

# “CRACKPOTS DON’T MAKE GOOD MESSENGERS”

For the record, I have no intention of voting for Ron Paul in the General election (though depending on how the GOP primary rolls out, I might consider crossing over to vote for Paul in the MI primary, for similar reasons as I voted for John McCain in the 2000 primary: because I knew my vote wouldn’t matter in the Democratic primary and I hoped a McCain win might slow down George Bush’s momentum and focus some attention on campaign finance reform, McCain’s signature issue at the time).

I don’t want Ron Paul to be President and, for all my complaints with Obama, he is a less bad presidential candidate than Paul.

But that’s an entirely different question than the one Kevin Drum purports to address with this post:

Should we lefties be happy he’s in the presidential race, giving non-interventionism a voice, even if he has other beliefs we find less agreeable? Should we be happy that his non-mainstream positions are finally getting a public hearing?

Drum doesn’t actually assess the value of having a non-interventionist in the race, or even having a civil libertarian in the race (which he largely dodges by treating it as opposition to the drug war rather than opposition to unchecked executive power), or having a Fed opponent in the race.

Instead, he spends his post talking about what a “crackpot” Paul is, noting (among other things), that Paul thinks climate change is a hoax, thinks the UN wants to confiscate our guns, and is a racist.

Views, mind you, that Paul shares in significant part with at least some of the other crackpots running for the GOP nomination.

Of course, Paul does have views that none of the other Republicans allowed in Presidential debates share. And that's what Drum would need to assess if he were genuinely trying to answer his own question: given a field of crackpots, several of whom are explicit racists, several of whom make claims about cherished government programs being unconstitutional, most of whom claim to believe climate change doesn't exist, is it useful that one of the candidates departs from the otherwise universal support for expanded capitulation to banks, authoritarianism, and imperialism? Is it useful to do so leading up to a General election with a Democrat who has been weak against banks, expanded executive authority, and found new Muslim countries to launch drone strikes against?

Before I get into the reasons why it is, let me address a completely false claim Drum makes.

Ron Paul has never once done any of his causes any good.

Paul, of course, succeeded in getting a limited audit of the Fed's bailout done. That hasn't resulted in the elimination of the Fed, but it has educated a lot of people about the vast power of the Fed and showed how far government efforts to prop up the banks really went in 2008 and 2009. Of course, he did so in partnership with Alan Grayson, someone who doesn't embrace all of Paul's views but nevertheless demonstrates why Drum's advice that those who share some views with Paul, "should run, not walk, as fast as you can to keep your distance from Ron Paul" is bad advice. We live in a democracy, and it's far easier to get laws passed if members of both parties support them.

And it's not just the Fed. By providing space to support civil liberties and oppose the war on

the right, Paul slowed the steam roll in support of the PATRIOT Act, SOPA, the detainee provisions of the NDAA, and the wars. In these areas, he may not have had the limited but notable success he had with the Fed, but if—for example—Dianne Feinstein's effort to specifically exclude Americans from indefinite military detention has any success, it will in part be because Paul and his son mobilized opposition to indefinite detention on the right.

But all that explains why it has been useful to have Paul—bolstered by his 2008 campaign, which seems to disprove Drum's promise that, "in a couple of months he'll disappear back into the obscurity he so richly deserves"—in the House. That doesn't explain why it is useful to have him polling at almost 20% in the GOP race in IA.

Because that is, after all, what we're talking about. So when Drum scoffs at those who have, "somehow convinced yourself that non-interventionism has no other significant voices except Ron Paul," **when we're talking about the Presidential race**, I want to know what race he's been watching? While Gary Johnson supports non-interventionism, he's not a significant voice. In this presidential race, which is what Drum purports to be talking about, there are no other significant voices supporting non-interventionism or championing civil liberties.

And without a such a candidate—without someone playing the role Obama sort of did until July 9, 2008—then the focus of the billion-dollar political debate in the next 11 months will focus primarily on who will more aggressively crack down on Iran and how many more civil liberties the President must dissolve to wage war against significantly weakened terrorists. Ron Paul's presence in the race not only exposes voters to commonsense but otherwise impermissible observations—such as that the detainees we're holding are, with just a handful of exceptions, suspects, never proven to be terrorists in a trial. But his presence also raises the cost for Obama for not addressing his

past claims and promises on civil liberties.

And then, of course, we lefties are supposed to be trying to defeat these right wing nutjobs. Drum may think Paul toxic, but his views are equally toxic to the rich donors paying for these Republican candidates. And while Paul doesn't threaten to become a viable anti-Mitt, he can (and did, in 2008) stay in this race long enough to be an annoyance to GOP claims to unity. All the time by differentiating himself with issues—anti-imperialism, civil libertarianism, and anti-banksterism—for which Paul is the only significant voice in this election. Twelve years ago, my support for a policy that I supported, championed by a flawed messenger, contributed in a small way to making Bush spend more money and reveal his loathsome (if transactional) racism in South Carolina. That didn't make Al Gore the winner, but it didn't hurt. Why would we categorically oppose something similar to happen to Mitt Romney?

As Drum himself notes, there's no danger that by calling out those areas where Paul is good, he's going to be elected President and implement his more loathsome ideas. "Ron Paul is not a major candidate for president." But for those guarding the DC common sense, support for Paul in these areas does seem to present real danger.

It's telling, ultimately, that Drum's piece, which doesn't prove what it purports to (that having Paul in the Presidential race is bad for lefties) but does call him a crackpot crackpot crackpot, is a near mirror image to this Michael Gerson column, which points towards the very same repulsive stances—as well as some downright commonsense ones—as Drum to call Paul a scandal.

No other recent candidate hailing from the party of Lincoln has accused Abraham Lincoln of causing a "senseless" war and ruling with an "iron fist." Or regarded Ronald Reagan's presidency a "dramatic failure." Or proposed the legalization of prostitution and heroin use. Or called America the most "aggressive,

extended and expansionist" empire in world history. Or promised to abolish the CIA, depart NATO and withdraw military protection from South Korea. Or blamed terrorism on American militarism, since "they're terrorists because we're occupiers." Or accused the American government of a Sept. 11 "coverup" and called for an investigation headed by Dennis Kucinich. Or described the killing of Osama bin Laden as "absolutely not necessary." Or affirmed that he would not have sent American troops to Europe to end the Holocaust. Or excused Iranian nuclear ambitions as "natural," while dismissing evidence of those ambitions as "war propaganda." Or published a newsletter stating that the 1993 World Trade Center attack might have been "a setup by the Israeli Mossad," and defending former Ku Klux Klan Grand Wizard David Duke and criticizing the "evil of forced integration."

Each of these is a disqualifying scandal. Taken together, a kind of grandeur creeps in.

Neither wants to deal with the downright logic (and deserved widespread support) of some of Paul's views. They both seem to want to, instead, suggest that any deviation from the DC consensus is lunacy (and lunacy of a kind not exhibited by Bachmann, Perry, Newt, and Santorum).

The question of whether it is good to have Paul audibly in the Presidential race—which is fundamentally different from whether we want him to be President—is ultimately a question of whether it is good to have a diversity of views expressed in our democratic debates. Neither Drum nor Gerson object here to the lunacy espoused by the other GOP candidates, per se—the ones that espouse lunacy embraced by the DC consensus, what Drum approvingly calls the

“mainstream.” So what is so dangerous in having Paul’s ideas—both sound and repulsive—expressed?

I’m perfectly comfortable having Paul exposed—as he has been—as a racist over the course of this race. Why are Drum and Gerson so upset that the other candidates might be exposed as authoritarians and imperialists in turn?

