performs extraordinary acts, then an additional 2 days

per month for 12 months may be credited. The total combined credited time may not exceed 15 days per month.

There is no interplay between parole and good time credit as good time credit affects the adjusted maximum release date, and parole consideration is annual after a specified time frame as explained above. If a prisoner is not paroled, s/he may be released earlier than initially expected as a result of good time credit.

So, what is the bottom line as to how much time Bradley Manning will likely really serve in confinement given the sentence today by Judge Lind? As you can tell from the above discussion, that is an extremely hard question to answer, and the answer is quite fluid and subject to change as the circumstances dictate. A good rule of thumb, however, is that Bradley could be released after serving one third of his sentence. In light of the fact Judge Lind has imposed a term of 35 years, Mr. Manning, considering the time he has already served, could potentially be eligible for release in as little as 9 years from now. As painful as it is to admit, this sentence, and Bradley Manning's prospects could have very easily looked far worse. [UPDATE – after pondering what Col. Morris Davis said, I think he is right, and after recalculation, I think the initial eligibility for release – assuming everything goes perfectly for Bradley Manning – will be in 8.3 years.]

One last point – what are the effects of this UCMJ conviction upon Bradley Manning's civil rights? That is a question not nearly as easy to answer as it is for a civilian felony conviction, where certain rights are simply lost until formally restored. It turns out that for military convictions there is no set authority. The best resource I have found on understanding collateral consequences of a military conviction and sentence is this from the American Bar Association. Some consequences may apply during

a period of supervised release while others could be permanent. In general, the consequences that military convicts face is determined by the state law of the person's residence.

THE BRADLEY MANNING SENTENCING DYNAMICS

U.S. Army Private First Class Bradley Manning stands convicted of crimes under the Uniform Code of Military Justice (UCMJ). The convictions result from two events. The first was a voluntary plea of guilty by Pvt. Manning to ten lesser included charges in February, and the remainder from a verdict of guilty after trial entered by Judge Denise Lind on July 30.

The maximum possible combined sentence originally stood at 136 years for the guilty counts, but that was reduced to a maximum possible sentence of 90 years after the court entered findings of merger for several of the offenses on August 6. The "merger" resulted from the partial granting of a motion by Mr. Manning's attorney arguing some of the offenses were effectively the same conduct and were therefore multiplicitous. The original verdict status, as well as the revised verdict status after the partial merger of offenses by the court, is contained in a very useful spreadsheet created by Alexa O'Brien (whose tireless coverage of the Manning trial has been nothing short of incredible).

Since the verdict and merger ruling, there have been two weeks of sentencing witnesses, testimony and evidence presented by both the government and defense to the court. It is not the purpose of this post to detail the testimony and evidence per se, but rather the mechanics of the sentencing process and how it will likely be carried out. For detailed coverage of the

testimony and evidence, in addition to Alexa O'Brien, the reportage of Kevin Gosztola at FDL Dissenter, Julie Tate at Washington Post, Charlie Savage at New York Times and Nathan Fuller at the Bradley Manning Support Network has been outstanding.

All that is left are closing arguments and deliberation by Judge Lind on the final sentence she will hand down. So, what exactly does that portend for Bradley Manning, and how will it play out? Only Judge Lind can say what the actual sentence will be, but there is much guidance and procedural framework that is known and codified in rules, practice and procedure under the UCMJ.

Initially, the obvious should be stated, Bradley Manning is in front of an Army court martial process under the UCMJ, and while there is much similar to the traditional state and federal civilian trial processes covered over the years here, much is different and unique. There has been much said about the process in terms of the Manning trial in terms of the secrecy, lack of transparency in docket items and evidence and closed proceedings. Much of it is fair, some is not. Having been involved in a few UCMJ proceedings, the issues of poor access to docket items and pleadings is not unique to the Manning trial, it is inherent in the decentralized and rigid UCMJ system. That is certainly something that is an issue compared to civilian systems and needs to be improved on by the military.

