HAVE CLAPPER, FEINSTEIN, AND ROGERS CONFUSED THE DISTINCT ISSUES OF SECTION 215 AND PRISM? OR ARE THEY INDISTINCT?

[youtube]hmw4G5q1OkE[/youtube]

Last year, when Pat Leahy tried to switch the FISA Amendments Act reauthorization to a 3 year extension instead of 5, which would have meant PATRIOT and FAA would be reconsidered together in 2015, the White House crafted a talking point claiming that would risk confusing the two provisions.

> Aligning FAA with expiration of provisions of the Patriot Act risks confusing distinct issues.

In the last week, the Guardian had one scoop pertaining to FAA (the PRISM program) and another to PATRIOT (the use of Section 215 to conduct dragnet collection of Americans' phone records).

Since then, almost everyone discussing the issues seems to have confused the two.

Including, at a minimum, Mike Rogers, as demonstrated by the video above. When Dianne Feinstein started explaining the Section 215 Verizon order, Mike Rogers interrupted to say that the program could not be targeted at Americans. But of course the Section 215 order was explicitly limited to calls within the US, so he had to have been thinking of PRISM.

Then there what, on first glance, appears to be confusion on the part of journalists. I noted

how Reuters' Rogers-related sources were clearly confused (or in possession of a time machine) when they made such claims, and NYT appeared to conflate the issues as well. Similarly, Andrea Mitchell took this exchange — which is clearly about Section 215 — and elsewhere reported that the law allowing NSA to wiretap Americans (which could be FISA or FAA) stopped the attack.

> ANDREA MITCHELL:
>
> At the same time, when Americans woke up and learned because of these leaks that every single telephone call in this United States, as well as elsewhere, but every call made by these telephone companies that they collect is archived, the numbers, just the numbers, and the duration of these calls. People were astounded by that. They had no idea. They felt invaded.
>
> JAMES CLAPPER:
>
> I understand that.
>
> [snip]
>
> A metaphor I think might be helpful for people to understand this is to think of a huge library with literally millions of volumes of books in it, an electronic library. Seventy percent of those books are on bookcases in the United States, meaning that the bulk of the of the world's infrastructure, communications infrastructure is in the United States.
>
> [snip]
>
> So the task for us in the interest of preserving security and preserving civil liberties and privacy is to be as precise as we possibly can be when we go in that library and look for the books that we need to open up and actually read.
>
> [snip]

So when we pull out a book, based on its essentially is– electronic Dewey Decimal System, which is zeroes and ones, we have to be very precise about which book we're picking out. And if it's one that belongs to the– was put in there by an American citizen or a U.S. person.

We ha– we are under strict court supervision and have to get stricter– and have to get permission to actually– actually look at that. So the notion that we're trolling through everyone's emails and voyeuristically reading them, or listening to everyone's phone calls is on its face absurd. We couldn't do it even if we wanted to. And I assure you, we don't want to.

ANDREA MITCHELL:

Why do you need every telephone number? Why is it such a broad vacuum cleaner approach?

JAMES CLAPPER:

Well, you have to start someplace. If– and over the years that this program has operated, we have refined it and tried to– to make it ever more precise and more disciplined as to which– which things we take out of the library. But you have to be in the– in the– in the chamber in order to be able to pick and choose those things that we need in the interest of protecting the country and gleaning information on terrorists who are plotting to kill Americans, to destroy our economy, and destroy our way of life.

ANDREA MITCHELL:

Can you give me any example where it actually prevented a terror plot?

JAMES CLAPPER:

Well, two cases that– come to mind,

> which are a little dated, but I think in the interest of this discourse, should be shared with the American people. They both occurred in 2009. One was the aborted plot to bomb the subway in New York City in the fall of 2009.
>
> And this all started with a communication from Pakistan to a U.S. person in Colorado. And that led to the identification of a cell in New York City who was bent on– make– a major explosion, bombing of the New York City subway. And a cell was rolled up, and in their apartment, we found backpacks with bombs.
>
> A second example, also occurring in 2009, involved– the– one of the– those involved, perpetrators of the Mumbai bombing in India, David Headley. And we aborted a plot against a Danish news publisher based on– the same kind of information. So those are two specific cases of uncovering plots through this mechanism that– prevented terrorist attacks.

What would seem to support the conclusion that everyone was just very confused is that, in his talking points on the two programs, Clapper claims three examples as successes for the use of PRISM, none of which is Zazi or Headley.

Now, the AP reports Clapper's office (which is fast losing credibility) has circulated talking points making the claim that PRISM helped nab Zazi.

> The Obama administration declassified a handful of details Tuesday that credited its PRISM Internet spying program with intercepting a key email that unraveled a 2009 terrorist plot in New York.
>
> The details, declassified by the director of national intelligence, were circulated on Capitol Hill as part of

> government efforts to tamp down criticism of two recently revealed National Security Agency surveillance programs.

But, as I suggested last year, the White House clearly wasn't concerned about us confusing our pretty little heads by conflating FAA and Section 215. Rather, it seemed then to want to hide the relationship between the dragnet collection of Americans calls and the direct access to Internet providers' data.

But Clapper and DiFi seem to hint at the relationship between them.

In her first comments about Section 215 (even before PRISM had broken) DiFi said this.

> The information goes into a database, the metadata, but cannot be accessed without what's called, and I quote, "reasonable, articulable suspicion" that the records are relevant and related to terrorist activity.