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## THE MATERIAL SUPPORT OF HILLARY CLINTON AND TAREK MEHANNA

18 USC 2339(A) and 18 USC 2339(B) proscribe the material support of terrorism and designated foreign terrorist organizations. In short, it is the “material support” law:

the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

During oral argument on the now seminal defining case as to the astounding reach of this statute, *Holder v. HLP*, now Supreme Court Justice Elena Kagan argued, as Solicitor General, that even humanitarian lawyers could be charged and convicted under the wide ranging provisions:

JUSTICE KENNEDY: Do you stick with the

argument made below that it's unlawful to file an amicus brief?

GENERAL KAGAN: Justice Kennedy –

JUSTICE KENNEDY: I think I'm right in saying it that that was the argument below.

GENERAL KAGAN: Yes, I think that would be a service. In other words, not an amicus brief just to make sure that we understand each other. The Petitioners can file amicus briefs in a case that might involve the PKK or the LTTE for themselves, but to the extent that a lawyer drafts an amicus brief for the PKK or for the LTTE, that that's the amicus party, then that indeed would be prohibited.

Kagan argued for an interpretation so broad that even the filing of an amicus brief would be violative of the material support prohibitions and the Supreme Court so held.

So, surely, the DOJ is going to heed the words and intent of the right honorable Justice Kagan over this report then, right?

The Iraqi government has promised to shutter Camp Ashraf – the home of the Iranian dissident group Mujahedeen e-Khalq (MEK) – by Dec. 31. Now, the United Nations and **the State Department** are scrambling to **move the MEK** to another location inside Iraq, which just may be a **former U.S. military base**.

The saga puts the United Nations and President Barack Obama's administration in the middle of a struggle between the Iraqi government, a new and fragile ally, and the MEK, a persecuted group that is also on the State Department's list of foreign terrorist organizations.

**The Marxist-Islamist group, which was formed in 1965, was used by Saddam**

Hussein to attack the Iranian government during the Iran-Iraq war of the 1980s, and has been implicated in the deaths of U.S. military personnel and civilians.

The new Iraqi government has been trying to evict them from Camp Ashraf since the United States toppled Saddam in 2003.

The U.S. military guarded the outside of the camp until handing over external security to the Iraqis in 2009. The Iraqi Army has since tried twice to enter Camp Ashraf, resulting in bloody clashes with the MEK both times.

(emphasis added)

Well, no, there will be no prosecution for aiding and abetting *these* terrorists. Now, in all seriousness and fairness, Secretary of State Clinton is probably exempted under 18 USC 2339(B)(j) which provides:

No person may be prosecuted under this section in connection with the term "personnel", "training", or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

Still, the point being the hypocrisy of the US Government who on one hand is willing to prosecute even attorneys trying to give humanitarian legal assistance to alleged terrorist organizations to help reform them, but is on the other hand willing to actively and affirmatively work to provide a former US military base and accoutrements to shelter a known and designated violent terrorist group, one that has a history of killing Americans,



both military and civilian.

While there may be an exemption for the State Department itself, there certainly is not for other US citizens and officials who have, for years, directly aided and abetted the MEK within the definition of “material support. Again, from Josh Rogin’s report in FP’s *The Cable* linked above:

As part of its multi-million dollar lobbying effort, the MEK has paid dozens of top U.S. officials and former officials to speak on its behalf, sometimes at rallies on the State Department’s doorstep. MEK supporters have been stationed outside the State Department non-stop for months now, and are even showing up at Congressional hearings.

Their list of advocates, most who have admitted being paid, includes Congressman John Lewis (D-GA), former Pennsylvania Gov. Ed Rendell, former FBI Director Louis Freeh, former Sen. Robert Torricelli, Rep. Patrick Kennedy, former CIA Deputy Director of Clandestine Operations John Sano, former National Security Advisor James Jones, former Vermont Gov. Howard Dean, former New York Mayor Rudolph Giuliani, former Joint Chiefs Chairman Gen. Richard Myers, former White House Chief of Staff Andy Card, Gen. Wesley Clark, former Rep. Lee Hamilton, former CIA Director Porter Goss, senior advisor to the Romney campaign Mitchell Reiss, Gen. Anthony Zinni, former Pennsylvania Gov. Tom Ridge, former Sen. Evan Bayh, and many others.

The Department of Justice has just convicted a man, Tarek Mehanna, in Massachusetts for, in significant part, material support in the form of posting videos on the internet. Adam Serwer has a nice description of the parameters of the

Mehanna case at Mother Jones that includes this analysis:

"This case is being used by the government to really narrow First Amendment activity in dangerous new ways," says Nancy Murray of the Massachusetts branch of the American Civil Liberties Union. "It might be speech that horrifies people, but it's the nature of the First Amendment to protect that speech, unless it's leading to imminent lawless action."

Civil liberties advocates say the case represents a slippery slope. In the 2010 case *Holder v. Humanitarian Law Project*, which decided whether or not providing nonviolent aid (such as legal advice) to terrorist groups constitutes material support for terrorism, the Supreme Court ruled that even protected speech can be a criminal act if it occurs at the direction of a terrorist organization. Based on that ruling, you could be convicted of materially supporting terrorism merely for translating a document or putting an extremist video online, depending on your intentions.

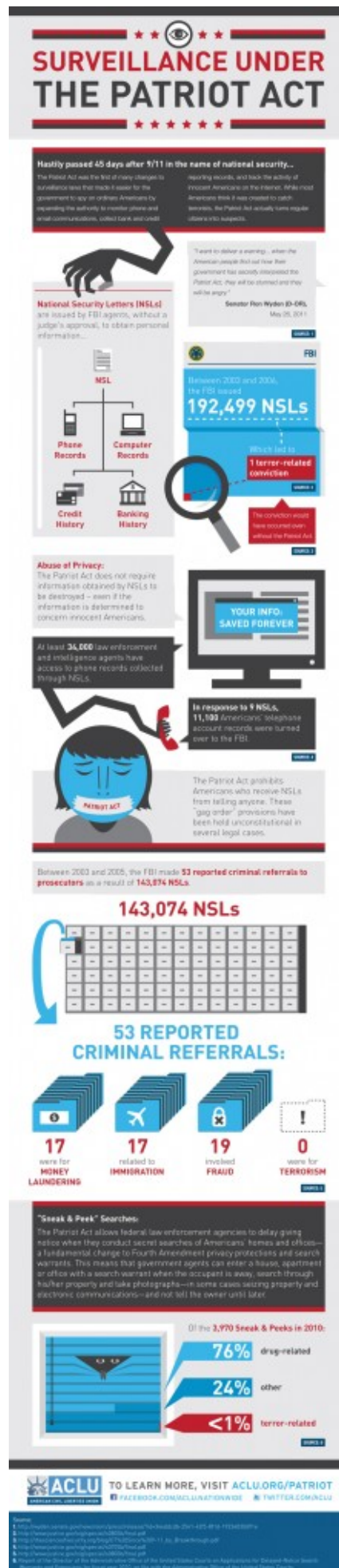
Adam's article is worth a full read to gain a glimpse of the fine line in material support cases.

Well, it is a fine line in some cases, not so much if it concerns *our* terrorists. You know, the *good terrorists* the US Government favors. Tarek Mehanna may think this a pretty inconsistent posture.

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**OKLAHOMA ATTORNEY  
GENERAL SCOTT PRUITT  
ADVOCATES EXTENDING  
PATRIOT ACT TO  
DOMESTIC TERRORISTS**

I watched last night's Huckabee Presidential forum between thrilling plays in the Big 10.2 Championship game. Since each candidate appeared by him or herself, it lacked the entertaining in-fighting of other episodes of this reality show. But it was fascinating because some rising stars in the Republican Party—three far right Attorneys General, OK's Scott Pruitt, VA's Ken Cuccinelli, and FL's Pam Bondi—served as co-moderators. As such, I think the forum provided some indication of where the leading edge of Republican crazy is.



