HOW DAVID BARRON PLAYED JUDGE AND JURY FOR ANWAR AL-AWLAKI

Rand Paul has gone and united drone apologists and opponents with an op-ed explaining his opposition to David Barron's confirmation without full transparency on the drone memos Barron wrote. It's a good op-ed, though the only new addition from what he has said before is that any other drone memos Barron has written ought to be on the table as well.

It's Ben Wittes' and David Cole's responses that I'm reluctantly interested in.

In addition to a lot of "trust me I know the man" defenses from Cole that I find utterly inappropriate for a lifetime appointment, both Cole and Wittes argue we've already seen the "Administration's" logic on drone killing, so we have no need to see the memo itself. Cole cautiously doesn't characterize what that standard is in his defense.

> Second, the administration has in fact made available to *all Senators* any and all memos Barron wrote concerning the targeting of al-Awlaki — the core of the issue Sen. Paul is concerned about. So if Sen. Paul and any other Senator want to review Barron's reasoning in full, they are free to do so. Moreover, the administration also made available to the Senate, and ultimately to the public, a "White Paper" said to be drawn from the Barron memo (though written long after he left office). Thus, no Senator need be in the dark about the Administration's reasoning, and the public also has a pretty good idea as well.

Wittes, less wisely, does.

> This idea of a trial in absentia followed by drone strike as a means of effectuating a death sentence is novel—and very eccentric. Paul never seeks to explain why wartime authorities are inappropriate for dealing with a senior operational leader of an enemy force who is actively plotting attacks on the United States.
>
> [snip]
>
> The legal standard for targeting a U.S. citizen the administration has embraced is limited to U.S. citizens (1) who are operational leaders of AUMF-covered groups, (2) who pose an imminent threat, (3) whose capture is not feasible, and (4) whose targeting is consistent with the law of armed conflict. Suspects in Germany or Canada or any other governed space would almost surely be feasible to capture and if not, because in a hostage-like situation, would be dealt with by law enforcement, including using law enforcement's powers at times to use lethal force. The definition of the group of citizens covered is so narrow, in reality, that it has so far described a universe of exactly one person—Al Awlaki—whom the administration has claimed the authority to target.

Wittes, you see, is certain that not only did the Administration have evidence Anwar al-Awlaki was a "senior operational leader" of AQAP by the time they executed him, but they had that evidence by July 2010 when Barron signed a memo saying that the specific circumstances at hand justified killing Awlaki. But even if he's seen it via some magic leak, the public has not.

As I've noted repeatedly — and as Lawfare has been sloppy about in the past — at the time Barron signed off on Awlaki's execution, one of the chief pieces of evidence against Awlaki — a confession Umar Farouk Abdulmutallab had given

as a proffer in a plea deal that never got consummated — was undermined by Abdulmutallab's previous confession and other evidence (and would be undermined further, just days after Awlaki's execution, when Abdulmutallab pled guilty without endorsing the claims about Awlaki included in that confession).

Now, I suspect the government didn't present that nuance to Barron when he wrote his memo (just as the government lied to John Yoo and a series of other OLC lawyers as they wrote torture memos). I imagine the memo starts with a caveat that says, "Assuming the facts are as you present them and no other facts exist," absolving Barron in case the government presented only partial evidence or worse, as it appears to often do in the case of OLC memos.

But it is possible that the government gave Barron really nuanced information, and he nevertheless rubber stamped this execution, in spite of the possibility that the case Awlaki was a senior operational official of AQAP by that point was overstated. It's possible too that there's a great deal of evidence to counterweigh the very contradictory information on the chief claim in the public record and absent any contrary evidence Barron thought it was a conservative legal decision.

One way or another, Barron participated in a tautological exercise in which the government presented unchallenged evidence showing that Awlaki was a senior operational leader that then served as justification for setting aside due process and instead having OLC — Barron — weigh whether or not Awlaki was a senior operational leader who could be executed with no due process.

This is why (egads) Paul is right and Wittes is wrong. Because the idea of a trial before you execute an American citizen is in fact the rule, and the idea of having an OLC lawyer judge all this in secret is in fact the novelty. It doesn't matter whether the case laid out against Awlaki applies to him and him alone (though I

doubt it does; I doubt it applies as well as supporters say, and complaints about the lack of specificity of it makes it clear it could too easily be applied for others).

But the big underlying point — and the reason why Cole and Wittes' claim that Barron can't be held to account here, only the Administration whose policy he reviewed can be, is wrong — is that tautology. What the memo shows and the white paper does not is that Barron was provided evidence against Awlaki and he willingly played the role of both saying that the underlying legal logic (what we see in the white paper) was sound but that the evidence in this case (what we haven't seen in the memo) made this departure from due process sound. Barron signed off on both the logic and the evidence justifying that logic itself.

And for me, that's enough. That's enough to disqualify him — no matter how liberal or brilliant he is, both qualities I'd like to see on a bench — as a judge.

That's enough for me. But those who want to push Barron through anyway ought to consider what they would need to show to prove that Barron's decision was reasonable: the evidence Barron saw that he believed sufficient (and unquestionable, given the absence of rebuttal) to authorize a due-process free execution. It's unlikely we'll ever get that evidence, because the government won't declassify it.

That's the problem with this nomination, one way or another. No matter how sound the underlying logic, Barron played another role in Awlaki's execution, certifying that the evidence merited getting to the underlying logic of denying a US citizen due process. Barron both approved an entirely parallel system to replace due process, and played the judge in that system.

Update: Katherine Hawkins reminds me that when David Cole wrote about the white paper shortly after it got released, he had trouble with precisely the thing he has no trouble now.

> The white paper addresses the legality of killing a US citizen "who is a senior operational leader of al-Qaeda or an associated force." Such a person may be killed, the document concludes, if an "informed, high-level official" finds (1) that he poses "an imminent threat of violent attack against the United States;" (2) that his capture is not feasible; and (3) the operation is conducted consistent with law-of-war principles, such as the need to minimize collateral damage. However, the paper offers no guidance as to what level of proof is necessary: does the official have to be satisfied beyond a reasonable doubt, by a preponderance of the evidence, or is reasonable suspicion sufficient? We are not told.
>
> Nor does the paper describe what procedural safeguards are to be employed. It only tells us what is *not* required: having a court determine whether the criteria are in fact met.

What determines whether that standard has been met is the same OLC lawyer who determined that such a standard would be appropriate.

JUDGE COLLYER'S FACTUALLY ERRONEOUS FREELANCE RUBBER STAMP FOR KILLING AMERICAN CITIZENS

As I noted on Friday, Judge Rosemary Collyer threw out the Bivens challenge to the drone

killings of Anwar and Abdulrahman al-Awlaki and Samir Khan.

The decision was really odd: in an effort to preserve some hope that US citizens might have redress against being executed with no due process, she rejects the government's claims that she has no authority to decide the propriety of the case. But then, by citing precedents rejecting Bivens suits, including one on torture in the DC Circuit and Padilla's challenge in the Fourth, she creates special factors specifically tied to the fact that Awlaki was a horrible person, rather than that national security writ large gives the Executive unfettered power to execute at will, and then uses these special factors she invents on her own to reject the possibility an American could obtain any redress for unconstitutional executions. (See Steve Vladeck for an assessment of this ruling in the context of prior Bivens precedent.)

The whole thing lies atop something else: the government's refusal to provide Collyer even as much information as they had provided John Bates in 2010 when Anwar al-Awlaki's father had tried to pre-emptively sue before his son was drone-killed.