And in his talking points on 215, Clapper said this.

> By order of the FISC, the Government is prohibited from indiscriminately sifting through the telephony metadata acquired under the program. All information that is acquired under this program is subject to strict, court-imposed restrictions on review and handling. The court only allows the data to be queried when there is a reasonable suspicion, based on specific facts, that the particular basis for the query is associated with a foreign terrorist organization.

This standard — reasonable suspicion that the records are relevant to or associated with a terrorist investigation (I'll come back to the

terrorism issue in another post) — is not the 215 standard, because it requires reasonable suspicion. But it's not as high as a FISA warrant would be, which requires it to be more closely related than "relevant" to a terrorist investigation.

So what standard is this, and where did it come from?

Via email, Cato's Julian Sanchez hypothesizes that the FISA Court may have required the government apply the standard for Terry stops and ECPA to their ability to access US person data from the database.

> It looks like they essentially imported the Terry stop-and-frisk standard, maybe by way of the ECPA "specific and articulable facts" standard in 18 USC 2703, as a post-collection constraint on QUERIES of the database, rather than its collection. That would comport with the DOD understanding that "acquisition" of a communication only occurs when it's actually processed into human-readable form and received by an analyst: They've concluded that the "relevance" test can be embedded in back end restrictions at the "query" phase where "acquisition" happens rather than the initial copying of the data. And they've used the ECPA/Terry standard as the test of relevance.

In other words, DiFi and Clapper's comments, in particular, and the underlying confusion that suggests there's a tie between PRISM and the Section 215 database generally, seem to suggest that the PRISM collection provides the evidence the government uses to get access to the predominantly US person metadata to start seeing which Americans have 6 degrees of separation from the terrorists.

They're saying over and over again that they just can't go into the database willy nilly.

Except they can access the PRISM data willynilly (including seeing the US person data) and use that to access a data of predominantly American records.

MIKE ROGERS: AS CONFUSED ABOUT TELECOM SURVEILLANCE AS HE IS ABOUT DRONE STRIKES

Congressman Mike Rogers, like most members of the ranking Gang of Four members of the Intelligence Committees, has long made obviously false claims about the drone program, such as that public reports of civilian casualties (which were being misreported in intelligence reports) were overstated.

That's just one of the many reasons I was dubious about this report, claiming that, well … it's not entirely clear what it claimed. Here's the lead two paragraphs:

> A secret U.S. intelligence program to collect emails that is at the heart of an uproar over government surveillance helped foil an Islamist militant plot to bomb the New York City subway system in 2009, U.S. government sources said on Friday.
>
> The sources said Representative Mike Rogers, chairman of the House of Representatives Intelligence Committee, was talking about a plot hatched by Najibullah Zazi, an Afghan-born U.S. resident, when he said on Thursday that such surveillance had helped thwart a significant terrorist plot in recent

> years.

These paragraphs suggest that we found Najibullah Zazi — pretty clearly the most successful effort to prevent a known terrorist attack since 9/11 — because of one of the programs the Guardian (and WaPo) broke over the last few days.

Some paragraphs down, the piece explains the program in question was the "one that collected email data on foreign intelligence suspects." Which is weird, because we've learned about a program to collect email data on **everyone in the United States**, not "foreign intelligence suspects." And a program to collect a range of telecom content on known foreign intelligence suspects and their associates. Already, Reuters' sources seemed confused.

The next paragraph describes the PRISM program by name.

> The Washington Post and Britain's Guardian newspaper on Thursday published top-secret information from inside NSA that described how the agency gathered masses of email data from prominent Internet firms, including Google, Facebook and Apple under the PRISM program.

And the rest of the report traces what former Agent and now FBI mouthpiece CBS pundit John Miller had to say.

All of that might lead you to believe this is a story reporting that we had foiled Zazi's plot using PRISM, the program that involves the NSA accessing bulk data on everything these foreign targets were doing. But even that is problematic, since Zazi is a US person, whose communications are supposedly excluded from this program.

Then there are the problems with the actual content of this.

Dianne Feinstein, who unlike Rogers, was on the Gang of Four in 2009 and therefore privy to the most comprehensive intelligence, and who is pretty systematic about boasting how the intelligence programs she has approved have netted terrorists, has (as far as I'm aware) never made such a claim. As far as I'm aware, she has never, not even during the FISA Amendments Act extension, boasted that it got Zazi (she usually vaguely points to a list of 100 people we've caught and vaguely said some of them were caught using FAA). Mind you, DiFi **has** boasted about how central Section 215 was to the ongoing investigation into Zazi several months after he was caught. Even assuming that wasn't just surveillance re-approval season bluster, that's the other program we're talking about, Section 215, not PRISM. Furthermore, it's possible that she was so intent on tying 215 to Zazi solely so FBI could identify more entirely innocent people to interrogate, as they had 3 apparently innocent people already.

Then there's the public reporting that contradicts what I assume to be Mike Rogers' staffers' claim. This NPR piece, obviously designed to showcase all the new surveillance tools used to nab Zazi, makes no mention of anything beyond roving NSA wiretaps.