Which is troubling, because in a question directed to Congressman Ron Paul, Pruitt endorsed applying the PATRIOT Act to purely domestic terrorists. [Update: bob johnson, who is from OK, says this wasn't an endorsement. A pity, then, that Pruitt not only extended the discussion of PATRIOT to domestic grounds but also set up Bondi for more fearmongering.] After raising the specter of Tim McVeigh's attack on the Murrah Federal Building, Pruitt asked,

Pruitt: What thoughtful alternative do you have to the PATRIOT Act to prevent acts of domestic terrorism in the future?

Paul provided the same kind of answer he has provided when he has gotten asked similar questions in the context of foreign terrorism in other debates, noting that the PATRIOT Act should have been called the repeal of the Fourth Amendment. To which Priutt doubled down:

So Congressman, you don't believe that there needs to be a comprehensive law at the federal level equipping law enforcement to prevent domestic terrorism in this country?

Now, as I said, Paul gets asked a similar question at just about every debate. The authoritarian streak of today's GOP party likes to call out Paul's libertarianism so as to mock it as outside acceptable bounds of GOP ideology (usually just before everyone applauds torture).

Which is why I find it so troubling that Pruitt did so with regards to domestic terrorism.

Don't get me wrong: I begrudge no Oklahoman a real concern about domestic terrorism. Oklahomans know as well as anyone in this country that domestic terrorism can be just as deadly as Islamic terrorism. And we do need to have a conversation in this country about why the FBI gets so much stronger tools to entrap aspirational Islamic terrorists than it does to

stop white supremacists stockpiling explosives.

But investigations into “domestic terrorism” in the last decade have focused on environmental groups, perhaps only recently focusing on right wing terrorism.

Moreover, the PATRIOT Act already did include a number of provisions applying to domestic terrorists. It defined domestic terrorism to include the use of “coercion.”

(5) the term ‘domestic terrorism’ means activities that—

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.

And it included the authority to seize the assets of “any individual, entity, or organization engaged in planning or perpetrating any act of domestic or international terrorism.”

Furthermore, as was made clear on this year’s decade anniversary of the PATRIOT Act, many of the provisions in it, like sneak and peeks and NSLs, have primarily been used in the pursuit of drug or money laundering convictions rather than international terrorism ones.

But it seems Pruitt wants more. He seems to want a full PATRIOT Act for what gets called domestic

terrorism, presumably allowing wiretaps and other surveillance to “prevent” “crimes” that have not yet been committed (yet presumably never infringing on the right to bear semi-automatic machine guns). While I welcome some consistency about how we treat brown terrorists and white ones, I’m sure applying the authorities in the PATRIOT Act to domestic “terrorists” is not the answer.

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## WHY THE IRAQ AUMF STILL MATTERS

The big headline that came out of yesterday’s American Bar Association National Security panels is that DOD General Counsel Jeh Johnson and CIA General Counsel Stephen Preston warned that US citizens could be targeted as military targets if the Executive Branch deemed them to be enemies.

U.S. citizens are legitimate military targets when they take up arms with al-Qaida, top national security lawyers in the Obama administration said Thursday.

[snip]

Johnson said only the executive branch, not the courts, is equipped to make military battlefield targeting decisions about who qualifies as an enemy.

We knew that. Still, it’s useful to have the Constitutional Lawyer President’s top aides reconfirm that’s how they function.

But I want to point to a few other data points from yesterday’s panels (thanks to Daphne Eviatar for her great live-tweeting).

First, Johnson also said (in the context of discussions on cyberspace, I think),

Jeh Johnson: interrupting the enemy's ability to communicate is a traditionally military activity.

Sure, it is not news that the government (or its British allies) have hacked terrorist "communications," as when they replaced the AQAP propaganda website, "Insight," with a cupcake recipe (never mind whether it's effective to delay the publication of something like this for just one week).

But note what formula Johnson is using: they've justified blocking speech by calling it the communication of the enemy. And then apparently using Jack Goldsmith's formulation, they have said the AUMF gives them war powers that trump existing domestic law, interrupting enemy communications is a traditional war power, and therefore the government can block the communications of anyone under one of our active AUMFs.

Johnson also scoffed at the distinction between the battlefield and the non-battlefield.

Jeh Johnson: the limits of "battlefield v. Non battlefield is a distinction that is growing stale." But then, it's not a global war. ?

Again, this kind of argument gets used in OLC opinions to authorize the government targeting "enemies" in our own country. On the question of "interrupting enemy communication," for example, it would seem to rationalize shutting down US based servers.

Then, later in the day Marty Lederman (who of course has written OLC opinions broadly interpreting AUMF authorities based on the earlier Jack Goldsmith ones) acknowledged that Americans aren't even allowed to know everyone the US considers an enemy.

Lederman: b/c of classification, "we're in armed conflicts with some groups the



American public doesn't know we're in armed conflict with."

Now, as I've noted, one of the innovations with the Defense Authorization passed yesterday is a requirement that the Executive Branch actually brief Congress on who we're at war with, which I take to suggest that Congress doesn't yet necessarily know everyone who we're in "armed conflict" with.

Which brings us to how Jack Goldsmith defined the "terrorists" whom the government could wiretap without a warrant.

the authority to intercept the content of international communications "for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are reasonable grounds to believe ... [that] a party to such communication is a group engaged in international terrorism, or activities in preparation therefor, or any agent of such a group," as long as that group is al Qaeda, an affiliate of al Qaeda **or another international terrorist group** that the President has determined both **(a) is in armed conflict with the United States and (b) poses a threat of hostile actions within the United States;**

It's possible the definition of our enemy has expanded still further since the time Goldsmith wrote this in 2004. Note Mark Udall's ominous invocation of "Any other statutory or constitutional authority for use of military force" that the Administration might use to authorize detaining someone. But we know that, at a minimum, the Executive Branch used the invocations of terrorists in the Iraq AUMF—which are much more generalized than the already vague definition of terrorist in the 9/11 AUMF—to say the President could use war powers against people he calls terrorists who have nothing to

do with 9/11 or al Qaeda.

So consider what this legal house of cards is built on. Largely because the Bush Administration sent Ibn Sheikh al-Libi to our Egyptian allies to torture, it got to include terrorism language in an AUMF against a country that had no tie to terrorism. It then used that language on terrorism to justify ignoring domestic laws like FISA. Given Lederman's language, we can assume the Administration is still using the Iraq AUMF in the same way Goldsmith did. And yet, in spite of the fact that the war is ending, we refuse to repeal the AUMF used to authorize this big power grab.

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## **BACHMANN WAS ALMOST RIGHT: THE ACLU IS IN CAHOOTS WITH THE CIA**

As I have puzzled over the civil liberties and human rights communities' stance on the NDAA Detainee Provisions, I've come to the unfortunate conclusion that Michelle Bachmann was not far off when she claimed, "Barack Obama ... has essentially handed over our interrogation of terrorists to the ACLU. He has outsourced it to them."

After all, in the guise of "fixing" some of what I agree are problems with the Detainee Provisions—the laws regarding detention and interrogation of detainees—the ACLU is telling its members to lobby for the Udall Amendment to the NDAA.

But there is a way to stop this dangerous legislation. Sen. Mark Udall (D-Colo.) is offering the Udall Amendment that will delete the harmful

provisions and replace them with a requirement for an orderly Congressional review of detention power. The Udall Amendment will make sure that the bill matches up with American values.

In support of this harmful bill, Sen. Lindsey Graham (R-S.C.) explained that the bill will “basically say in law for the first time that the homeland is part of the battlefield” and people can be imprisoned without charge or trial “American citizen or not.” Another supporter, Sen. Kelly Ayotte (R-N.H.) also declared that the bill is needed because “America is part of the battlefield.”