On December 26, Collyer ordered the government to provide classified information on how it decides to kill American citizens.

> MINUTE ORDER requiring the United States, an interested party 19 , to lodge no later than January 24, 2014, classified declaration(s) with court security officers, in camera and ex parte, in order to provide to the Court information implicated by the allegations in this case and why its disclosure reasonably could be expected to harm national security…, include[ing] information needed to address whether or not, or under what circumstances, the United States may target a particular foreign terrorist organization and its

> senior leadership, the specific threat posed by… Anwar-al Aulaqi, and other matters that plaintiff[s have] put at issue, including any criteria governing the use of lethal force, updated to address the facts of this record.

Two weeks later, the government moved to reconsider, both on jurisdictional grounds and because, it said, Collyer didn't need the information to dismiss the case.

> Beyond the jurisdictional issue, the Court should vacate its Order because Defendants' motion to dismiss, which raises the threshold defenses of the political question doctrine, special factors, and qualified immunity, remains pending. The information requested, besides being classified, is not germane to Defendants' pending motion, which accepts Plaintiffs' well-pled facts as true.

As part of their motion, however, the government admitted to supplementing the plaintiffs' facts.

> Defendants' argument that decedents' constitutional rights were not violated assumed the truth of Plaintiffs' factual allegations, and supplemented those allegations only with judicially noticeable public information, the content of which Plaintiffs did not and do not dispute.

The plaintiffs even disputed that they didn't dispute these claims, pointing out that they had introduced claims about:

- AQAP's status vis a vis al Qaeda
- Whether the US is in an armed conflict with AQAP
- The basis for Awlaki's

listing as a Special Designated Global Terrorist

Ultimately, even Collyer scolds the government for misstating the claims alleged in the complaint.

> The United States argued that the factual information that the Court requested was not relevant to the Defendants' special factors argument because special factors precluded Plaintiffs' cause of action, given the context in which the claims, "as pled," arose——that is, "the alleged firing of missiles by military and intelligence officers at enemies in a foreign country in the course of an armed conflict." Mot. for Recons. & to Stay Order at ECF 10. The United States, however, mischaracterizes the Complaint. Nowhere does the Complaint allege that Anwar Al-Aulaqi was an "enemy" of the United States or that he was part of AQAP. The Complaint states only that "government officials told reporters that Al-Aulaqi had "cast his lot" with terrorist groups and encouraged others to engage in terrorist activity. Later, they claimed he had played "a key role in setting the strategic direction" for [AQAP]." Compl. ¶ 26. Further, far from alleging that Anwar Al-Aulaqi was killed "in the course of an armed conflict," the Complaint asserts that he was killed outside of armed conflict, in Yemen. See Compl. ¶ 4 ("At the time of the killing, the United States was not engaged in armed conflict with or within Yemen."). In fact, Plaintiffs allege that "at the time the strike was carried out, Anwar Al-Aulaqi was not engaged in activities that presented a concrete, specific, and imminent threat of death or serious physical injury."

All this, she complains, made it a lot harder to come up with the legally improper but judicially cowardly decision to throw out the case.

> The United States' truculent opposition to the December 26, 2013 Minute Order made this case unnecessarily difficult. Were the Court not able to cobble together enough judicially-noticeable facts from various records, it would have denied the motion to dismiss for the sheer fact that the Defendants failed to support the assertion that Bivens special factors apply.

She doesn't let the government's "truculence" dissuade her, however. In spite of the fact that both sides say she needs no more details to decide the motion to dismiss, Collyer takes judicial notice of what she calls facts and uses them to decide the issue.

> Because the Court may take judicial notice of facts contained in the public records of other proceedings, see Covad, 407 F.3d at 1222, the Court takes judicial notice of the facts regarding Anwar Al-Aulaqi's involvement in the Christmas Day attack. See Sentencing Mem. at 12-14; Tr. of Plea Hr'g (Oct. 12, 2011) at 26. The Court also takes judicial notice of the fact that in a May 2010 video interview, Anwar Al-Aulaqi called for "jihad against America" and declared that he would "never surrender." Al-Aulaqi v. Obama, 727 F. Supp. 2d at 10-11; Clapper Decl. ¶ 16. Judicial notice is taken, too, of the Treasury publication in the Federal Register, i.e., the designation of Anwar Al-Aulaqi as a Specially Designated Global Terrorist due to the fact that he was a key leader of AQAP. See 75 Fed. Reg. 43,233-01.

But she misstates some of the facts she takes

judicial notice of, most significantly in the way she misreads the evidence in the record on the UndieBomb attack.

> When pleading guilty, Mr. Abdulmutallab stated that he conspired with Anwar Al-Aulaqi to carry an explosive device onto the aircraft, thereby attempting to kill those onboard and wreck the plane, as an act of jihad against the United States. Tr. of Plea Hr'g (Oct. 12, 2011) at 26. Mr. Abdulmutallab was debriefed by FBI agents at various times between January and April 2010; he specifically named Anwar Al-Aulaqi as the AQAP leader who approved the Christmas Day attack, and he described in detail the nature of Anwar Al-Aulaqi's participation in the attack. See United States v. Abdulmutallab, Crim. No. 10-CR-20005-1 (E.D. Mich.), Gov't Sentencing Mem., Supp. Factual Appx. (Sentencing Mem.) at 12-14.

Ultimately, Collyer points to the UndieBomb as "proof" of the "fact" that Awlaki was dangerous (and just as importantly, that he supported attacks rather than just propagandized for them).

> The fact is that Anwar Al-Aulaqi was an active and exceedingly dangerous enemy of the United States, irrespective of his distance, location, and citizenship. As evidenced by his participation in the Christmas Day attack, Anwar Al-Aulaqi was able to persuade, direct, and wage war against the United States from his location in Yemen, i.e., without being present on an official battlefield or in a "hot" war zone. Defendants, top military and intelligence officials, acted against Anwar Al-Aulaqi, a notorious AQAP leader, as authorized by the AUMF.
>
> [snip]

> Anwar Al-Aulaqi was an AQAP leader who levied war against his birth country, as unambiguously revealed by his role in the Christmas Day bombing, as well as his video and writings.

But Collyer completely misquotes the evidence from Abdulmutallab's guilty plea, in which he said Awlaki's tapes — which he watched long before he arrived in Yemen — **inspired** his attempted attack, but pointedly does not name his co-conspirators and definitely did not name Awlaki as such. And the claim that any of the rest of the evidence is "unambiguous" is equally false. Significantly, Collyer doesn't mention Abulmutallab's initial confession — details of which appear in the sentencing memo she does cite and which were used for the opening of the trial — which attributes the actions blamed on Awlaki on someone made up, a probable synthesis of multiple people, including Fahd al-Quso (whom the government doesn't name in the sentencing memo) named Abu Tarak.

Collyer similarly ignores evidence in the White Paper showing that the government considered Awlaki to be outside the battlefield — a point the plaintiffs called attention to prior to her ruling.

Even her claim that this was authorized by the AUMF is, at least, unproven. Not even Ron Wyden, who by law should have been but was probably not a participant in what she "prior approval" of the killing (only the Gang of Four gave prior approval, but even there, they had inadequate information), did not know for over a year after Awlaki's killing whether he was killed under the AUMF or not, and the White Paper she invokes leaves that studiously unclear as well.