> The wiretap used on Zazi was different. In his case, officials tell NPR they asked a judge for what's called a roving FISA wire tap. (FISA stands for Foreign Intelligence Surveillance Act.)
>
> [snip]
>
> FISA wiretaps are meant to be aimed at foreign targets — people who work for or are representing a foreign entity. FISA wiretaps used to be all about espionage, but, according to former FBI Assistant Director Tom Fuentes, that changed to include terrorism. The foreign entity in this case would be a group like al-Qaida.

In fact, NPR attributed our discovery of Zazi to a tip from Pakistan.

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But that's not all. This NPR piece bragging about all the new toys deployed to catch Zazi makes it clear that the first tip-off came from Pakistan.

> Sources say officials acted after Pakistani intelligence allegedly told them that Zazi had met with al-Qaida operatives there.

The AP's Adam Goldman says even that is not right. The tip came from the Brits, not Pakistan.

> Let's be clear Operation Pathway in London uncovered email that thwarted Najibullah Zazi plot in 2009. Public docs available….
>
> Brits got this email —sana_pakhtana@yahoo.com — and gave it to USG. Zazi sent urgent message to that email. Alarms went off. See PACER

This was not PRISM identifying associations. It was the Brits identifying the email of a Pakistani bomber, which we then tracked right to Zazi's desperate requests for bomb-making help.

But there's one more problem with Mike Rogers' story about Zazi. Look at that second paragraph again.

> The sources said Representative Mike

> Rogers, chairman of the House of Representatives Intelligence Committee, was talking about a plot hatched by Najibullah Zazi, an Afghan-born U.S. resident, **when he said on Thursday** that such surveillance had helped thwart a significant terrorist plot in recent years.

This is a reference to when, sometime well before 2PM on Thursday, Rogers said the Section 215 dragnet collection of US call data had thwarted a plot. PRISM wasn't broken until a number of hours later.

So this article suggests (though not consistently—Rogers' anonymous sources seem confused!) that PRISM busted Zazi, when chronologically, it must be Section 215 he's thinking of.

The record doesn't appear to support that either. More likely, he's remembering that when the Intelligence Committees renewed the PATRIOT Act in 2009, the FBI and others boasted that they were using Section 215 in interesting ways.

But again—the public record doesn't necessarily suggest that was anything more than 3 innocent Muslims buying haircare products.

Maybe there's more to this. But until there is, the record suggests that 1) Rogers' staffers (or Reuters' other sources) are hopelessly confused, and can't keep these programs separate and 2) that Rogers has a fundamentally different understanding of what happened than even DOJ suggested in their court filings.

Rogers is confused. And he's what counts as oversight on these dragnet programs.

Update: Thanks to Ben Smith for doing the legwork to prove how silly Rogers' claims are.

> The path to his capture, according to the public records, began in April 2009, when British authorities arrested several suspected terrorists. According

> to a 2010 rulingfrom Britain's Special Immigration Appeals Commission, one of the suspects' computers included email correspondence with an address in Pakistan.
>
> > The open case is founded upon a series of emails exchanged between a Pakistani registered email account sana_pakhtana@yahoo.com and an email account admittedly used by Naseer humaonion@yahoo.com between 30 November 2008 and 3 April 2009. The Security Service's assessment is that the user of the sana_pakhtana account was an Al Qaeda associate…"
>
> "For reasons which are wholly set out in the closed judgment, we are sure satisfied to the criminal standard that the user of the sana_pakhtana account was an Al Qaeda associate," the British court wrote.
>
> Later that year, according to a transcript of Zazi's July, 2011 trial, Zazi emailed his al Qaeda handler in Pakistan for help with the recipe for his bombs. He sent his inquiry to the same email address: sana_pakhtana@yahoo.com.
>
> An FBI agent, Eric Jurgenson, testified, "I was notified, I should say. My office was in receipt of several e-mail messages, e-mail communications." Those emails — from Zazi to the same sana_pakhtana@yahoo.com — "led to the investigation," he testified.

Update: Go figure. NYT has a story that, like Reuters, conflates 215 and PRISM and then, without apparently mastering the difference

between the two or known facts of Zazi's case, declares "Victory!." After mentioning stockpiling of email, it says,

> To defenders of the N.S.A., the Zazi case underscores how the agency's Internet surveillance system, called Prism, which was set up over the past decade to collect data from online providers of e-mail and chat services, has yielded concrete results.
>
> "We were able to glean critical information," said a senior intelligence official, who spoke on the condition of anonymity. "It was through an e-mail correspondence that we had access to only through Prism."

Except we know the email correspondance could have been available via FISA under the rules in place in 1998. Did they use fancy software? Maybe, but they certainly didn't need it.

Later, it admits it doesn't know which program, if any, foiled which plot, if any.

> An administration official said Friday that agencies were evaluating whether they could publicly identify particular terrorism cases that came to the government's attention through the telephone or Internet programs.
>
> Representative Mike Rogers, the Michigan Republican who is chairman of the House intelligence committee, said Thursday that the program "was used to stop a terrorist attack." He did not identify the plot, or explain whether the call logs in the case would have been unavailable by ordinary subpoenas.

Then, later, it cites DiFi's (also dubious) list of plots foiled by FAA. Zazi's plot is not included.

AMERICAN DRONE WAR: MURDER AND DEMOCRACY

In his post on the drone killing of Waliur Rehman Mehsud earlier this week, Jim noted that CIA has sworn revenge for the 2009 Pakistani Taliban supported suicide attack on CIA's base in Khost.