The solution is the Udall Amendment; a way for the Senate to say no to indefinite detention without charge or trial anywhere in the world where any president decides to use the military. Instead of simply going along with a bill that was drafted in secret and is being jammed through the Senate, the Udall Amendment deletes the provisions and sets up an orderly review of detention power. It tries to take the politics out and put American values back in.

As a threshold matter, the ACLU’s support of the Udall Amendment appears to put them on the same side of the debate as—among others—former CIA exec John Brennan and the former Director of the CIA, Leon Panetta. (Current CIA Director and outspoken detention authority while still at DOD, General David Petraeus, has been eerily quiet over the last several weeks.)

And I do agree with the ACLU that the Udall Amendment sets up an orderly review of detention power.

But, as I’ve noted, there’s one aspect of the Detainee Provisions that Udall **doesn’t** leave for

orderly review: the scope of the language describing a “covered person.” Instead, Udall’s Amendment says covered people should be those “whose detention ... is consistent with the laws of war and based on authority provided by” the 9/11 and Iraq AUMFs, as well as “any other statutory or constitutional authority.”

(b) *Covered Persons.*—A covered person under this section is any person, other than a member of the Armed Forces of the United States, whose detention or prosecution by the Armed Forces of the United States is consistent with the laws of war and based on authority provided by any of the following:

(1) The Authorization for Use of Military Force (Public Law 107-40).

(2) The Authorization for Use of Military Force Against Iraq Resolution 2002 (Public Law 107-243).

(3) Any other statutory or constitutional authority for use of military force.

Udall pretty much unilaterally reasserts the application of the AUMFs (plural) and other vaguely defined legal bases to detention (and, because that’s how OLC has built up Executive Power over the last decade, a bunch of other things), in an effort to defeat SASC’s language that limits such detention authority to those tied directly to 9/11 or “who [were] part of or substantially supported al-Qaeda, the Taliban, or associated forces.” Udall’s Amendment may give SSCI and SJC another shot at this law, but **it dictates that detention authority apply to a far broader group of people than the SASC language describes.**

Hey, Mark. See that calendar? We’re not going to pass and sign this bill before December 1. We’re due to pull our troops out of Iraq by the end of that month. Are you telling me we need to include that language for less than 31 days? Or

just to provide a bubble during which the Administration can do whatever it wants with Ali Mussa Daqduq, the alleged Hezbollah agent in US custody presenting so many legal dilemmas for us in Iraq? Or are you instead applying the AUMF for **a war that is effectively over** to grant the President authority to hold a much broader category of "terrorist" than the 9/11 AUMF authorized? **Why, at this late date, are you including the Iraq AUMF?**

Given your "based on authority provided" language, I assume it is the latter, meaning this attempt to do an orderly review of detention authority also mandates that that detention authority be applied as if the Iraq war were not ending.

And all that's before you consider the "any other statutory or constitutional authority for use of military force," which seems to say that in any circumstance in which Congress has authorized some use of military force, Udall's Amendment also piggybacks detention authority ... and whatever else (like assassination and wiretap authority) gets built off of detention authority in secret by the OLC.

The Udall Amendment, while giving the Senate Intelligence and Senate Judiciary Committees an opportunity to weigh in on what the President must and can do with detainees, goes far beyond the language in the SASC version of 1031, which reaffirmed the war on terrorists, but only on terrorists who have anything directly to do with, or are associated with, 9/11.

I may be badly misreading this. But as I understand it, the ACLU is basically lobbying to codify a vastly-expanded AUMF that will serve to legitimize many of the intelligence community's most egregious civil liberties abuses, not just on detention, but on a range of other "war powers," like wiretapping and assassination.

And while that may not be the same as outsourcing interrogation to the ACLU—as Bachmann described it—it does amount to using

the ACLU to give sanction to a broad expansion of Executive war and surveillance powers the likes of which the CIA loves to exploit.

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## **IT'S THE ZENITH- LIMITING WAR DECLARATION, NOT THE DETAINEE RESTRICTIONS, OBAMA WANTS TO VETO**

A bit of a parlor game has broken out over whether Obama really means his veto threat over the detainee provisions of the Defense Authorization. Josh Gerstein weighed in here, including a quote from John McCain accusing the Administration of ratcheting up the stakes.

It's also clear that, whether for political reasons or due to some complex internal dynamics, the administration seems at this point willing to put up more of a public fight over detainee-related strictures than it has in the past. However, whether that will ultimately translate to a willingness to blow up the defense bill with a veto is unclear. At least some lawmakers seem to view the threats as bluster, in light of the president's track record.

As McCain said Thursday: "The administration ratcheted up the stakes...with a threat of a veto. I hope they are not serious about it. There is too much in this bill that is important to this Nation's defense."

## The veto threat is probably tied to the new AUMF language

But I think Gerstein has the dynamic wrong—and his claim that this veto threat represents more public fight than he has shown in the past is flat out wrong. You see, Gerstein's making the claim based on the assertion that the fight is over the Administration's authority to move and try detainees as it sees necessary.

In the past three years, President Barack Obama's administration has been in numerous public skirmishes with Congressional Republicans over legislation intended to limit **Obama's power to release Al Qaeda prisoners, move them to the U.S. and decide where they should face trial.**

[snip]

A couple of thoughts on the dust-up: Obama has already signed legislation **putting limits on releases of detainees.** While officials said at the time that the White House would oppose similar proposals in the future, it is clear that as a practical matter those limits have now become the baseline for those in Congress. [my emphasis]

Gerstein's right that Obama stopped short of vetoing the Defense Authorization last year, which had those limits, instead issuing a signing statement.

Despite my strong objection to these provisions, which my Administration has consistently opposed, I have signed this Act because of the importance of authorizing appropriations for, among other things, our military activities in 2011.

Nevertheless, my Administration will work with the Congress to seek repeal of these restrictions, will seek to

mitigate their effects, and will oppose any attempt to extend or expand them in the future.

And Obama didn't issue a veto threat on similar restrictions place on DHS funding.

But Obama **has** issued a veto threat on "detainee and related issues" before—on Buck McKeon's version of the Defense Authorization in May. That version added a couple of things to last year's Defense Authorization: More limits on when the government can use civilian courts to try terrorists, limits on the detainee review system beyond what Obama laid out in an Executive Order last year.

And this language:

Congress affirms that—

(1) the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad;

(2) the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 15 1541 note);

(3) the current armed conflict includes nations, organization, and persons who—

(A) are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or

(B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A); and



(4) the President's authority pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) includes the authority to detain belligerents, including persons described in paragraph (3), until the termination of hostilities.

The current bill is less harsh on several counts than McKeon's language: it includes a series of waivers to bypass military detention and lets the Administration write procedures for determining who qualifies as a terrorist. While these loopholes require the Administration to do more paperwork, they still allow it to achieve the status quo if it does use those loopholes.

But it still includes very similar to McKeon's defining this war.

Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.

COVERED PERSONS—A covered person under this section is any person as follows:

(1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2) A person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or who has supported such hostilities in aid of such enemy forces.

[snip]

(d) CONSTRUCTION.—. Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

Given that the waivers and procedures get around many of the worst parts of the McKeon version of this bill, I'd suggest it's this language, effectively restating the AUMF and affirming the ability to detain people based on that authority, and not limits on what he can do with detainees, that Obama finds so troublesome.

**The new AUMF language threatens OLC interpretations of Youngstown used since 2004**

Which is why I find it interesting that Jack Goldsmith has now weighed in, goading Obama to carry through on his veto threat.

But failing to veto the bill after threatening one will hardly make the left happy; it is more likely to confirm its belief that he is spineless on detention issues.