And while her freelance research isn't as egregious in the case of Abdulrahman al-Awlaki (mostly because there's almost no hard evidence one way or another), she doesn't take notice of the report that the government deliberately killed the younger Awlaki. Given that John

Brennan reportedly ordered a report into the killing to find out who had killed him deliberately, that claim is something that rightly should be assessed in discovery, not ignored so as to make dismissing the case more palatable.

In their comments on the decision, both Center for Constitutional Rights and ACLU talk about Collyer accepting the government's allegations as proof so she could rubber stamp the killing.

> Said Center for Constitutional Rights Senior Attorney Maria LaHood, "Judge Collyer effectively convicted Anwar Al-Aulaqi posthumously **based on the government's own say-so**, and found that the constitutional rights of 16-year-old Abdulrahman Al-Aulaqi and Samir Khan weren't violated because the government didn't target them. It seems there's no remedy if the government intended to kill you, and no remedy if it didn't. This decision is a true travesty of justice for our constitutional democracy, and for all victims of the U.S. government's unlawful killings."
>
> Said ACLU National Security Project Director Hina Shamsi, one of the attorneys who argued the case, "This is a deeply troubling decision that **treats the government's allegations as proof** while refusing to allow those allegations to be tested in court. The court's view that it cannot provide a remedy for extrajudicial killings when the government claims to be at war, even far from any battlefield, is profoundly at odds with the Constitution. It is precisely when individual liberties are under such grave threat that we need the courts to act to defend them. In holding that violations of U.S. citizens' right to life cannot be heard in a federal courtroom, the court abdicated its constitutional role."

But it's worse than that. Having been refused details by the government of those allegations, Collyer went out looking for "proof" of the allegations on her own. What the evidence she consulted shows is that the public proof, at least, is actually contradictory. So she ignored that and just rubber stamped away.

JEREMY SCAHILL: TWO DEGREES OF SEPARATION FROM THE DIRTY WARS DRAGNET

Congratulations to Jeremy Scahill and the entire team that worked on Dirty Wars for being nominated for the Best Documentary Oscar.

This post may appear to be shamelessly opportunistic — exploiting the attention Dirty Wars will get in the days ahead to make a political point before the President endorses the dragnet on Friday — but I've been intending to write it since November, when I wrote this post.

Jeremy Scahill (and the entire Dirty Wars team) is the kind of person whose contacts and sources are exposed to the government in its dragnet.

To write his book (and therefore research the movie, though not all of this shows up in the movie) Scahill spoke with Anwar al-Awlaki's father (one degree of separation from a terrorist target), a number of people with shifting loyalties in Somalia (who may or may not be targeted), and Afghans we identified as hostile in Afghanistan. All of these people might be targets of our dragnet analysis (and remember — there is a far looser dragnet of metadata collected under EO 12333, with fewer

protections). Which puts Scahill, probably via multiple channels, easily within 3 degrees of separation of targets that might get him exposed to further network analysis. (Again, if these contacts show up in 12333 collection Scahill would be immediately exposed to that kind of datamining; if it shows up in the Section 215 dragnet, it would happen if his calls got dumped into the Corporate Store.) If Scahill got swept up in the dragnet on a first or second hop, it means all his other sources, including those within government (like the person depicted in the trailer above) describing problems with the war they've been asked to fight, might be identified too.

Scahill might avoid some of this with diligent operational security — a concerted effort to prevent the government from tracking him along with terrorists (though remember two things: one purpose of the dragnet is to discover burner phones, and his computer got hacked while he was working on this book). But the government's intent is to sweep up records of any conversations that get as close to those hostile to American efforts as Scahill does.

One of my favorite figures in Scahill's book was the Heineken and Johnny Walker swilling Mullah Zabara, a Yemeni tribal leader from Shabwa who expressed the ambivalence Yemenis might feel towards the US.

> Several souther leaders angrily told me stories of US and Yemeni attacks in their areas that killed civilians and livestock and destroyed or damaged scores of homes. If anything, the US air strikes and support for Saleh-family-run counterterrorism units had increased tribal sympathy for al Qaeda. "Why should we fight them? Why?" asked Ali Abdullah Abdulsalam, a southern tribal sheikh from Shabwah who adopted the nom de guerre Mullah Zabara, out of admiration, he told me, for Taliban leader Mullah Mohammed Omar. If my

> government built schools, hospitals and roads and met basic needs, I would be loyal to my government and protect it. So far, we don't have basic services such as electricity, water pumps. Why should we fight al Qaeda?" He told me that AQAP controlled large swaths of Shabwah, conceding that the group did "provide security and prevent looting. If your car is stolen, they will get it back for you." In areas "controlled by the government, there is looting and robbery. You can see the difference." Zabara added, "If we don't pay more attention, al Qaeda could seize and control more areas."
>
> Zabara was quick to clarify that he believed AQAP was a terrorist group bent on attacking the United States, but that was hardly his central concern. "The US sees al Qaeda as terrorism, and we consider the drones terrorism," he said. "The drones are flying day and night, frightening women and children, disturbing sleeping people. This is terrorism."
>
> [snip]
>
> "I don't know this American," he said to my Yemeni colleague. "So if anything happens to me as a result of this meeting—if I get kidnapped—we'll just kill you later."
>
> [snip]
>
> "I am not afraid of al Qaeda. I go to their sites and meet them. We are all known tribesmen, and they have to meet us to solve their disputes." Plus, he added, "I have 30,000 fighters in my own tribe. Al Qaeda can't attack me."

Zabara served as a fascinating source for Scahill. He described seeing Umar Farouk Abdulmutallab while he was staying at Fahd al-

Quso's farm.

> 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, then Fahd told me the truth." [2nd bracket original]

This story does not entirely back the narrative the US told about Abdulmutallab and Awlaki at the former's sentencing; it strongly suggests Quso played a role in Abdulmutallab's plotting the government suppressed in public documents and claims, instead attributing that role to Awlaki as part of the case to kill him. While we can't be sure he told the truth, it does seem that Zabara provided necessary nuance to the story our government has told us about executing an American citizen with a drone strike.

Scahill goes onto reveal,

> In January 2013, Zabara was assassinated in Abyan. It is unknown who killed him.

It could, of course, be anyone, quite likely AQAP (who had let Zabara get away with drinking in the past) or the Yemeni government or some other rival.

Jeremy Scahill's reporting — as well as the reporting of scores of journalists who speak to people who might not be terrorists, but might express well-considered ambivalence toward American presence in the countries where we fight — is utterly crucial to our understanding of whether our "war on terror" will achieve its desired end. In the same way that Peter Bergen's reporting (whose conversation with Osama bin Laden would put him one hop away from the lead terrorist) taught us things about our adversary

we might not otherwise know, Scahill's reporting helps us understand what our Dirty War looks like on the ground. Just as importantly, this reporting provides details that challenge the government's closely managed narrative about what it is doing in our name.

The Academy apparently thinks Scahill's work has artistic and documentary merit. Our government thinks such work should receive no protection in its dragnet.

6TH CIRCUIT: YOU CAN STILL REPRESENT YOURSELF IF SOLITARY CONFINEMENT HAS MADE YOU INCOMPETENT

As expected, the Sixth Circuit wasted no time in denying Umar Farouk Abdulmutallab's appeal of his conviction and sentence. The Circuit affirmed District Court Judge Nancy Edmunds on all matters.

Curiously though, in his opinion, Judge David McKeague spends relatively little time on the most contentious issue of the case: whether or not Abdulmutallab was competent to represent himself. He doesn't really address an issue raised by Abdulmutallab's Appelate lawyer, Travis Rossman, whether any competence determination be concurrent.