Sure enough, one of the things Press Secretary Jay Carney mentioned when asked about the strike yesterday was Rehman's role in the "murder" of 7 CIA officers in Khost in 2009.

> While we are not in the position to confirm the reports of Waliur Rehman's death, if those reports were true or prove to be true, it's worth noting that his demise would deprive the TTP – Tehrik-e-Taliban Pakistan – of its second in command and chief military strategist. Waliur Rehman has participated in cross-border attacks in Afghanistan against U.S. and NATO personnel and horrific attacks against Pakistani civilians and soldiers. And he is wanted in connection to the murder of seven American citizens on December 30, 2009, at Forward Operating Base Chapman in Khost, Afghanistan.

Now, I'm sorry that 7 CIA officers died, but let's consider what it means that the US continues to call the attack murder.

As I noted almost 3 years ago when DOJ first sanctioned TTP and indicted Hakimullah Mehsud, the notion that they should be legally held responsible – in the US, at least – for "murder" is laughable. The Khost attack took place after an extended campaign to kill Baitullah Mehsud,

as Jane Mayer recounts.

> Still, the recent [in 2009] campaign to kill Baitullah Mehsud offers a sobering case study of the hazards of robotic warfare. It appears to have taken sixteen missile strikes, and fourteen months, before the C.I.A. succeeded in killing him.
>
> [snip]
>
> On June 14, 2008, a C.I.A. drone strike on Mehsud's home town, Makeen, killed an unidentified person. On January 2, 2009, four more unidentified people were killed. On February 14th, more than thirty people were killed, twenty-five of whom were apparently members of Al Qaeda and the Taliban, though none were identified as major leaders. On April 1st, a drone attack on Mehsud's deputy, Hakimullah Mehsud, killed ten to twelve of his followers instead. On April 29th, missiles fired from drones killed between six and ten more people, one of whom was believed to be an Al Qaeda leader. On May 9th, five to ten more unidentified people were killed; on May 12th, as many as eight people died. On June 14th, three to eight more people were killed by drone attacks. On June 23rd, the C.I.A. reportedly killed between two and six unidentified militants outside Makeen, and then killed dozens more people—possibly as many as eighty-six—during funeral prayers for the earlier casualties. An account in the Pakistani publication *The News* described ten of the dead as children. Four were identified as elderly tribal leaders. One eyewitness, who lost his right leg during the bombing, told Agence France-Presse that the mourners suspected what was coming: "After the prayers ended, people were asking each other to leave the area, as

> drones were hovering." The drones, which make a buzzing noise, are nicknamed *machay* ("wasps") by the Pashtun natives, and can sometimes be seen and heard, depending on weather conditions. Before the mourners could clear out, the eyewitness said, two drones started firing into the crowd. "It created havoc," he said. "There was smoke and dust everywhere. Injured people were crying and asking for help." Then a third missile hit. "I fell to the ground," he said.

When CIA finally got Baitullah, they also took out his young new bride.

The people Humam al-Balawi took out at Khost were all, as far as is known, active participants in the drone campaign that created all this carnage. As NYU's Sarah Knuckey laid out yesterday, the Khost attack is probably murder under Afghan law, but not under international law, which would count CIA drone killers as civilians directly participating in hostilities.

> In an international armed conflict (IAC), members of the armed forces have combatant immunity and combatant privilege. Meaning: they can kill the other side's combatants (if rules on killing satisfied in individual case), AND, they cannot be prosecuted under domestic law (of their enemy, if e.g., they were captured) for a killing that was permitted under IHL. They could be tried by the capturing enemy for any violation of IHL, e.g. war crimes.
>
> But, this immunity only attaches to members of the armed forces. It does not apply to "civilians who directly participate in hostilities [DPH]" (e.g the farmer who picks up arms to fight the Americans one day, the US civilian – yes, including any CIA officer who

> "directly participates"). So, a CIA officer (not any of them, only those DPH'ing, eg. involved in, say, drone strikes, or night raids) could, under the laws of war, be arrested and tried in Afghanistan or Pakistan, and tried for murder under domestic law. (This is so, even if the "murder" was permitted by IHL). Ditto for some AQ or Taliban member — they have no immunity. Their killing might be permitted by IHL, but not by Afghan law. Whether the Khost killings violated Afghan criminal law, I don't know (haven't studied the Afghan crim code), but I'd assume yes.

In other words, calling Khost "murder" simply imposes a double standard, in which we're allowed to kill scores of civilians, including funeral goers and young wives not directly participating in combat, but those DPHs are not allowed to strike back.

But that's not the only thing that likely went on with this strike. As McClatchy lays out (and Jim also hinted at) it was probably just as much an effort to thwart peace discussions between the civilian government of Pakistan and the Pakistani Taliban.

> Waliur Rehman Mehsud's death comes just before the assumption of power next month of a government led by Nawaz Sharif, a center-right politician who'll become the prime minister for a record third time. Sharif based his appeal partly on his demand for an end to drone strikes and a pledge to seek peace talks with the Pakistani Taliban.
>
> It's unclear, however, whether Sharif's plan has the backing of the powerful army, which ruled the country for half of its 65-year existence and has 150,000 troops in the tribal region, where fighting is underway in three of the seven tribal agencies.