Goldsmith's language repeats Gerstein's focus on detainee restrictions.

Is the president really going to expose himself, in an election cycle, to the charge (fair or not) that he jeopardized the nation's defenses in order to vindicate the principle of presidential discretion to release terrorists from GTMO or to bring them to the United States to try them in civilian courts? It is the right principle, but it is a generally unpopular one that the president has not to date fought for.

But that's not really his baby like it is for his co-bloggers Robert Chesney and Benjamin Wittes. Or rather, just the presidential

discretion part is. And Goldsmith, as much as anyone out there, knows well how that discretion has been built up over the years, in total secrecy, in OLC opinions that claim Presidential authorization for certain things—detention, certainly, but also wiretapping and assassination—based on the vaguely worded version of the AUMF passed in 2001. That’s because he authored a particularly seminal version of that argument when he shifted the justification for Bush’s illegal wiretap program from raw Article II authority to authorization rooted in the AUMF.

The [AUMF] functions as precisely such legislation [that overrides FISA]: it is emergency legislation passed to address a specific armed conflict and expressly designed to authorize **whatever military actions the Executive deems appropriate to safeguard the United States**. In it the Executive sought and received a blanket authorization from Congress **for all uses of the military against al Qaeda that might be necessary to prevent future terrorist attacks against the United States**. There mere fact that the Authorization does not expressly amend FISA is not material. By its plain terms it gives clear authorization for “all necessary and appropriate force” against al Qaeda that the President deems required “to protect United States citizens both at home and abroad from those (including al Qaeda) who “planned, authorized, committed, or aided” the September 11 attacks. [citation omitted] It is perfectly natural that Congress did not attempt to single out into subcategories every aspect of the use of the armed forces it was authorizing, for as the Supreme Court has recognized, even in normal times outside the context of a crisis “Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take.” [my emphasis]

After Hamdi, this assertion that the AUMF authorized fairly broad use of Presidential discretion became more closely tied to the President's detention authority, as that was the one example where SCOTUS had affirmed that broad "uses of the military" were included in the AUMF. Here's how it got translated in the White Paper purportedly authorizing limited parts of Bush's illegal wiretapping program.

The Supreme Court's interpretation of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), confirms that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad. This understanding of the AUMF demonstrates Congress's support for the President's authority to protect the Nation and, at the same time, adheres to Justice O'Connor's admonition that "a state of war is not a blank check for the President," *Hamdi*, 542 U.S. at 536 (plurality opinion), particularly in view of the narrow scope of the NSA activities.

[snip]

Although Congress's war powers under Article I, Section 8 of the Constitution empower Congress to legislate regarding the raising, regulation, and material support of the Armed Forces and related matters, rather than the prosecution of military campaigns, the AUMF indicates Congress's endorsement of the President's use of his constitutional war powers. This authorization transforms the struggle against al Qaeda and related terrorist organizations from what Justice Jackson called "a zone of twilight," in which the President and

the Congress may have concurrent powers whose “distribution is uncertain,” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), into a situation in which the President’s authority is at its maximum because “it includes all that he possesses in his own right plus all that Congress can delegate,” *id.* at 635. With regard to these fundamental tools of warfare—and, as demonstrated below, warrantless electronic surveillance against the declared enemy is one such tool—the AUMF places the President’s authority at its zenith under *Youngstown*.

In other words, for years the Executive Branch has used the vague wording of the AUMF to claim all the laws limiting the Executive Branch didn’t apply, because the AUMF trumped those laws. Their assertion the AUMF authorized detention authority became a cornerstone of that argument because in *Hamdi*, they claimed, SCOTUS affirmed that broad reading of the AUMF. But with the language in the Defense Authorization (both McKeon’s earlier version and the one that will pass the Senate today), Congress asserts its authority to define the Executive Branch’s authority, which ought to, at least, put limits to the areas in which the Executive can be claiming to acting at the zenith of its power.

**The Executive Branch has already claimed authority to exceed the plain language of the new AUMF language**

And while the language of the section—which purports to define the war in the same way the Administration already has in secret—and the Construction language, intending neither “to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force” (as well as the Administration’s successful attempt to get SASC to take out language limiting the application of this definition to US citizens), might seem to

achieve a status quo, I suspect that's not really the case.

That's because the Executive has already exceeded the terms of the newly-defined AUMF (or at least claimed the authority to do so). Here's how Goldsmith defined the application of the war on terror in 2004 (probably because he needed to apply it to the way Bush's illegal wiretap program had already been used).

the authority to intercept the content of international communications "for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are reasonable grounds to believe ... [that] a party to such communication is a group engaged in international terrorism, or activities in preparation therefor, or any agent of such a group," as long as that group is al Qaeda, an affiliate of al Qaeda **or another international terrorist group** that the President has determined both **(a) is in armed conflict with the United States and (b) poses a threat of hostile actions within the United States;** [my emphasis]

This definition would seem to permit the use of the President's war on terror authority against groups like FARC or Hezbollah, not to mention—particularly in the wake of the Scary Iran Plot—al Quds. The language in the Defense Authorization limits the target of the President's counterterrorism authorities to "associated forces," which probably doesn't include FARC or the Quds Force.

In other words, by deigning to define the war on terror, Congress not only threatens that entire "AUMF puts the President at the zenith of his power" argument on which things like wiretapping and, presumably, geolocation and assassination authorities rely. But it has done so in terms that are more narrow than the Executive has

already claimed in its OLC opinions.

**Administration language opposes this limit on its claimed authority**

And this focus—a concern that the explicit restatement of AUMF actually limits the Executive Branch’s authority—shows up in Administration objections to it. Here’s what they said in May:

The Administration strongly objects to section 1034 which, in purporting to affirm the conflict, would effectively recharacterize its scope and would risk creating confusion regarding applicable standards.

Here’s what they said last week:

Section 1031 attempts to expressly codify the detention authority that exists under the Authorization for Use of Military Force (Public Law 107-40) (the “AUMF”). The authorities granted by the AUMF, including the detention authority, are essential to our ability to protect the American people from the threat posed by al-Qa’ida and its associated forces, and have enabled us to confront the full range of threats this country faces from those organizations and individuals. Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended

consequences that could compromise our ability to protect the American people.

And the language of one of Gerstein's anonymous Administration officials can certainly be read to include flexibility both on questions about where you hold detainees but also on whether they can assassinate a US citizen affiliated with a group that didn't exist on 9/11.

"The President's record in dealing effectively and forcefully with the terrorist threat is second to none," a senior administration official said. "The very idea that some members of Congress think we will be better off if they limit the flexibility of our counterterrorism professionals, micromanage their operational activities, and further restrict our ability to deal with terrorists currently or prospectively in our custody is utterly absurd."

The Administration—and Goldsmith—are ultimately talking about unchecked Executive Branch discretion. Sometimes the Administration has used that discretion to do things human rights supporters would prefer it did, such as trying detainees in civilian courts. But just as frequently, the Administration has done things that human rights supporters abhor, such as killing a US citizen with no due process or data mining and geolocating completely innocent citizens. The authority to do all of those things, good and bad, come from the claims about the AUMF that rely on its vague wording.

It seems fairly clear. The veto threat is about that discretion, not just detainee issues. And it's only when the underlying basis for Executive Branch discretion became threatened that the Administration issued a veto threat.