By the same token, the secrecy and utilization of closed proceedings for portions of the trial were not necessarily much different than would have occurred in a federal District Court which also can utilize closed proceedings as well as the CIPA process. All in all, many defense attorneys I know that have practiced in both jurisdictions have, surprisingly, found the UCMJ process to be generally fair and protective of defendants' rights. Certainly others may differ, but that comports with my experience as well. That is no comment on the Manning proceedings,

but just a general observation.

With that overview in mind, let’s take a look at how the process looks to play out for Pvt. Manning. As stated above, the evidentiary portion of the sentencing process concluded late last week. Rule for Courts-Martial (RCM) 1001 outlines the presentation of sentencing evidence and what qualifies as sentencing evidence. Specifically, the prosecution presents personnel records which include the accused’s marital status, number of dependents, character of prior service, performance reports, prior convictions, and any other personnel records which were made or maintained in accordance with Army regulations such as prior non-judicial punishment and letters of reprimand/counseling.

Thereafter, the prosecution presents evidence in aggravation which is defined as evidence directly relating to or resulting from the offenses for which the accused has been found guilty. This may include evidence of financial, social, psychological, medical impact on victims and adverse impacts on the mission or discipline of the service units. Lastly, the prosecution may present opinion evidence as to the accused’s rehabilitative potential.

The defense then may present any matter in extenuation or mitigation that it considers favorable to the the convicted individual, in this case Bradley Manning. This includes information which may explain the circumstances surrounding why the accused committed the offenses and matters which may cause the court to lessen the punishment which may include acts of good conduct, bravery, reputation, or any other trait that is probative and favorable.

The accused has the right to make a sworn or unsworn statement during sentencing. It is not uncommon for a defendant to exercise this right and make an unsworn statement, which is exactly what Bradley Manning did. Other defense evidence frequently consists of letters of support for the accused. Military courts are required to consider all the evidence before them when

determining the most appropriate sentence; however, the exact weight that the court gives to any particular piece of evidence is within the deliberative process and discretion of the court, and is not specifically delineated or disclosed with the final sentence.

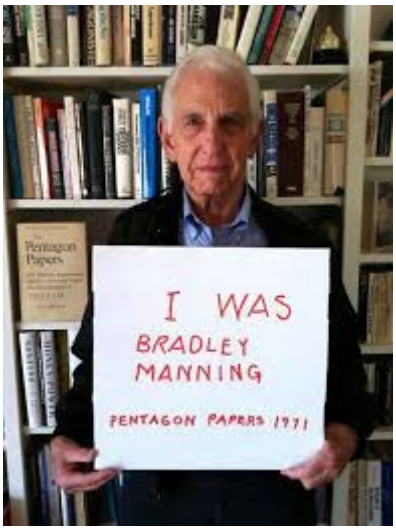
In a civilian court, many of the separate counts would, for final sentence calculation, be considered as either concurrent or consecutive for sentence determination and, at least in the federal system, the Federal Sentencing Guidelines would then be calculated to provide a range of sentence to guide the court. That, however, is not how it works under the UCMJ.

Under the UCMJ, once the charges and specifications are reviewed, a maximum punishment is determined by the court and, in this case, as stated above, it is 90 years confinement. The court also has available other sentencing modalities such as dishonorable discharge, reduction to the lowest enlisted grade, a reprimand, and the possibility of a fine (although a fine is uncommon in non-financial cases). At that point, the Court will review what Manning has been convicted of and the sentencing evidence to decide what punishment to impose. The Court does not impose a separate punishment for each charge or specification. The court, i.e. Judge Lind, will come up with one lump sum sentence for the entire case and impose it pursuant to RCM 1003 and 1005.

To whatever sentence Pvt. Manning is given, he will be given credit for 112 days as compensation for mistreatment in his initial pre-trial confinement period at Quantico. You would think the court should take further notice of the abuse inflicted on Bradley Manning in his confinement, but such is unlikely to be the case and, again, there will be no way to tell since the basis of the sentence is not specifically delineated by the court. Credit for time in confinement pre-trial and pre-sentence, since his arrest on May 27, 2010, will also be given.

And that is the process for the sentencing of Bradley Manning. Final statements will be given this morning and Judge Lind may well hand down the final sentence as early as this morning or afternoon; Tuesday morning at the likely latest. Once the court has issued its sentence, a host of new factors and processes, including parole and appeal considerations, that are far different from civilian courts (and arguably much more favorable), will come into play, and those will be explained in a separate post once Judge Lind has issued her sentence.