As I noted in my coverage of the hearing, Standby Counsel Anthony Chamber's case for incompetence was not that Abdulmutallab was incompetent in 2009 when he was arrested or in 2010 when he fired his attorneys, but had been

made in competent by 19 months of solitary confinement.

> The question wasn't whether Abdulmutallab was competent on August 17, 2011, Tukel suggested, when Edmunds did not call for a competency hearing, nor whether he was competent on October 12, 2011, when he plead guilty. Rather, it was whether he was competent on September 13, 2010, when he fired his defense attorneys. This was part of what seemed a broader government strategy to obscure the timing issues. He also argued all Abdulmutallab's most bizarre behavior post-dated the August 2011 hearing. He argued that because Abdulmutallab attended college in England, he must be competent (!). He also argued that US v. Miller weighs against the standard on concurrent determination.
>
> What Tukel didn't provide much evidence about (beyond that Abdulmutallab always answered Edmunds' questions about counsel as one would expect a defendant defending himself) is whether he was incompetent in August 2011.
>
> Yemeni daggers. Allahu Akbar. Improper attire. Those are the external signs of "craziness" this hearing focused on.
>
> And yet, in spite of the fact that Rossman repeatedly raised Chambers' descriptions of Abdulmutallab's "mental lapses," no one focused on that question.
>
> Which is crucial because, as Rossman argued (albeit weakly), part of the argument was that the conditions of Abdulmutallab's confinement — 19 months of solitary confinement by the time of the August 2011 hearing — made him incompetent to defend himself.

And while McKeague pointed to one point where Abdulmutallab responded rationally to Edmunds' questions, his most sustained case for Abdulmutallab's competence rests on the Nigerian's competence in carrying out his terrorist plot 21 months before he pled guilty (note, some of these claims are actually quite contestable, but I won't deal with that here).

> In order for Abdulmutallab to accomplish his goal of blowing up an aircraft over United States soil, Abdulmutallab had to make numerous calculated decisions. A brief overview of the steps that Abdulmutallab took in preparation for his mission is instructive:
>
> - *Abdulmutallab studied the teachings of the radical Imam Anwar Awlaki, which prompted his decision to travel to Yemen for the purpose of meeting Awlaki.*
> - *While in Yemen, Abdulmutallab agreed to carry out the martyrdom mission.*
> - *In order to conceal his time in Yemen, Abdulmutallab decided to travel to Ghana before departing to Amsterdam.*
> - *Abdulmutallab had to come up with clever reasons for traveling to the United States when an airport screener in Amsterdam*

> *questioned his reasons for travel.*
>
> These actions show the deliberate, conscious, and complicated path Abdulmutallab chose to pursue in the name of martyrdom. Unlike the defendants in Pate and Drope, Abdulmutallab not only acted rationally, but was (nearly) able to execute a complex martyrdom mission. The complexity behind Abdulmutallab's mission indicates the exact opposite of incompetence.

In other words, McKeague's opinion most strongly argues that if you're competent enough to (almost) carry out a terrorist plot then you are competent enough to defend yourself, whether or not 19 months of solitary confinement make you incompetent in the meantime.

Ramzi bin al-Shibh, take note.

Perhaps as significant a part of this ruling as the competency one is how the Circuit dealt with Abdulmutallab's challenge to his statements at University of Michigan hospital, given the assault on Miranda in other terrorism cases. Not only had he not been Mirandized, but he had also been administered drugs, when he made those comments.

Basically, McKeague punted.

> Abdulmutallab argues that the district court erred in failing to suppress the statements he made during his time at the University of Michigan Hospital. Abdulmutallab states that his testimony at the hospital was compelled and therefore the Fifth Amendment prohibited the use of that testimony in trial.
>
> We will not address the merits of Abdulmutallab's argument, as he waived any right to challenge the suppression of his statements when he entered the guilty plea. When a criminal defendant

> pleads guilty, “he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards [for effective assistance of counsel].” Tollett v. Henderson, 411 U.S. 258, 267 (1973). This court has held that a defendant who pleaded guilty may not appeal an adverse ruling on a pre-plea motion to suppress evidence “unless he has preserved the right to do so by entering a conditional plea of guilty in compliance with Rule 11(a)(2).”

I don’t question this decision, particularly given the decision on competence. But it’s important because commentators had pointed to Abdulmutallab’s case as precedent for the treatment of (among others) Dzhokhar Tsarnaev. But the Circuit declined to fully endorse his treatment, one way or another.

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2 AGENTS 3 HOURS A DAY WEREN’T REALLY READING ANWAR AL-AWLAKI’S EMAIL

Former CIA Deputy Director John McLaughlin wants you to believe the NSA wasn’t really reading Anwar al-Awlaki’s communications content, on whose emails (including the web-based ones) the NSA had a full-time tap at least as early as March 16, 2008.

> In my experience, NSA analysts err on the side of caution before touching any data having to do with U.S. citizens. In 2010, at the request of then-Director of National Intelligence Dennis Blair, I chaired a panel investigating the intelligence community's failure to be aware of Umar Farouk Abdulmutallab, the "underwear bomber" who tried to blow up a commercial plane over Detroit on Dec. 25, 2009.
>
> The overall report remains classified, but I can say that the government lost vital time because of the extraordinary care the NSA and others took in handling any data involving a "U.S. person." (Abdulmutallab, a Nigerian, was recruited and trained by the late Anwar al-Awlaki, a U.S. citizen based in Yemen.)

And maybe that's the case.

Except it doesn't seem to square with the report that two FBI Agents were spending 3 hours a day each reading Awlaki's mail. It doesn't seem to accord with the efforts those Agents made to chase down the Nidal Hasan lead — which, after all, infringed on the privacy of **two** American citizens, against one of whom probable cause had not been established. You'd think it would be far easier to chase down the Abdulmutallab messages, particularly given what has been portrayed as more clearly operational content, given that Abdulmutallab would have gotten no protection as a US person.

Sure, those Agents complained about the "crushing" volume of the communications content they had to review every day, but that was a factor of volume, not any restrictions on reading FISA target Anwar al-Awlaki's email.

Don't get me wrong. I'm thrilled someone has raised Abdulmutallab in the context of assessing NSA's dragnet, which I've been calling for since

October.

> UndieBomb 1.0 was the guy who was allegedly plotting out Jihad with Anwar al-Awlaki — whose communications the FBI had two guys reading — over things like chats and calls. That is, Umar Farouk Abdulmutallab was a guy whose plot the NSA and FBI should have thwarted before he got on a plane. (To say nothing of the CIA and NCTC's fuck-ups.)
>
> And yet, he got on that plane. His own incompetence and the quick work of passengers prevented that explosion, while a number of needles went unnoticed in the NSA's most closely watched haystacks.
>
> Nevertheless, the lesson DiFi takes is that we need more haystacks.
>
> Shouldn't the lessons of UndieBomb 1.0 be just as important to this debate as the partial, distorted, lessons of 9/11?

(I've also been wondering why Faisal Shahzad, who was getting instructions, including hawala notice, from known targets of drone strikes in Pakistan, before his attack, wasn't identified by phone and Internet dragnet analysis as a person of interest through those contacts, though that may legitimately be because of turmoil in both dragnet programs.)

But for McLaughlin's claims to be true then the description of the treatment of the Awlaki wiretaps in the Webster report on the Nidal Hasan investigation wouldn't seem to make sense.

By all means, let's hear what really happened back between 2008 and 2010, when the NSA missed multiple contacts with top AQAP targets and TTP targets and as a result missed two of the three main international terrorist attacks on this country since 9/11. That should be part of the debate.