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# “THE PATRIOT ACT, WHICH THE PRESIDENT SIGNED INTO LAW ON OCTOBER 2001”

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d to outright falsehoods or lies of omission) in Dick Cheney’s entire infernal tome. There’s this reference to an October 10, 2002 speech from Jello Jay Rockefeller in support of the Iraq war:

One of the most eloquent statements of the necessity of removing Saddam came from Senator Jay Rockefeller, the vice chairman of the Senate Intelligence Committee. (393)

On October 10, 2002, of course, Jello Jay was not yet Ranking Member of SSCI. Rather, Bob Graham was Chair. On October 10, 2002, Graham was saying the following about the war:

With sadness, I predict we will live to regret this day, Oct. 10, 2002, the day we stood by and we allowed these terrorist organizations to continue growing in the shadows.

[snip]

This timid resolution, I fear, will only increase the chance of Americans being killed, and that is not a burden of probability that I am prepared to take. Therefore I will vote no.

Yeah, Cheney's misattribution probably wasn't a typo, but instead a cynical attempt to pretend that the Democrat who had reviewed the intelligence behind the war most closely had backed the war, rather than correctly predicted it would heighten the threat of terrorism.

But I don't think the grammatical error in the following passage, describing the relationship between Cheney's illegal wiretap program and the PATRIOT Act (which turns 10 today), is really a typo either.

One of the first efforts we undertook after 9/11 to strengthen the country's defenses was securing passage of the Patriot Act, which the president signed into law on October 2001.

Thus begins the passage in which Cheney describes the genesis of his illegal wiretap program. Of course, the passage should either say, "which the president signed into law **on** October 26, 2001," or "which the president signed into law **in** October 2001."

A minor point, but one that might suggest Cheney once had the date in there and then took it out.

You see, including the actual date would have really disrupted Cheney's narrative, which suggests Congress passed the PATRIOT Act and only then did he begin thinking about how to use NSA to fight terrorism, which (implicitly) is why he didn't include the illegal program in PATRIOT. After a description of how PATRIOT broke down the wall between intelligence and law enforcement in the first paragraph, Cheney continues,

I also thought it important to be sure the National Security Agency, or NSA, which is responsible for collecting intelligence about the communications of America's adversaries, was doing everything possible to track the conversations of terrorists, so I asked George Tenet whether the NSA had all the authorities it needed. Tenet said he would check with General Mike Hayden, who was then director, and a short time later both of them came to see me in my office in the White House. Hayden explained that he had already made adjustments in the way NSA was collecting intelligence. Those adjustments were possible within NSA's existing authorities, but additional authorities were needed in order to improve the coverage and effectiveness of the program.

A few paragraphs later, he continued.

With [Bush's] approval, I asked Dave Addington to work with General Hayden and the president's counsel, Alberto Gonzales, to develop a legal process by which we could ensure the NSA got the authorizations Hayden needed.

It's only five paragraphs after Cheney's description of PATRIOT that he provides the date that—had he actually included the date of the PATRIOT Act—would have made clear that the illegal program started before the signing of the PATRIOT Act.

On October 4, 2001, the president, on the recommendation of the director of central intelligence and the secretary of defense, which the determination of the attorney general that it was lawful to do so, authorized the program for the first time.

Of course, Cheney leaves out some key details along the way, such as that Hayden briefed the House Intelligence Committee about what he was already doing on October 1, which elicited some questions from Nancy Pelosi, then the Ranking Member on HPSCI. Cheney doesn't mention that Bush clamped down on briefing Congress on October 5. And he doesn't mention that Pelosi raised questions about minimization, in writing, on October 11, but never got answers to those questions.

Cheney also doesn't mention that David Kris, who was busy drafting the PATRIOT Act, got an OLC opinion on September 25 approving the one change to FISA he deemed necessary to make with the PATRIOT.

To reveal those details—the briefings to Congress, Pelosi's questions, Kris' ability to get FISA changed under PATRIOT—would have made it clear that the rest of the “legal approval” process Cheney describes could have—should have—instead been done with Congress as part of the PATRIOT Act. I may be nitpicking here, writing an absurdly long post about Cheney's use of the wrong preposition. But Cheney's choice to bypass Congress even as it was making changes to FISA remains the biggest piece of evidence that he knew he was engaging in an illegal program that Congress would not entirely approve.

There will be a number of retrospectives in “honor” of PATRIOT Act's birthday today. ACLU's got a nifty infographic (the image above is just one part of it).

But ACLU's other “tribute” to the PATRIOT—a lawsuit to force the government to reveal its secret interpretation of PATRIOT Act—and Cheney's typographical tell that he recognizes he deliberately chose not to get Congressional approval for the illegal wiretap program are even more important.

As horrible as the PATRIOT Act is, after all, both the Bush Administration and the Obama Administration have exceeded the plain meaning

of the act. For ten years, then, it has not been enough that Congress has eagerly dealt away our civil liberties. But the Executive Branch will take even what Congress won't give.

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## **WILLIAM WELCH & DOJ'S DISHONEST INTELLIGENCE WITNESS AGAINST JEFF STERLING**

In a comment to Marcy's *The Narratology of Leaking: Risen and Sterling* post yesterday, MadDog related this nugget regarding the Sterling case from a Steve Aftergood article in Privacy News:

I know EW's post's focus was on Sterling's defense team's strategy, but I'd be remiss in not commenting on this tidbit from Steven Aftergood's post:

"...In addition, a former intelligence official now tells prosecutors that portions of his testimony before a grand jury concerning certain conversations with Mr. Risen about Mr. Sterling were "a mistake on his part." As a result, prosecutors said (8 page PDF), Mr. Risen himself is "the only source for the information the government seeks to present to the jury."..."

I wondered just what this paragraph meant. Did it mean, as I assumed, that one of the prosecution's key witnesses, a former intelligence official, had in fact recanted the former intelligence official's grand jury testimony?

Here is just what the prosecution blithely said on the matter from page 5

of their supplement (8 page PDF):

“...Fifth, the testimony of the “former intelligence official” referenced in the Court’s Opinion has changed. The former official will now only say that on one occasion, Mr. Risen spoke with him about the defendant and stated that the defendant had complained about not being sufficiently recognized for his role in Classified Program No. 1 and in his recruitment of a human asset relating to Classified Program No. 1, and that on a separate occasion, Mr. Risen asked him generic questions about whether the CIA would engage in general activity similar to Classified Program No. 1. This former official, however, cannot say that Mr. Risen linked the second conversation with the defendant, although both conversations occurred within several months of each other. The former official termed his grand jury testimony, which linked the two conversations together, as a mistake on his part. In addition, the former official further modified his testimony to say that although Mr. Risen had acknowledged visiting the defendant in his hometown, Mr. Risen’s trip to see the defendant was not the main purpose of his travel, but rather a side trip.

The testimony of this former official had been cited by the Court as providing “exactly what the government seeks to obtain from its subpoena [to Mr. Risen]: an admission that Sterling was Risen’s source for the classified information in Chapter Nine.” Memorandum Opinion (Dkt No.148) at 24. The former official’s testimony will not now provide such a direct admission, further underscoring the government’s contention that for the reasons discuss in its Motion, Mr. Risen is the only source for the information the government seeks to present to the

jury..."

So, that got me thinking, what is the status of the "former intelligence officer" in question? Is he still on the witness list? Who is it, and why is he "former"? Has he been charged with false statements to a government officer under 18 USC 1001? Has he been charged with perjury under 18 USC 1623? Is there a criminal investigation regarding the duplicity underway? What is being done?

Because, giving the government's prosecutors the benefit of the doubt that they did not misrepresent or puff the "former intelligence officer's" statements and testimony to start with, which is a pretty sizable grant for a William Welch run show, then it seems pretty clear that the "former intelligence official" is now saying that he either testified to things he did not, in fact know at the time, or he embellished/lied to the grand jury and the attending prosecutors.