> Taking out Waliur Rehman Mehsud, who was seen as more amenable to negotiations than Hakimullah Mehsud, could be a way for the military to short-circuit Sharif's plans.
>
> "I can imagine that the ISI is not especially happy with Nawaz Sharif's professions of wanting to open talks with the TTP," [Christine] Fair said, pointing out that the militants have repeatedly rejected a demand that they accept Pakistan's democratic Constitution as a condition for peace. "One way of clipping his wings on this issue is by taking out a senior member of the TTP leadership."
>
> Legal scholars who question the legality of targeted killings said Mehsud's killing seemed to contravene the rules that Obama broadly described last week for targeted killings. A key issue concerned the criteria that the administration used in apparently designating Mehsud a target.

As I've noted before, effectively our counterterrorism program in Pakistan increasingly treats the military as more legitimate than the elected government.

And not surprisingly that fosters more war.

The Pakistani Taliban have already announced — while confirming Rehman's death — that they are withdrawing their offer to negotiate for peace.

> The militant group had said earlier that it was open to peace talks with the newly elected Pakistani government.
>
> But Ahsan said Thursday that the Taliban believes the government approves of the drone strikes so they are withdrawing their offer of peace talks.

And it’s not just with this drone killing.

Both in Pakistan and Yemen (not coincidentally, the places where we use what we call signature strikes but might just be side payment strikes), we have taken out more than a few people who — like Rehman — were either amenable to negotiations or had served as mediators between the government and extremist forces in the past.

Either at the behest of our undemocratic “partners” or based on our own (CIA’s?) assessment of our best interests we’re effectively killing the people most likely to bring about some kind of peace.

Very literally, the drone war has become the self-perpetuating logic of its own power for those who wield it. And those with democratic accountability don’t appear to wield that power.

DOJ GOES NUCLEAR ON GOLDMAN AND APUZZO

While the AP doesn’t say it in their report that DOJ got two months of unnamed reporters’ call records, but this effectively means they’ve gone nuclear on Goldman and Apuzzo for breaking a story the White House was going to break the following day anyway.

> Prosecutors took records showing incoming and outgoing calls for work and personal numbers for individual reporters, plus for general AP offices in New York, Washington and Hartford, Conn. The government also seized those records for the main phone number for AP in the House of Representatives press gallery.
>
> The Justice Department disclosed the seizure in a letter the AP received

> Friday.
>
> [snip]
>
> In the letter notifying the AP received Friday, the Justice Department offered no explanation for the seizure, according to Pruitt's letter and attorneys for the AP. The records were presumably obtained from phone companies earlier this year although the government letter did not explain that. None of the information provided by the government to the AP suggested the actual phone conversations were monitored.

As a reminder, here's a history of the White House's attempts to dubiously claim they weren't planning on releasing the information themselves, as they had the last time a Saudi infiltrator tipped us to a plot.

> When the AP first broke the story on UndieBomb 2.0, it explained that it had held the story but decided to publish before the Administration made an official announcement on what would have been Tuesday, May 8.
>
> > The AP learned about the thwarted plot last week but agreed to White House and CIA requests not to publish it immediately because the sensitive intelligence operation was still under way.
> >
> > Once those concerns were allayed, the AP decided to disclose the plot Monday **despite requests from the Obama administration to wait for an official announcement Tuesday.** [my emphasis]
>
> Since that time, the Administration has

> tried to claim they never intended to make an official announcement about the "plot." They did so for a May 9 LAT story.
>
> > **U.S. intelligence officials had planned to keep the bomb sting secret**, a senior official said, but the Associated Press learned of the operation last week. The AP delayed posting the story at the request of the Obama administration, but then broke the news Monday.
> >
> > [snip]
> >
> > "We were told on Monday that the operation was complete and that the White House was planning to announce it Tuesday," he said.

Then the White House tried misdirection for a Mark Hosenball story last week—both blaming AP for information about the Saudi infiltrator the AP didn't break, and attributing Brennan's comments implying the plot involved an infiltrator to hasty White House efforts to ~~feed the news cyclespin~~respond to the story.

> > According to National Security Council spokesman Tommy Vietor, due to its sensitivity, the AP initially agreed to a White House request to delay publication of the story for several days.
> >
> > But according to three government officials, a final deal on timing of publication fell apart over the AP's insistence that no U.S. official would respond to the story for one clear hour after its release.

> > [snip]
> > **The White House places the blame squarely on AP, calling the claim that Brennan contributed to a leak "ridiculous."**
> >
> > "It is well known that we use a range of intelligence capabilities to penetrate and monitor terrorist groups," according to an official statement from the White House national security staff.
> >
> > "None of these sources or methods was disclosed by this statement. **The egregious leak here was to the Associated Press. The White House fought to prevent this information from being reported and ultimately worked to delay its publication for operational security reasons. No one is more upset than us about this disclosure**, and we support efforts to prevent leaks like this which harm our national security," the statement said.
> >
> > The original AP story, however, made no mention of an undercover informant or allied "control" over the operation, indicating only that the fate of the would-be suicide bomber was unknown. [my emphasis]

Now, there are several problems with this latest White House story. The allegation of a quid pro quo rests on the premise that the Administration was also about to release the information; it's just a different version of the request to hold the story until an official White House announcement. Furthermore, if the White House didn't

> want this information out there, then why brief Richard Clarke and Fran Fragos Townsend, who went from there to prime time news shows and magnified the story?