But let's be very clear whether it was really

limits on US person data, when we see FBI reading content of two US persons directly, or rather the sheer volume we're collecting (as well as the crappy computer systems FBI had in place in 2009) that caused the dragnet to fail.

NSA FAILURES AND TERROR SUCCESSES DRIVE THE DRAGNET

Ryan Lizza has a long review of the dragnet programs. As far as the phone dragnet, it's a great overview. It's weaker on NSA's content collection (in a piece focusing on Ron Wyden, it doesn't mention back door searches) and far weaker on the Internet dragnet, the technical and legal issues surrounding which he seems to misunderstand on several levels. It probably oversells Wyden's role in bringing pressure on the programs and treats Matt Olsen's claims about his own role uncritically (that may arise out of Lizza's incomplete understanding of where the dragnet has gone). Nevertheless, it is well worth a read.

I think it most valuable for the depiction of Obama's role in the dragnet and its description of the ties between the war on terror and perceptions about the dragnet. Take this account of Obama's decision not to embrace transparency during the PATRIOT Act Reauthorization in 2009-10. Lizza describes Wyden pressuring Obama to make information on the dragnets available to Congress and the public (we know HJC members Jerry Nadler, John Conyers, and Bobby Scott were lobbying as well, and I've heard that Silvestre Reyes favored disclosure far more than anyone else in a Ranking Intelligence Committee position).

But then the UndieBomb attack happened.

> The debate ended on Christmas Day, 2009, when Umar Farouk Abdulmutallab, a twenty-three-year-old Nigerian man, on a flight from Amsterdam to Detroit, tried to detonate a bomb hidden in his underwear as the plane landed. Although he burned the wall of the airplane's cabin—and his genitals—he failed to set off the device, a nonmetallic bomb made by Yemeni terrorists. Many intelligence officials said that the underwear bomber was a turning point for Obama.
>
> "The White House people felt it in their gut with a visceralness that they did not before," Michael Leiter, who was then the director of the National Counterterrorism Center, said. The center was sharply criticized for not detecting the attack. "It's not that they thought terrorism was over and it was done with," Leiter said, "but until you experience your first concrete attack on the homeland, not to mention one that becomes a huge political firestorm—that changes your outlook really quickly." He added, "It encouraged them to be more aggressive with strikes"—drone attacks in Yemen and Pakistan—"and even stronger supporters of maintaining things like the Patriot Act."
>
> Obama also became more determined to keep the programs secret. On January 5, 2010, Holder informed Wyden that the Administration wouldn't reveal to the public details about the N.S.A.'s programs. He wrote, "The Intelligence Community has determined that information that would confirm or suggest that the United States engages in bulk records collection under Section 215, including that the Foreign Intelligence Surveillance Court (fisc) permits the collection of 'large amounts of information' that includes

> ‘significant amounts of information about U.S. Persons,’ must remain classified.” Wyden, in his reply to Holder a few weeks later, expressed his disappointment with the letter: “It did not mention the need to weigh national security interests against the public’s right to know, or acknowledge the privacy impact of relying on legal authorities that are being interpreted much more broadly than most Americans realize.” He said that “senior policymakers are generally deferring to intelligence officials on the handling of this issue.”

Curiously, Lizza makes no mention of Nidal Hasan who, unlike Umar Farouk Abdulmutallab, actually succeeded in his attack, and like Abdulmutallab, had had communications with Anwar al-Awlaki intercepted by the NSA (and FBI) leading up to the attack. Weeks before the UndieBomb attack, Pete Hoekstra had already started criticizing the Obama Administration for not responding to Hasan’s emails to Awlaki, and Hasan’s attack led to more tracking of Awlaki (and, I suspect, Samir Khan’s) online interlocutors. I also suspect that, because of certain technical issues, the Hasan experience led to increased support for suspicionless back door searches.

But whether or not the UndieBomber alone or in conjunction with the Hasan attack was the catalyst, I absolutely agree Obama got spooked.

The question is whether Obama took the correct lesson from the UndieBomb, in particular. While the Hasan attack definitely led to real lessons about how to better use content collection (FISA and PRISM), the UndieBomb case should have elicited conclusions about having too much data to find the important messages, such as Abdulmutallab’s text to Awlaki proposing Jihad. (Note that Hoekstra’s blabbing about the Awlaki taps may have led AQAP to encrypt more of their data — as Awlaki was alleged to have done with Rajib Karim — which would have led to legitimate

concerns about publicizing NSA techniques.) With the UndieBomb, NSA purportedly had advance warning of the attack that didn't get read until after the attempt. Why not? And why wasn't that Obama's main takeaway?

And the National Security people still seem to be taking the wrong lessons. Here's Matt Olsen and DiFi's version of the National Security crowd's latest fearmongering, that we need dragnets even more so now because the terrorist group has dispersed.

> As core members of Al Qaeda were killed, the danger shifted to terrorists who were less organized and more difficult to detect, making the use of the N.S.A.'s powerful surveillance tools even more seductive. "That's why the N.S.A. tools remain crucial," Olsen told me. "Because the threat is evolving and becoming more diverse."
>
> Feinstein said, "It is very difficult to permeate the vast number of terrorist groups that now loosely associate themselves with Al Qaeda or Al Nusra or any other group. It is very difficult, because of language and culture and dialect, to really use human intelligence. This really leaves us with electronic intelligence."

Olsen says the problem is, in part, that Al Qaeda is "less organized." DiFi says one problem we have "permeating" terrorist groups is language and culture and dialect and her solution to that is to use "electronic intelligence." While electronic intelligence — and specifically metadata — provides a way to compensate for linguistic failures (the NSA uses structure to identify which are the important conversations), in terrorist attack after terrorist attack (as well as CW attack) we turn out not to have been watching the right content feeds. And if we don't have the linguistic skills, we're likely not going to understand the

messages correctly in any case.

And these are less organized groups! Are they really any more effective than crime gangs at this point, and crime gangs in countries far away with little means to access the US?

But rather than saving money on the dragnet and working instead on shoring up our cultural and linguistic failures, this failure is instead seen as another excuse to sustain the dragnet.

It's clear that terror — whether NSA has failed or not — serves as a evergreen excuse for the dragnet. The real question is whether it should.

HOW DOES A COMPETENT JIHADI ACT AFTER 21 MONTHS OF SOLITARY CONFINEMENT?

I would be shocked if, after today's appeal hearing in Umar Farouk Abdulmutallab's trial, he were granted a new trial on competency grounds. On the panel, David McKeague seemed completely skeptical on legal grounds, Jane Branstetter Stranch seemed skeptical on the central competency issue, leaving Curtis Collier (a District Judge on loan from E TN) with the only apparent sympathy for the argument at hand in the least.

As I explained back in May, The central question was whether Abdulmutallab was competent to defend himself. He had fired his federal defenders in September 2010 and the court named a standby counsel, Anthony Chambers, for him. In August of the next year, Chambers submitted a sealed motion arguing Abdulmutallab was not

competent. Judge Nancy Edmunds had a hearing on August 17, 2011 and while she addressed several questions to Abdulmutallab, she did not have him evaluated for competency. When he plead guilty on October 12, 2012, she asked standby counsel if he thought Abdulmutallab was competent to plead guilt and after he assented, she accepted the guilty plea.