The problem with the above is, the "former intelligence official is not entitled to any protection or benefit of the doubt for a "recantation" under 18 USC 1963(d). Here is the relevant portion on this subject from the US Attorney's Office Criminal Resource Manual:

Recantation was never a defense to perjury in the common law, and is not a complete defense in a Section 1621 prosecution. *United States v. Norris*, 300 U.S. 564, 573-74 (1937). Recantation in such cases is relevant only as to whether the defendant intended to make a willfully false statement. *Id.*

Section 1623(d), however, makes recantation a bar to a perjury prosecution in certain cases that meet either three or four requirements. First, the recantation must be made "in the same continuous court or grand jury proceeding" in which the original false

declaration was made. Second, the recantation must unambiguously admit that the prior statement was false. A request to clarify or supplement testimony is not enough to satisfy the statutory requirement. Finally, recantation bars prosecution only if the admission occurs at a time when the false declaration has "not substantially affected the proceedings, and it has not become manifest that such falsity has been or will be exposed." *United States v. Fornaro*, 894 F.2d 508, 511 (2d Cir. 1990); *United States v. Scivola*, 766 F.2d 37, 45 (1st Cir. 1985); *United States v. Moore*, 613 F.2d 1029, 1039 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980). Thus, if the witness has knowledge that the false testimony "has been or will be exposed," no effective recantation can thereafter be made. *United States v. Denison*, 663 F.2d 611, 615 (5th Cir. 1981). Similarly, if the grand jury has acted in reliance upon the false testimony, no recantation is possible. The United States Court of Appeals for the Eighth Circuit, however, viewed the last two requirements in the disjunctive when it allowed a defendant an opportunity to show either that the proceedings were not substantially affected or that the falsity will be exposed. *United States v. Smith*, 35 F.3d 344, 347 (8th Cir. 1994). Because recantation is a jurisdictional bar to prosecution, Fed.R.Crim.P. 12(b)(2) requires that it be shown before trial. *United States v. Fornaro*, 894 F.2d 508, 511 (2d Cir. 1990).

There are two problems here. First, there is no evidence from the government's description in its motion that the "former intelligence officer" made a clear admission his/her testimony was false or did anything other than hemming, hawing and modifying. Secondly, and



most importantly, it is simply impossible to say that the false testimony of the “former intelligence official” “has not substantially affected the proceedings”. Remember, even the prosecutors, in their motion, stated unequivocally:

The testimony of this former official had been cited by the Court as providing “exactly what the government seeks to obtain from its subpoena [to Mr. Risen]: an admission that Sterling was Risen’s source for the classified information in Chapter Nine.”

It is pretty amazing that here is the Obama DOJ prosecution team, persecuting yet another clearcut whistleblower, whom they ought to be protecting, and doing so with such inconsistent and malignant gimmicks. Welch and DOJ have accused Mr. Sterling of egregious crimes of dishonesty and betrayal, and put up a dishonest unidentified “former intelligence officer” in front of the grand jury to get the indictment. And now Welch and the DOJ not only want to continue their wrongheaded prosecution, but want to invade the sanctity of the press, Jim Risen, which has already been noted by Judge Leonie Brinkema, to bail their sorry behinds out of their predicament.

So, what is going on with the investigation and/or prosecution of this vaunted “former intelligence officer”? Because, save for there being some meaningful activity in that regard, it just looks like another case of a contrived, manipulated and contorted prosecution by a team led by a man, William Welch, famous for just that.

Oh, and as a late arriving parting shot, it turns out that William Welch, who was rather unceremoniously removed from his post at DOJ’s Public Integrity Section (PIN) in the aftermath of the Ted Stevens disaster and court ordered investigation into his conduct, as a news release, pointed out by Shane Harris, about a

public official being sentenced in Massachusetts, contains this little plum in its last paragraph:

The case was investigated by the FBI, with assistance from the Massachusetts Inspector General's Office and the Lowell Police Department. It is being prosecuted by Senior Litigation Counsel William M. Welch II and Kevin Driscoll of the Criminal Division's Public Integrity Section, with assistance from the U.S. Attorney's Office, Public Corruption Unit.

What were once vices in the Department of Justice are now just unending bad habits under the Administration of Barack Obama and Eric Holder. Nothing has changed.

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## **FBI CONDUCTS THREAT ASSESSMENT ON ANTIWAR.COM JOURNALISTS FOR LINKING TO PUBLICLY AVAILABLE DOCUMENT**

Antiwar.com has a troubling story detailing how what appears to be either an FBI counterintelligence investigation of suspected Israeli spies or an attempt to track down everyone who had posted terrorist watch lists online led to the FBI to investigate the site and Justin Raimondo and Eric Garris.

The story is troubling for several reasons:

1. The report on Antiwar.com

reveals the FBI's Electronic Communications Unit (the same one involved in using exigent letters to get community of interest phone numbers) was already monitoring Antiwar.com when the FBI did a threat analysis of them in 2004.

2. Based on the fact that they had posted two watch lists, that a number of people under investigation read the site, and other redacted reasons, the FBI recommended a preliminary investigation into whether (basically) they were spying.
3. The report cited electronic communications collected under FISA. While that may be no more than 4 FISA references in another case out of the Newark Office (which appears to be a prior investigation tied to the Israelis), that's not clear that that's the only FISA-collected information here.
4. Whether or not the FBI already had used FISA on Antiwar.com, the low bar for PATRIOT powers (connection to a counterterrorist or counterintelligence investigation; the Israeli investigation would qualify)

means the government could have used PATRIOT powers to investigate them.

So here's my analysis.

Someone emailed Antiwar.com this set of FOIAed FBI documents. The documents appear to show that the FBI did some research on Antiwar.com in 2004 and recommended a Preliminary Investigation of them to see if they were spies. Their research appears to include 4 pieces of electronic communication collected under FISA, though it appears those were collected in another case.

#### **The Contents of the FBI File**

What follows assumes that the documents are authentic (Antiwar.com did not FOIA this themselves and they just received it out of the blue). It's possible they're an elaborate forgery, but they certainly appear to be valid FBI documents.

Roughly speaking, here's what's included in the document packet as a whole.

- 1-2: The faxed copy of a 302 (interview report) dated September 16, 2002 related to the Israelis
- 3-4: A transfer document
- 5-26: A document, dated October 4, 2002, documented the return and translation of evidence taken from the Israelis as well as xeroxes of the evidence
- 27-29: An interview report dated October 2, 2002, first requested September 10, 2002
- 30-32: An October 29, 2002 report on photos confiscated

from an Israeli when he was detained on October 30, 2001

- 33-34: An April 23, 2003 report on an earlier arrest of four Israelis on August 14, 2001
- 35: Mostly blank cover sheet
- 36-37: An FBI handwriting analysis of documents taken from the Israelis
- 38-51: A report, dated July 10, 2003, summarizing and closing the case on the Israelis
- 52-58: A report, dated July 10, 2003, summarizing the results of the case on the Israelis
- 59-61: Paperwork from February and April 2004 reopening and transferring the investigation of the Israelis
- **62-71: A 10-page report, dated April 30, 2004, on Raimondo, Garris, and Antiwar.com**
- **72-84: Web printouts of antiwar.com related information**
- 85-89: Paperwork related to the closure of the investigation into the 5 Israelis and the destruction of evidence collected from them
- 90-94: FOIA notations

Only the two bolded sections pertain to Antiwar.com. The rest (plus—it appears from the title of the Scribd file, <http://www.scribd.com/doc/62394765/1138796-001-303A-NK-105536-Section-6-944900>, which appears to come from the Newark case number—at least five other sections) describes the FBI's investigation of the five Israelis alleged to have filmed the destruction of the World Trade Center (read pages 38-51 for the most complete description of the FBI investigation). The short version of the conclusion in that investigation is that the Israelis did have ties to the Israeli government, but did not appear to have foreknowledge of the attack.