Meanwhile, John Brennan, who leaked the most damaging part of this (that it was just a Saudi sting), has since been promoted to run the CIA, even though, at least according to James Clapper's definition, he's a leaker.

Also, note the language used here: "seized." Not "subpoenaed."

That, plus the description of these as "phone records" suggests DOJ may well have relied on a National Security Letter to get journalist contacts, as I've long been predicting they've been doing.

Update, per the more detailed AP update: Apparently the letter says they were subpoenaed.

Update: Actually, the letter itself doesn't say they were subpoenaed, and given that no notice was provided, it seems like NSLs are a likely candidate.

> Last Friday afternoon, AP General Counsel Laura Malone received a letter from the office of United States Attorney Ronald C. Machen Jr. advising that, at some unidentified time earlier this year, the Department obtained telephone toll records for more than 20 separate telephone lines assigned to the AP and its journalists. The records that were secretly obtained cover a full two-month period in early 2012 and, at least as described in Mr. Machen's letter, include all such records for, among other phone lines, an AP general phone number in New York City as well as AP bureaus in New York City, Washington, D.C., Hartford, Connecticut, and at the House of Representatives. This action was taken without advance notice to AP or to any of the affected journalists,

> and even after the fact no notice has been sent to individual journalists whose home phones and cell phone records were seized by the Department.

This entire leak investigation was always a witch hunt, because sources in the Middle East were blabbing about it anyway, because John Brennan was blabbing too, and because the White House planned to blab about it the following day.

But that, apparently, didn't stop DOJ from throwing its most aggressive weapons against Adam Goldman and Matt Apuzzo, who first broke the story.

SOME CANADIAN BACON IS MORE EQUAL THAN SOME CARNITAS

The funny thing about this Josh Marshall column against (other peoples') dual citizenship is that he didn't need to go to the issue of dual citizenship at all. He wrote it in response to a proposal to let NYC non-citizens vote in municipal elections.

> I'm curious to hear what you think about the New York City Council proposal to let non-citizens vote in municipal elections. To me, it's definitely a bad idea.

But as part of his effort to explain his concept of "thick citizenship" he goes there: condemning the legal status of dual citizenship for Latino immigrants but not, apparently, for Canadian (and Israeli) ones.

> If Latin American immigrants maintain citizenship in the countries of their birth, doesn't that undermine the claim to full equality here?
>
> [snip]
>
> Now, as a practical matter I know there are people who carry dual citizenship because of very practical reasons like child custody and basic convenience for bi-national families. My wife is probably arguably a dual citizen simply because there's no obvious way to renounce her original citizenship in the country of her birth. So I don't see people who have dual US-Canadian citizenship as some great threat to the commonwealth or something or something that we actively need to eliminate. It's basically a non-problem. But I think it would be a bad thing if it became more pervasive – which is something that I think is possible as the free flow of peoples becomes easier and more common.

As a reminder, I'm a dual citizen, having gotten Irish citizenship before they made doing so much more onerous some years ago, because of the possibility that at some point my Irish spouse and I might move somewhere in the EU (though not necessarily Ireland – funny how that works).

Perhaps it offends the Irish that an American, seven-eighths of whose ancestors were Irish, whose Irish forebears left Ireland before some of my spouse's arrived there, now has legal paperwork that permits her to live and work in Ireland (and the rest of the EU), not to mention go through either line at customs in Dublin. They've never said that, though. They do, however, complain about the East Europeans who came to Ireland as cheap workers during the Tiger era and have made it their thick citizenship home. Curiously, they sometimes tell my cousin – who lives and works for an "thick citizenship" NGO in Ireland but doesn't have

citizenship – she has “returned,” I guess because Irish-Americans never stop being Irish.

There’s a difference, it seems, between nationality and citizenship.

Now, not only have I not ever voted in an Irish election (they don’t allow absentee voting, but boy would I if I could), neither has my spouse, in part because he has lived in Japan or the US almost from the time he could vote. That’s the way pre-Celtic Tiger Ireland was (and is again, increasingly). Mr EW has, however, engaged in a number of activities that would fall under Marshall’s “thick citizenship” category here in the US (with about five exceptions, though, only if I dragged him along kicking and screaming).

So my response to the substance of Marshall’s post is this: I’m agnostic on non-citizen voting at the local level (though I think it beats the hell out of what we have here in MI, where inner city citizens are being stripped of their municipal franchise left and right, and I think it’s a way to encourage thick citizenship). I think thick citizenship is a good thing for everyone where ever they live – it’s a fundamental part of building community, and the more we integrate all contributors of our local society into its thick citizenship, the more we’ll develop both the local and global empathy we need to get along in this world. And I think thick citizenship and legal citizenship are entirely different things (as demonstrated by both my cousin and my spouse, engaging in thick citizenship in countries where they’re not citizens). It’d be nice if the former had some tie to the latter, but as it is, we really only demand minimal competence in citizenship from immigrants, not from kids raised and schooled here.

Legal citizenship may be how we draw boundaries around the legal entrees to thick citizenship (though we often exclude felons even though they’re citizens), but it is also at least as much about how one legally negotiates daily life, particularly economic life, which is one

reason so many people retain dual citizenship.

But all that's what I think about the larger points in Marshall's post.

It's the underlying logic, though, of suggesting that there's no problem with Canadians retaining dual citizenship but there is for "Latin American" immigrants.