NEGATIVE MANNING DECISION AND THE FUTURE OF INVESTIGATIVE JOURNALISM



Little more than few hours ago, a critical ruling was handed down by Judge Denise Lind in the Bradley Manning UCMJ prosecution ongoing at Fort Meade. The decision was on based on this motion by the defense seeking dismissal of the "Aiding the Enemy" charge, among others in the prosecution.

To make a long, even if sadly predictable, story short, the motion was denied by Judge Lind and the charge will proceed to determination on the merits. This is, to be sure, a nod to the prosecution (which is actually the standard in

such motions for directed verdicts during trials; that is the facts are taken in the light most favorable to the non-moving party, the government). It is also, obviously, a blow to the defense, although undoubtedly an expected one for defense attorney David Coombs. There is a very outside chance of a silver lining I will discuss below.

Julie Tate at the Washington Post sets the table:

> The motion to dismiss the charge was filed July 4 by Manning's civilian defense attorney. He argued that the government had failed to show that Manning "had 'actual knowledge' that by giving information to WikiLeaks, he was giving information to an enemy of the United States." He said the government did introduce evidence "which might establish that PFC Manning 'inadvertently, accidentally, or negligently' gave intelligence to the enemy," but that this was not enough to prove the most serious charge against him, known as an Article 104 offense.
>
> On two separate occasions, Lind, an Army colonel, had questioned military prosecutors about whether they would be pursuing the charge if the information had been leaked directly to The Washington Post or the New York Times. Each time, the prosecution said it would. That troubles advocates for whistleblowers, who fear that the leaking of national defense information that appears online, as it inevitably does, can be construed as assisting the enemy.
>
> If convicted of aiding the enemy, Manning, an intelligence analyst who served in Iraq, could face life in prison.

That describes the motion and the stakes as to Manning. Julie's article also gives more particulars on the denial this morning, and is worth a read. For a tick tock, please see the continuously good coverage by Kevin Gosztola of Firedoglake.

But as enormous as the stakes are for Bradley Manning, the enterprise of investigative journalism is also on trial, even if in an indirect manner.

Yet another journalist who has tirelessly, and superbly, covered the Manning prosecution, Alexis O'Brien, has written at the Daily Beast, the stakes for investigative journalism are also life and/or death in the face of the security/surveillance state. Citing the in court, and on the trial record, compelling testimony of Professor Yochai Benkler of Harvard Law School, Alexis related:

> In a historic elocution in court last week, Prof. Yochai Benkler, co-director of the Berkman Center for Internet and Society at Harvard Law School, told Lind that "the cost of finding Pfc. Manning guilty of aiding the enemy would impose" too great a burden on the "willingness of people of good conscience but not infinite courage to come forward," and "would severely undermine the way in which leak-based investigative journalism has worked in the tradition of [the] free press in the United States."
>
> "[I]f handing materials over to an organization that can be read by anyone with an internet connection, means that you are handing [it] over to the enemy—that essentially means that any leak to a media organization that can be read by any enemy anywhere in the world, becomes automatically aiding the enemy," said Benkler. "[T]hat can't possibly be the claim," he added.

> Benkler testified that WikiLeaks was a new mode of digital journalism that fit into a distributed model of emergent newsgathering and dissemination in the Internet age, what he termed the "networked Fourth Estate." When asked by the prosecution if "mass document leaking is somewhat inconsistent with journalism," Benkler responded that analysis of large data sets like the Iraq War Logs provides insight not found in one or two documents containing a "smoking gun." The Iraq War Logs, he said, provided an alternative, independent count of casualties "based on formal documents that allowed for an analysis that was uncorrelated with the analysis that already came with an understanding of its political consequences."

Those really are the stakes in the, now, not all that new age of digital journalism. When the prosecutors in the Manning trial, upon direct questioning by Judge Lind as to whether they would still prosecute Manning if his leaks had been delivered straight to the New York Times or Washington Post, it had to be a wake up call for traditional media. Or so you would think. But, really, the outrage has been far greater over the James Rosen/Fox subpoena that could, and arguably should, be considered relative peanuts.