The Antiwar.com Threat Assessment appears to have been forwarded to the counterterrorism people working on the Israeli case; it's likely the FOIA asked for everything relating to the Israeli investigation.

#### **The Genesis of the Antiwar.com Threat Assessment**

Which brings us to the report on Antiwar.com itself.

It appears that, in March 2004, the FBI may have done a search of everyone who had a 9/11 "watch list" available online.

An electronic communication from the Counterterrorism, NTCS/TWWU to all field offices, dated 03/24/2004, advised that the post-9/11 "watch list," "Project Lookout," was posted on the Internet and may contain the names of individuals of active investigative interest. Different versions of these lists may be found on the Internet. This assessment was conducted on the findings discovered on [www.antiwar.com](http://www.antiwar.com).

The file doesn't actually say whether that's why the FBI started investigating Antiwar.com. Rather, it says,

While conducting research on the Internet, an untitled spreadsheet , dated 10/03/2001, was discovered on the website [antiwar.com](http://www.antiwar.com).

Given the recently reopened investigation into the Israelis at that time, the FBI may have found it in research on them and used the watch list directive to conduct further investigation. Or it may have just been the watch list directive.

#### **The FBI's Research into Antiwar.com**

As Raimondo notes, he posted links to that document—sourced clearly to Cryptome—in this post on the Israelis.

Ostensibly to figure out how and why he was posting a terrorist watch list, the FBI:

- Did searches on its Universal Index on both Garris and Raimondo (there was significant material on one of them)
- Did a scan of the Electronic Case File, apparently finding:
  - One completely redacted file
  - A counterintelligence report forwarded from the Counterintelligence office to the Office
  - Several documents (from a different FBI office) that appear to be based on posts of Raimondo (these have serial numbers reading "315M/N-SL-188252), though the second is a Letterhead Memo
  - A document citing

Antiwar.com as a source of information on US military aid to Israel

- A report on a peaceful protest in the UK including a reference to an article handed out at the protest citing antiwar.com
- A report on a Neo-Nazi conference at which a member recommended reading Antiwar.com for information on the Middle East conflict
- The contents of a seized hard drive showing its owner visited Antiwar.com between July 2002 and June 2003.
- Recorded six more completely redacted entries
- Looked up details on DMV, Dun and Bradstreet, Lexis Nexis, business, and phone searches
- Looked up several other database searches the description of which are redacted
- **Cited four FISA-derived references from a case file in Newark, but with no description of contents**
- Referred to a bunch of other



articles on Antiwar.com,  
both access via Lexis Nexis  
and via web searches.

#### **The FBI's Verdict: Further Investigation**

All of which the FBI used to come to the  
following conclusion:

The rights of individuals to post  
information and to express personal views on  
the Internet should be honored and  
protected; however, some material that is  
circulated on the Internet can compromise  
current active FBI investigations. The  
discovery of two detailed Excel spreadsheets  
posted on [www.antiwar.com](http://www.antiwar.com) may not be  
significant by itself since distribution of  
the information on such lists are wide  
spread. Many agencies outside of law  
enforcement have been utilizing this  
information to screen their employees. Still  
it is unclear whether [www.antiwar.com](http://www.antiwar.com) may  
only be posting research material compiled  
from multiple sources or if there is  
material posted that is singular in nature  
and not suitable for public release. There  
are several unanswered questions regarding  
[antiwar.com](http://www.antiwar.com). It describes itself as a non-  
profit group that survives on generous  
donations from its readers. Who are these  
contributors and what are the funds used  
for? [two lines redacted] on  
[www.antiwar.com](http://www.antiwar.com). If this is so, then what is  
his true name? Two facts have been  
established by this assessment. Many  
individuals worldwide do view this website  
including individuals who are currently  
under investigation and [one line redacted].

With the recommendations (for DC's corrupt ECAU  
office):

It is recommended that ECAU **further monitor**  
the postings on the website [www.antiwar.com](http://www.antiwar.com).

And in San Francisco:

It is recommended that a [Preliminary Investigation] be opened to determine if [redacted] are engaging in, or have engaged in, activities which constitute a threat to National Security on behalf of a foreign power.

Now, it's bad enough the FBI doesn't consider Antiwar.com a journalistic site at all. It's also pretty appalling that they used pretty unnecessary questions to justify further investigation.

And remember, the bar for the FBI to use First Amendment "protected" reasons to investigate someone have been lowered since 2004.

Apparently, for the FBI, advocating for peace and making a publicly available PDF available constitutes sufficient threat to conduct a counterintelligence investigation.

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## **RICHARD BEN-VENISTE CALLS OUT OBAMA FOR SPIKING THE PRIVACY BOARD**

I just watched a scintillating panel at the Aspen Security Forum. It featured former LAPD Chief Bill Bratton, Alberto Gonzales, ACLU's Anthony Romero, John Yoo, and David Cole, moderated by Dahlia Lithwick.

The panel itself was notable for the staging of it. The panelists were seated right next to each other, with no table in front. Gonzales sat right next to Romero; Yoo sat right next to Cole. So when Romero corrected Lithwick's assertion that the Bush Administration had showed respect for using civilian trials with

terrorists by recalling that Gonzales had argued for holding American citizen Jose Padilla without trial, Gonzales shifted notably, uncomfortably, by my read. And when Cole rehearsed the language people like Michael Mukasey and Jack Goldsmith used to describe Yoo's memo all the while pointing with his thumb at Yoo sitting next to him—"solvenly," he emphasized—Yoo also shifted, though aggressively towards Cole. Before it all ended, Romero started reading from Yoo's torture memo; Yoo accused him of using Dickensian dramatic delivery.

The physical tension of these men, attempting to contain the contempt they had for each other while sitting in such close proximity, was remarkable.

There were a number of other highlights: John Yoo made the ridiculous claim that no one in the human rights community had come out against drone strikes (Romero came back later and reminded him the ACLU had sued on precisely that issue, representing Anwar al-Awlaki's family). Gonzales insisted there should be accountability (no matter that he escaped it, both when he politicized DOJ and when he took TS/SCI documents home in his briefcase). Romero hailed Obama's "willingness to shut down secret sites," apparently missing Jeremy Scahill's recent scoop about the CIA-paid prison in Somalia. Yoo, as is typical, lied to protect his actions, not only repeating that canard that torture helped to find Osama bin Laden (rather than delayed the hunt as is the case), but also to claim that warrantless wiertaps helped find the couriers; they did, but those were warrantless wiretaps in the Middle East, not the US!

Just as interesting, though, were the questions. Yoo was somewhat stumped when an IAVA member and former officer asked what an officer who had taken an oath to support and defend the Constitution should do if he received what he believed was an unconstitutional order.

Finally, most interesting came when Richard Ben-

Veniste—the former Watergate prosecutor and 9/11 Commissioner—asked questions. He said, first of all, that Mohammed al-Qahtani had been providing information before he was tortured (a claim I'm not sure I've heard before, made all the more interesting given that we know the Commission received interrogation reports on a running basis). But then his torture turned him into a "vegetable," which meant the US was unable to prosecute him.

And then Ben-Veniste raised something that the panel, for all its discussion about accountability, didn't mention. The 9/11 Commission recommended a privacy board to ensure that there was some balance between civil liberties and security. Bush made a half-assed effort to fulfill that requirement; after 2006, at least, there was a functioning Privacy and Civil Liberties Oversight Board. But Obama has all but spiked it, killing it by not appointing the Board.

Particularly given Ron Wyden's and Mark Udall's concerns about secret law, it's time the civil liberties community returned its focus on Obama's refusal to fulfill the law and support this board. That board is precisely the entity that should be balancing whether or not the government is making appropriate decisions about surveillance.

Update: David Cole corrected for John.