Some pigs are more equal than other pigs.

Does Marshall include Mexico in that category which, like Canada, is part of NAFTA, and provides far more people who serve as America's cheap labor but also (because of our immigration preferences) tends to create lifestyles that require splitting families across borders? Does it foster "thick citizenship" if a farm worker and union member who lives most of the year in California has to choose between engaging in legal citizenship in the country he lives most of the time or the country where his wife and kids live (and he sends remittances)? Are our national interests so divorced from those of Mexico (but not Canada!?!) that we need to maintain strict unitary citizenship only for those from the south, in spite of how closely tied our countries have become. Why? Is there some common "white Anglo" culture, one which hasn't been enriched by the Latino heritage of much of the US?

A poor Latino immigrant — or even a poor white working class American — gains power against rich (often white) people through a combination of thick citizenship and legal citizenship rights. To suggest just Latinos should have additional barriers to gain those legal rights out of some sense they're more likely to have divided loyalties than Canadians only serves to strengthen the rich white people by comparison.

More importantly, though, the US is so powerful, has such an overriding influence on the daily lives of poor people all over the world, and our daily life has become so globalized, it seems we'd do well to expand the fluidity of citizenship, not curtail it. If we affluent

white Americans felt more common citizenship with the Mexicans who pick our food or the Bangladeshis who make our clothing, we might be a lot more embarrassed about the ways we benefit from their exploitation.

If we don't share "thick citizenship" with the people whose lives we affect so negatively, then it's not doing the work it needs to.

THE BLAME GAME BEGINS: WHO WILL BE HELD RESPONSIBLE FOR CREATING THE AFGHAN "VERTICALLY INTEGRATED CRIMINAL" GOVERNMENT?

Last Sunday, the Beltway professed to be shocked – shocked!! – that the CIA has been bribing Hamid Karzai for years.

> Moreover, there is little evidence that the payments bought the influence the C.I.A. sought. Instead, some American officials said, the cash has fueled corruption and empowered warlords, undermining Washington's exit strategy from Afghanistan.
>
> "The biggest source of corruption in Afghanistan," one American official said, "was the United States."

Fred Kaplan, author of a fawning David Petraeus biography, described how Petraeus tried to fix that corruption but was stymied by practicality.

> Petraeus was impressed with their analysis but found their proposals impractical. First, he couldn't simply bypass Karzai. One of his strategic goals was to help stabilize Afghanistan. Overhauling the districts' governing boards and transferring power to new officials—who may themselves just be a new array of warlords—was hardly a recipe for stability. Second, the plan would undermine another strategic goal—protecting the Afghan population. The local officials who were taking bribes and extorting merchants were also helping out with local security, sometimes guarding convoys of NATO supply trucks. If the cash spigot were shut off, they might let the Taliban attack those trucks, maybe even join in.

Then Sarah Chayes, one of the civilian advisors who fought against Afghan corruption in the transition period from Stanley McChrystal to Petraeus, wrote an account of what Petraeus really did.

> Our PowerPoint presentation spelling out this plan ran to more than 40 slides. We selected a dozen we really planned to brief, but at a meeting with the entire command staff, General Petraeus read through every one. With a calculated flourish, he marked a check on each page as he turned it over. Petraeus was on board.
>
> [snip]
>
> But when he stood up to address the assembled brass, Petraeus seemed to skip past — or even argue against — the slides we had prepared explaining the new governance approach. We were stunned. What had happened? Had we misunderstood? Had he changed his mind?
>
> For another month, we kept at it; I

> hammered out a detailed implementation of our general concept to be employed in Kandahar province, alongside the troop surge. But by mid-September 2010, it was clear to me that Petraeus had no intention of implementing it, or of pursuing any substantive anti-corruption initiative at all. Four months later, in an intense interagency struggle over the language of a document spelling out objectives for Afghanistan by 2015, the U.S. government, at the cabinet level, explicitly reached the same decision.
>
> That was the moment I understood the Afghanistan mission could not succeed.

Like Kagan, Chayes ultimately blames CIA. But she does so, specifically, in the context of the attempted July 2010 arrest of the CIA's bagman, Muhammad Zia Salehi.

> I spent weeks wracking my brain, trying to account for the about-face. Eventually, after a glance in my calendar to confirm the dates, it came to me. It was the Salehi arrest. The Salehi arrest had changed everything.
>
> [snip]
>
> Throughout the unfolding investigation, two senior U.S. officials have told me, through Salehi's arrest and release after a few hours of police detention, CIA personnel never mentioned their relationship with him. Even afterwards, despite pressure in Kabul and Washington, the CIA refused to provide the ambassador or the key cabinet officials a list of Afghans they were paying. The CIA station chief in Kabul continued to hold private meetings with Karzai, with no other U.S. officials present.
>
> So whom did Salehi call from his jail cell the afternoon of his arrest? Was it

> Karzai, as many presumed at the time? Or was it the CIA station chief?

However lethal our bribes to Karzai have been to our so-called strategy in Afghanistan (though I wonder: have they simply forestalled an all-out civil war?), he's still going to proudly receive the cash.

> "Yes, we received cash from the CIA for the past 10 years. It was very useful, and we are very thankful for this aid," the president said during a news conference Saturday in Kabul.
>
> "Yesterday, I thanked the CIA's chief in Kabul and I requested their continued help, and they promised that they will continue."