Both Judge McKeague, to a lesser degree Stranch, and prosecutor Jonathan Tukel emphasized that last point in their discussion: given that the same standby counsel who had submitted the motion on competence did not re-raise it at the plea, they argued, it suggests the counsel agreed with Edmunds' determination that Adbulmutallab was competent. Abdulmutallab's attorney Travis Rossman argued that the Chambers could not, at that point, argue his client was totally crazy. Moreover, he argued, the standard for a defendant representing himself was higher and must be concurrent determination (meaning if he were crazy in August 2012 but competent in October 2012, it would still be an issue for a defendant representing himself). But that detail will almost certainly be the one the judges point to to reject this appeal.

Judges McKeague and Stranch also examined a different question. Some of the most obviously crazy things Abdulmutallab did (though this wasn't and couldn't have been Chambers' original argument) came leading up to trial, most notably his bid to wear a Yemeni dagger to his trial. Abdulmutallab intended to martyr himself, Stranch noted, couldn't these actions be interpreted as an effort to use the trial to make a point of his faith? McKeague pointed out that Abdulmutallab had done some pretty "well thought out logical things" leading up to his attack. He later asked whether his conduct at trial wasn't consistent with what you'd expect a jihadi to do, to use the trial as a platform to present his views?

Rossman contested that point — noting that had Abdulmutallab let the trial play out, he would

have had many more opportunities to parade his jihadi views. McKeague responded that refusing counsel left Abdulmutallab more empowered to make jihadi statements rather than mount a defense. Rossman correctly pointed out this was all getting into speculation about how a competent jihadi would act.

While it didn't come up in the hearing, remember that the statement Abdulmutallab ultimately made was remarkably muted and took up less than 15 minutes, so by measure of his exploitation of his soapbox, the UndieBomber failed.

All that's a way of saying that much of the hearing focused on how a competent jihadi would use his decision to represent himself to further his goals of jihad.

There is, however, a significant weakness in the government's case, one Tukel made obvious with the central ploy he made in his argument.

The question wasn't whether Abdulmutallab was competent on August 17, 2011, Tukel suggested, when Edmunds did not call for a competency hearing, nor whether he was competent on October 12, 2011, when he plead guilty. Rather, it was whether he was competent on September 13, 2010, when he fired his defense attorneys. This was part of what seemed a broader government strategy to obscure the timing issues. He also argued all Abdulmutallab's most bizarre behavior post-dated the August 2011 hearing. He argued that because Abdulmutallab attended college in England, he must be competent (!). He also argued that US v. Miller weighs against the standard on concurrent determination.

What Tukel didn't provide much evidence about (beyond that Abdulmutallab always answered Edmunds' questions about counsel as one would expect a defendant defending himself) is whether he was incompetent in August 2011.

Yemeni daggers. Allahu Akbar. Improper attire. Those are the external signs of "craziness" this hearing focused on.

And yet, in spite of the fact that Rossman repeatedly raised Chambers' descriptions of Abdulmutallab's "mental lapses," no one focused on that question.

Which is crucial because, as Rossman argued (albeit weakly), part of the argument was that the conditions of Abdulmutallab's confinement — 19 months of solitary confinement by the time of the August 2011 hearing — made him incompetent to defend himself.

> Pending trial he was held in solitary confinement and placed under constant watch in conditions that would strain the mental health of anyone. His treatment vastly differed from that of most pretrial inmates and his frequent reports of troubles with Milan coincided with his declining interest in mounting a defense.

After all, the exterior signs of mental impairment from solitary confinement may well be far different from those of a jihadi attempting to use his trial as a platform for propaganda.

In fact, Rossman's biggest mistake probably came when he asserted Abdulmutallab "did not have hallucinations." I'm not sure we know that. That's the entire point of having a competency examination, and one known potential impairment from solitary is hallucination. In any case, if you're arguing your client should have been evaluated, don't offer up layperson assessments about what he did and didn't have.

Now, frankly, there is evidence Abdulmutallab was crazy before he tried to down a Northwest flight (that's what people in Yemen told Jeremy Scahill, for example), though probably not so much that it would vacate his conviction.

The question before the court is not just whether Abdulmutallab was crazy on Christmas Day in 2009. Rather. It's also whether he was made crazy (or, more likely, crazier) by his conditions of incarceration. McKeague even

invited Rossman to present evidence that something happened between the time when he competently attempted to bomb a plane and incompetently (his defense argues) failed to mount a defense.

But no one wanted to — or did — discuss that issue.

WILLIAM WEBSTER MEETS EDWARD SNOWDEN, IRTPA, ROVING WIRETAPS, AND THE PHONE DRAGNET

For a post on back-door searches, I'm re-reading the William Webster report on whether the FBI could have anticipated Nidal Hasan's attack. In the light of the Edward Snowden disclosure, I'm finding there are a number of passages that read very differently (so expect this to be a series of posts).

As you read this, remember two things about Webster's report. First, FBI and NSA's failure to find Umar Farouk Abdulmutallab in spite of texts he sent to Anwar al-Awlaki was probably prominent on the Webster team's mind as they completed this (and surely factors significantly in the classified version of the SSCI report on the UndieBomb). So some of the comments in the Webster report probably don't apply directly to the circumstances of Nidal Hasan, but to that (and Webster notes that some of the topics he addresses he does because they're central to counterterrorism approaches). And the Webster report is perhaps the most masterful example of an unclassified document that hides highly classified background.

All that said, in a section immediately following Webster's description of Section 215, Webster discusses how Roving Wiretaps, Section 6001 of IRTPA, and Section 215 were all reauthorized in 2011.

> When FISA was passed in 1978, the likely targets of counterterrorism surveillance were agents of an organized terrorist group like the Red Brigades, the Irish Republican Army, or the Palestinian terrorist organizations of that era. **Given the increasing fluidity in the membership and organization of international terrorists**, the FBI may not be able to ascertain a foreign terrorist's affiliation with an international organization. Section 6001 of the Intelligence Reform and Terrorist Prevention Act of 2004 (IRTPA) allows the government to conduct surveillance on a non-U.S. person who "engages in international terrorism or activities in preparation therefor" without demonstrating an affiliation to a particular international terrorist organization. Pub. L. 108-458, § 6001, 118 Stat. 3638, 3742 (2004).
>
> Sections 206 and 215 of the PATRIOT Act and Section 6001 of IRTPA were scheduled to "sunset" on December 31, 2009. In May 2011, after an interim extension, Congress extended the provisions until June 1, 2015, without amendment. [my emphasis]

I find this interesting, first of all, because it doesn't mention the Pen Register and Lone Wolf language that also got reauthorized in 2011 (suggesting he lumped these three together for a specific reason). And because it puts the language, "engages in international terrorism or activities in preparation therefor" together with roving wiretaps ("continuous electronic surveillance as a target moves from one device to another"), and Section 215, which we now know

includes the phone dragnet.

As we've seen, DiFi's Fake FISA Fix includes the language from IRTPA, on "preparation therefor," which I thought was an expansion of potential targets but which I presume now is what they've been using all along. While I don't recall either the White Paper nor Claire Eagan's language using that language, I'm wondering whether some underlying opinion does.

Now consider how the roving wiretap goes with this. One reason — probably the biggest reason — they need all phone records in the US is so they can use it to find targets as they move from one burner cell phone to another. Indeed, one passage from DiFi's Fake FISA Fix seems specifically designed to authorize this kind of search.

> (C) to or from any selector reasonably linked to the selector used to perform the query, in accordance with the court approved minimization procedures required under subsection (g).