But, Yochai Benkler is right as to the import of the consideration as to Wikileaks in the Manning case.

In closing, the one slim and thin ray of limited hope from today's ruling by Denise Lind: If I were Lind and cared at all about the ultimate verdict on Pvt. Bradley Manning, I too would have made this ruling. Why, you ask? Well, because a dismissal on the motion would have been the equivalent of a directed verdict on the law and would be far easier to overturn on appeal than a decision on the merits that the government has not met its burden of proof. Is

this possible; sure, it certainly is. Is this likely; no, I would not make any substantial bets on it.

THE 3 HOP SCOTCH OF CIVIL LIBERTIES AND PRIVACY

I was in court, so I didn't see it, but apparently there was a little hearing over at House Judiciary Committee this morning on "Oversight of the Administration's Use of FISA Authorities". There was an august roll of Administration authorities and private experts: Mr. James Cole, United States Department of Justice; Mr. John C. Inglis, National Security Agency; Mr. Robert S. Litt, ODNI; Ms. Stephanie Douglas, FBI National Security Branch; Mr. Stewart Baker; Mr. Steven G. Bradbury; Mr. Jameel Jaffer; and Ms. Kate Martin.

Hmmm, let's take a look and see if anything interesting occurred (as reported by Pete Yost of AP). Uh, well, there was THIS:

> For the first time, NSA deputy director John C. Inglis disclosed Wednesday that the agency sometimes conducts what's known as three-hop analysis. That means the government can look at the phone data of a suspect terrorist, plus the data of all of his contacts, then all of those people's contacts, and finally, all of those people's contacts.
>
> If the average person calls 40 unique people, three-hop analysis could allow the government to mine the records of 2.5 million Americans when investigating one suspected terrorist.
> ….
> The government says it stores

> everybody’s phone records for five years. Cole explained that because the phone companies don’t keep records that long, the NSA had to build its own database.

Go read all of Yost’s report, there is quite a bit in there that is stunning in the blithe attitude the Administration takes on this hoovering of data and personal information. Also clear: Congress has no real grasp or control of the government’s actions. The Article I brakes are out and the Article II car is accelerating and careening down the road.

FEDERAL COURT STRIKES DOWN OBAMA DOJ’S STATE SECRETS DEFENSE

In what can only be described as a significant ruling, Judge Jeffrey White in the Northern California District (CAND) has rejected the federal government’s, via the Obama and Holder Department of Justice, assertion of state secrets privilege in the case of *Jewel v. National Security Agency* and the related consolidated case of *Shubert v. Obama*.

The full decision of the court is here, and in the critical active language from the court’s own summary states:

> Having thoroughly considered the parties’ papers, Defendants’ public and classified declarations, the relevant legal authority and the parties’ arguments, the Court GRANTS the Jewel Plaintiffs’ motion for partial summary adjudication by rejecting the state

> secrets defense as having been displaced by the statutory procedure prescribed in 50 U.S.C. § 1806(f) of FISA. In both related cases, the Court GRANTS Defendants' motions to dismiss Plaintiffs' statutory claims on the basis of sovereign immunity. The Court further finds that the parties have not addressed the viability of the only potentially remaining claims, the Jewel Plaintiffs' constitutional claims under the Fourth and First Amendments and the claim for violation of separation of powers and the Shubert Plaintiffs' fourth cause of action for violation of the Fourth Amendment. Accordingly, the Court RESERVES ruling on Defendants' motion for summary judgment on the remaining, non-statutory claims.
>
> The Court shall require that the parties submit further briefing on the course of this litigation going forward.

Now, before too much celebration is made, there are some sobering aspects of this decision as well. As can be told from the quote above, several counts in both complaints have been dismissed based on sovereign immunity, and the court has questions about the continued validity of the remaining counts and has requested further briefing in that regard.

With the ultimate status of the litigation left for another day, the big news today is the negation of the dreaded state secrets assertion. To say this is a rare occurrence is to be too kind. In fact, the main instance where the privilege was overcome was the al-Haramain litigation, also in CAND, where Judge Vaughn Walker found non-classified evidence sufficient to proceed in the face of the state secrets assertion, and even that case was later reversed and dismissed by the 9th Circuit.