That language "reasonably linked" surely invokes the process of using algorithms to match calling patterns to calling patterns to find a target's new phone. And note this is the only query that mentions minimization procedures, so the Court must have imposed certain rules about how you treat a new "burner" phone ID until such time as you've proven it actually is linked to the first one.

What's interesting, though, is that the Webster report also lumps roving wiretaps in with this. What's at issue in Nidal Hasan's case was effectively roving electronic communication; he emailed Awlaki from several different email addresses and one of the problems FBI had was in pulling up Hasan's communications under both identities (you can see how this relates to the back door loophole). But the inclusion of roving wiretaps here seems to suggest the possibility that a court has used the existing of roving

wiretap approval for the use of the phone dragnet to find burner phones (which shouldn't have been an issue in the Nidal Hasan case but probably was for Abdulmutallab).

One more comment? The notion that identifying an Al Qaeda target is any harder than identifying an IRA-affiliate is utter nonsense. If anything, US-based IRA affiliates were harder to identify because they were completely and utterly socially acceptable. But I guess such myths are important for people advocating more dragnet.

THE DOG ATE CHARLES MCCULLOUGH'S HOMEWORK

Let's take the narrative the Federal Government wants to tell us about the Boston Marathon attack.

Both FBI and CIA got tips from Russia in early- and mid-2011 implicating Tamerlan Tsarnaev in extremism which FBI, which appropriately has jurisdiction, investigated and entered into the relevant databases accessible to Joint Terrorism Task Force partners.

Later that year, the government alleges (based on the word of a guy they killed immediately thereafter), Tamerlan and Ibragim Todashev — and possibly Tamerlan's brother Dzhokhar — knifed three friends and associates to death on 9/11 while they waited for pizza from a place the brothers may have once worked; while several of the people on both sides of that killing were involved in selling drugs, the presumed motive for that killing (especially given the date) pertains to Islamic extremism, not a drug and money dispute, in spite of or perhaps because of the pot and money left at the scene. After the killing, Tamerlan disappeared from the scene in

Cambridge and was never interviewed by the cops. Senate Intelligence Committee members allege Russia passed on another warning about Tamerlan after October 2011, though the FBI insists it kept **asking** for more information to no avail.

The next year, Tamerlan left for Russia and Chechnya and Dagestan, but the Homeland Security dragnet missed him because Aeroflot misspelled his name (an issue that contributed to their missing the UndieBomb, too; Russia's original tip to the FBI had gotten his birthdate wrong). While in Russia, Tamerlan met a bunch of Chechen extremists, several of whom were killed shortly after he met them. Then, Tamerlan returned to Boston, and he and his brother made some bombs out of pressure cookers and fireworks in his Cambridge flat (testimony of their cab driver notwithstanding), and then set them off near the finish line of the Boston Marathon, killing 3 and maiming hundreds.

In spite of the thousands of videos of the event, FBI's prior investigation, and immigration records on the brothers including pictures, the government's facial recognition software proved unable to find them (in spite of claims "FBI" officials were asking around Cambridge already), so the government released their pictures and set off a manhunt that resulted in Tamerlan's death and the arrest of Dzhokhar.

That's the story, right?

Two weeks after the attack, James Clapper tasked the Intelligence Community Inspector General, Charles McCullough, with investigating the attack to see if it could have been prevented (note, after the 2009 UndieBomb attack, the Senate Intelligence Committee conducted such an investigation but I've heard no peep of them doing so here). Also involved in that investigation are DOJ, DHS, and CIA's IG, but not NSA's IG, in spite of the fact that the Russians, at least, reportedly intercepted international texts implicating Tamerlan in planning jihad (though there's no reason to

believe the non-US side of those texts — a family member of the brothers' mother — would have been a known CT target). (Note that, even as McCullough has been conducting this investigation, which ultimately involves information that has been leaked to the press, James Clapper has him conducting investigations into unauthorized leaks — does anyone else see the huge conflict here???)

Back on September 19 (perhaps not coincidentally the day after Ibragim Todashev's friend Ashurmamad Miraliev was arrested in FL and questioned for 6 hours without a lawyer), McCullough wrote Congress to tell them that because "information relevant to the review is still being provided to the review team," the review would be indefinitely delayed.

According to the BoGlo, McCullough is offering a new excuse for further delay: the shutdown.

> Officials said the shutdown has hampered various agencies' ability to conduct interviews, undertake research, or **pay support personnel who are responsible for reviewing the operations of the government's terrorism databases** before the Marathon attack and determining whether information on the bombing suspects was properly handled.
>
> [snip]
>
> Last month congressional oversight communities were informed that while officials were "working diligently" to complete the review, the process of interviewing counter-terrorism officials and **reviewing computer files had turned out to be more challenging than expected**. McCullough, the intelligence community's inspector general, said at the time that "information relevant to the review is still being provided to the review teams."
>
> A senior Senate staffer, who was not authorized to speak publicly, said

> briefings recently scheduled for intelligence officials to brief key congressional committees on the progress of the review were canceled.

So here we are over 6 months after the attack, and an inquiry purportedly reviewing whether our CT information sharing (led by the National Counterterrorism Center, which reports to Clapper, to whom McCullough also reports as a non-independent IG) did what it was supposed to, is still having trouble reviewing the actual databases (!?!?), ostensibly because they had to furlough the support people doing that rather than allow them to figure out how to fix problems to prevent the next terrorist attack. (Remember, James Clapper testified he had furloughed 70% of civilian IC staff, to the shock of Chuck Grassley and others.)

Perhaps that's the problem. Perhaps it is the case that in 6 months time, IC support personnel had not yet been able to access and assess the database counterterrorism professionals are expected to monitor and respond to almost instantaneously. If that is the case, it, by itself, ought to be huge news.

Or perhaps there's something about the Waltham investigation that has made it newly embarrassing that warnings before and — if blathery Senators are to be believed — after the murders didn't focus more attention on Tamerlan Tsarnaev.

"TOO MUCH TRANSPARENCY DEFEATS THE VERY

PURPOSE OF DEMOCRACY”

In truly bizarre testimony he will deliver to the House Intelligence Committee next week, Paul Rosenzweig argues that “too much transparency defeats the very purpose of democracy.” He does so, however, in a piece arguing that the government needs what amounts to be almost full transparency on all its citizens.

The first section of Rosenzweig analysis talks about the power of big data. It doesn’t provide any actual evidence that big data works, mind you. On the contrary, he points to one failure of big data.

> When we speak of the new form of “dataveillance,” we are not speaking of the comparatively simple matching algorithms that cross check when a person’s name is submitted for review¾when, for example, they apply for a job. **Even that exercise is a challenge for any government, as the failure to list Abdulmutallab in advance of the 2009 Christmas bombing attempt demonstrates.[**11] The process contains uncertainties of data accuracy and fidelity, analysis and registration, transmission and propagation, and review, correction, and revision. Yet, even with those complexities, the process uses relatively simple technologically—the implementation is what poses a challenge.
>
> By contrast, other systems of data analysis are far more technologically sophisticated. They are, in the end, an attempt to sift through large quantities of personal information to identify subjects when their identities are not already known. In the commercial context, these individuals are called “potential customers.” In the cyber

> conflict context, they might be called "Anonymous" or "Russian patriotic hackers." In the terrorism context, they are often called "clean skins" because there is no known derogatory information connected to their names or identities. In this latter context, the individuals are dangerous because nothing is known of their predilections. For precisely this reason, this form of data analysis is sometimes called "knowledge discovery," as the intention is to discover something previously unknown about an individual. [my emphasis]

Nevertheless, having not provided evidence big data works, he concludes that "There can be little doubt that data analysis of this sort can prove to be of great value."

The reference to Abdulmutallab is curious. At the beginning of his testimony he repeats the reference.

> In considering this new capability we can't have it both ways. We can't with one breath condemn government access to vast quantities of data about individuals, as a return of "Big Brother"[4] and at the same time criticize the government for its failure to "connect the dots" (as we did, for example, during the Christmas 2009 bomb plot attempted by Umar Farouk Abdulmutallab.

This formulation — and the example of Abdulmutallab even more so — is utterly crazy. **Having** big data is not the same thing as **analyzing** it correctly. Criticism that the Intelligence Community failed to connect the dots — with the UndieBomb attack, but even with 9/11 — assumes **they had the dots** but failed to analyze them or act on that analysis (as the IC did fail, in both cases). Indeed, having big data may actually be an impediment to analyzing

it, because it drowns you. And while Rosenzweig suggests the only big data failure with Abdulmutallab involved not placing him on a watch list, that's false. The NSA had wiretaps on Anwar al-Awlaki which, according to the government, collected information tying Abdulmutallab to an attack.

Yet they didn't respond to it.

And you know what? We measly citizens don't know why they didn't respond to it — though we do know that the FBI agents who were analyzing the Awlaki data were … you guessed it! Overwhelmed.

Before anyone involved in government claims that big data helps — rather than hinders — they should have to explain why a full-time tap on Anwar al-Awlaki didn't find the guy who was texting him about a terrorist attack. Particularly in the absence of any other compelling evidence big data works (and the Administration's claims of 54 "terrorist events stopped" barely makes a claim to justify Section 702 collection and certainly doesn't justify Section 215), then logical conclusion is that it in fact does the opposite.

Having made the unsubstantiated claim that giving the government full transparency on citizens and others provides a benefit, Rosenzweig then dismisses any privacy concerns by redefining it.

Part of that involves claiming — reports of the collection of address books notwithstanding — that so long as we don't get identified it doesn't matter.

> The anonymity that one has in respect of these transactions is not terribly different from "real-world anonymity." Consider, as an example, the act of driving a car. It is done in public, but one is generally not subject to routine identification and scrutiny.

He then proposes we not limit what can be seen,

but instead ensure that nothing unjustified can happen to you based on the discovery of something about you.

> In other words, the veil of anonymity previously protected by our "practical obscurity" that is now so readily pierced by technology must be protected by rules that limit when the piercing may happen as a means of protecting privacy and preventing governmental abuse. To put it more precisely, the key to this conception of privacy is that privacy's principal virtue is a limitation on consequence. If there are no unjustified consequences (i.e., consequences that are the product of abuse or error or the application of an unwise policy) then, under this vision, there is no effect on a cognizable liberty/privacy interest. In other words, if nobody is there to hear the tree, or identify the actor, it really does not make a sound.

If nothing bad in real life happens to you because of this transparency the government should have on citizens, Rosenzweig argues, nothing has happened.

For the moment, I'll just bracket the many examples where stuff happens in secret — being put on a no fly list, having your neighbor recruited as an informant using data the NSA found, having your computer invaded based on equations of Anonymous with hacker — that still have effects. On those, no one can now assess whether something bad has happened unjustly, because no one will ever see it. And I'll bracket all the things everyone has ever written about how living in a Panopticon changes behavior and with it community.

Here's how Rosenzweig justifies setting up a (what he fancies to be anonymous but isn't, really) Panopticon while denying citizens the same right to see; here's how he supports his

"too much transparency" comment.

> Finally, let me close this statement of principles by noting that none of this is to diminish the significance of the transparency and oversight, generally. Transparency is a fundamental and vital aspect of democracy. Those who advance transparency concerns often, rightly, have recourse to the wisdom of James Madison, who observed that democracy without information is "but prologue to a farce or a tragedy."[13]
>
> Yet Madison understood that transparency was not a supreme value that trumped all other concerns. He also participated in the U.S. Constitutional Convention of 1787, the secrecy of whose proceedings was the key to its success. While governments may hide behind closed doors, U.S. democracy was also born behind them. It is not enough, then, to reflexively call for more transparency in all circumstances. The right amount is debatable, even for those, like Madison, who understand its utility.
>
> What we need is to develop an heuristic for assessing the proper balance between opacity and transparency. To do so we must ask, why do we seek transparency in the first instance? Not for its own sake. Without need, transparency is little more than voyeurism. Rather, its ground is oversight—it enables us to limit and review the exercise of authority.

Man, that series of sentences … "without need, transparency is little more than voyeurism" … "why do we seek transparency for its own sake" are pretty ironic in testimony defending the NSA's collection of records of every phone-based relationship in the US, of having access to 75% of the Internet traffic in the US, and of tapping 35 world leaders just because it could.

But first, Madison.

Because Madison participated in a series of secret meetings the results of which and eventually the details of which were subsequently made public to the entire world, Rosenzweig suggests Madison might support a system where citizens never got to learn how close to all their data the government collects and how it uses it.

Then he argues the only purpose of transparency — the thing separating it from voyeurism — is "oversight," which he describes as limit[ing] and review[ing] the exercise of authority.

If he thought this through, he might realize that even if that's the only legitimate purpose for transparency, it'd still require some oversight over the Executive **and the Legislature** that, in his delegated model of oversight simply would not and could not (and does not) exist. One thing we're learning about the dragnet, for example, is that a good deal of collection on US persons goes on under Executive Order 12333 that gets almost no Congressional review at all. And that's just the most concrete way we're learning how inadequate the oversight practiced by the Intelligence Committees is.

But that's not the only purpose of transparency.

One other purpose of transparency — arguably, the purpose of democracy — is to exercise some rationality to assess the best policies. The idea is that if you debate policies and only then decide on them, you end up with more effective policies overall. It doesn't always work out that way, but the idea, in any case, is that policies subjected to debate end up being smarter than policies thought up in secret.

It's about having the most effective government.

So in addition to making sure no one breaks the law (Rosenzweig seems unconcerned that NSA has been caught breaking the law and violating court orders repeatedly), transparency — democracy — is supposed to raise the chances of us following

better policies.

I presume Rosenzweig figures the debate that goes on within the NSA and within the National Security Counsel adequate to the task of picking the best policies (and the Constitution certainly envisions the Executive having a great deal of that debate take place internally, though surely not on programs as monumental as this).

But here's the thing: the public evidence — whether it be missing the Abdulmutallab texts on an attack, the thin claims of 54 terrorist events, or Keith Alexander's reports that the US has been plundered like a colony via cyberattacks under his watch — it's actually not clear this approach is all that effective. In fact, there's at least reason to believe some parts of the approach in place are ineffective.

That's why we need more transparency. Not to be voyeurs on a bunch of analysts at NSA (really?). But to see if there's a better way to do this.

Ultimately, though, Rosenzweig defeats himself. He's right that we need to find "the proper balance between opacity and transparency" (though he might step back and reconsider what the "very purpose of democracy" is before he chooses that balance). But it is utterly illogical to suggest the balance be set for almost complete transparency when the government looks at citizens — records of all their phone-based relationships and access to 75% of the Internet data — but then argue that delegated transparency (but with almost no transparency on the delegated part) is adequate for citizens looking back at their government.

Related: Homeland Security Czar Lisa Monaco endorses the idea that just because we can collect it doesn't mean we should. Michael Hayden learns surveillance isn't actually all that fun. And Keith Alexander says we should get rid of journalism.