The court in *Jewel* mapped out the consideration process for the privilege challenge:

> The analysis of whether the state secrets privilege applies involves three distinct steps. First, the Court must ascertain whether the procedural requirements for invoking the privilege have been satisfied. Second, the Court must make an independent determination whether the information is privileged. In determining whether the privilege attaches, the Court may consider a party's need for access to the allegedly privileged materials. See Reynolds, 345 U.S. 19 at 11. Lastly, the "ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim." El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007).

Noting that the assertion of state secrets must not cause "a complete surrender of judicial control over access to the courts", Judge White wrote:

> Here, having reviewed the materials submitted for review and having considered the claims alleged and the record as a whole, the Court finds that Defendants have timely invoked the state secrets doctrine. Defendants contend that Plaintiffs' lawsuits should be dismissed as a result of the application of the privilege because the state secrets information is so central to the subject matter of the suit that permitting further proceedings would jeopardize national security. Given the multiple public disclosures of information regarding the surveillance program, the Court does not find that the very subject matter of the suits constitutes a state secret. Just as in *Al-Haramain*, and based significantly on the same set of facts in the record here, the Court finds that although there are certainly details that the

> government has not yet disclosed,
>
> > because of the voluntary disclosures made by various officials since December 2005, the nature and purpose of the [Terrorist Surveillance Program], the 'type' of persons it targeted, and even some of its procedures are not state secrets. In other words, the government's many attempts to assuage citizens' fears that they have not been surveilled now doom the government's assertion that the very subject matter of this litigation, the existence of a warrantless surveillance program, is barred by the state secrets privilege.
>
> 507 F.3d at 1200; see also *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 986-88, 991 (N.D. Cal. 2006) (holding that the existence of a program of monitoring the contents of certain telephone communications was no longer a state secret as a result of the public statements made by the President and the Attorney General). Accordingly, the Court does not find dismissal appropriate based on the subject matter of the suits being a state secret. See Totten, 92 U.S. at 107.

White went on to note that there were significant items of evidence in the Jewel case tending to confirm or negate the factual allegations in Plaintiffs' complaints that would be subject to state secrets exclusion. However, White held that, as a matter of law, the FISA procedural mechanism prescribed under 50 U.S.C. 26 § 1806(f) preempted application of the state secrets privilege in the litigation at bar.

Citing one of the interlocutory appellate

decisions in *al-Haramain* and the underlying logic of then trial judge Vaughn Walker), Judge White said:

> In its opinion on remand in the Al-Haramain matter, this district court found that "FISA preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes …." In re National Security Agency Telecommunications Records Litigation ("In re N.S.A. Telecommunication Records Litig."), 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008). The undersigned agrees and finds that the in camera review procedure in FISA applies and preempts the determination of evidentiary preclusion under the state secrets doctrine. Section 1806(f) of FISA displaces the state secrets privilege in cases in which electronic surveillance yields potentially sensitive evidence by providing secure procedures under which courts can consider national security evidence that the application of the state secrets privilege would otherwise summarily exclude.

Section 1806 of the FISA enabling statutes in Title 50 of the United States Code provides, *inter alia*;

> … whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State . . . to discovery or obtain applications or orders or other materials relating to electronic surveillance . . . the United States district court … shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other

> materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.

This finding by Judge White reaffirmed at least some control by federal trial courts of sweeping assertions of state secrets privilege by the Executive Branch. That is, better than nothing, for sure. But it is rather small comfort in light of the finding of qualified immunity extended to the government on the *Jewel* and *Shubert* plaintiffs' statutory claims under FISA.

In discussing the intersection of the FISA claims with related claims by plaintiffs under the Stored Communication Act and Wiretap Act, the court did leave several more general counts of the complaints active. However, there is no way to look at the entirety of Jeff White's opinion and come away believing the plaintiffs have any clear path to victory in the long run. The *Jewel* and *Shubert* cases live on to fight another day, for now, but the handwriting is on the wall for either the 9th Circuit or Supreme Court to deal the death blow down the road.