If all this sounds vaguely familiar, it should.

That's because much of this dispute played out in reporting at the time. After NYT first reported CIA's ties to Salehi a month after the attempted arrest in 2010 — and quoted one official saying "Fighting corruption is the very definition of mission creep" — the WaPo reported more anonymous sources almost boasting of the bribes (and reminding they went back to the mujahadeen era). A month later, the WaPo quoted several anonymous military officials (in an article that quoted then Afghan Commander David Petraeus and Secretary of Defense Robert Gates on the record), anxious to show progress by that December, saying they had to tolerate some corruption.

> Military officials in the region have concluded that the Taliban's insurgency is the most pressing threat to stability in some areas and that a sweeping effort to drive out corruption could create chaos and a governance vacuum that the Taliban could exploit.
>
> "There are areas where you need strong

> leadership, and some of those leaders are not entirely pure," said a senior defense official. "But they can help us be more effective in going after the primary threat, which is the Taliban."

Just a week after that WaPo article, another reported that Obama's top national security aides – not just the CIA – were reaching a consensus that cracking down on corruption would impede our efforts to "achieve our principal goals."

> But the officials said there is a growing consensus that key corruption cases against people in Karzai's government should be resolved with face-saving compromises behind closed doors instead of public prosecutions.
>
> "The current approach is not tenable," said an administration official who, like others interviewed, agreed to discuss internal deliberations only on the condition of anonymity. "What will we get out of it? We'll arrest a few mid-level Afghans, but we'll lose our ability to operate there and achieve our principal goals."

It was a view shared by officials in Afghanistan.

> There is a growing view at the U.S. and NATO headquarters in Kabul that "the law enforcement approach to corruption mucks up our strategic interests," said the U.S. official there.

The following year, in January 2011, when the Beltway professed to be shocked – shocked!! – that the Kabul Bank had "lost" $900 million, similar hints came out. The last two paragraphs of the NYT's account, for example, hinted that we couldn't attack Kabul Bank directly because it would reveal that we've been propping up a

bunch of crooks (and blowing millions to have Karzai “re-elected” in an obviously fraudulent election).

> Kabul Bank has extensive links to senior people in the Afghan government. In addition to Mahmoud Karzai, other shareholders included Haseen Fahim, the brother of the first vice president, and several associates of the family from the north of Afghanistan. Afghan officials said the bank poured millions into President Karzai’s election campaign.
>
> It is the loans and personal grants made by the bank to powerful people, including government ministers, that could prove the most explosive, Western and Afghan officials said. “If people who are thought to be clean and who were held up as ‘good’ by Western countries suddenly are caught with their fingers in the till, it will cause questions from donors,” said a Western official in Kabul. “They will say, ‘Why are we here?’ ”

Dexter Filkins provided far more detail of the many top Karzai officials who were on the take.

> The evidence, according to American officials close to the inquiry [into the collapse of the Kabul Bank], appears to implicate dozens of Afghan officials and businessmen, many of them, like [Karzai’s finance minister and campaign treasurer, Omar] Zakhilwal, among Karzai’s closest advisers, with regulatory responsibilities over the Afghan financial system. Among the others are Afghans regarded by American officials as among the most capable in Karzai’s government: Farouk Wardak, the Minister of Education; Yunus Qanooni, the speaker of the Afghan parliament; and Haneef Atmar, the former Minister of

> the Interior.
>
> [snip]
>
> “Just straight bribes,” a senior NATO officer said of the payments to Afghan officials.

Filkins also made it clear Karzai — and with him, the US — decided to stop pursuing corruption because Salehi threatened to expose everything.

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

So forgive me if I’m dubious of the professed shock — shock!! — coming from Beltway figures who presumably have been following this for three years.

What’s new is not knowledge of Karzai’s corruption. Indeed, as the ease with which Karzai speaks of ordering up the Kabul Station Chief to continue the bribes make clear, all this is not secret in the least.

What’s new, apparently, is an attempt to blame all this — and with it, our imminent failure in Afghanistan — exclusively on the CIA.

I confess, I’m a little confused how you can cast blame exclusively on the CIA in an administration where the Secretary of Defense when these decisions were made was a former CIA head who oversaw the earlier generation of such bribes in Afghanistan, the Afghan Commander would become the CIA Director, the CIA Director would become the Secretary of Defense, and Obama’s top counterterrorism advisor, who had already overseen his share of bribes while at CIA, and would go on to become the CIA Director. In an Administration where everyone is a former or future participant in CIA’s bribery, it’s sort of pointless to try to cast blame

exclusively on the CIA.

The other problem with this tale is the claim that bribery is now interfering with our exit strategy.

Back in 2010, when tolerating Afghan corruption became the formal policy of the Obama Administration, the entire rationale was that tolerating corruption would help American focus on its so-called strategic goals. Only, in truth, they weren't so much strategic goals as a hope to claim political success for all the top figures involved, from the Generals on up to the Cabinet Members and the President. And now that the game of musical chairs has advanced three rounds and failure seems assured, the various parties are attempting to place blame for a decision they, at the very least, ultimately agreed to (interestingly, Hillary was perhaps the most vocal against this organized bribery at the time; perhaps she realized she was the only one whose time horizon would have to account for this failure).

Besides, I'm not sure why the Beltway gets to feign shock that Afghanistan has a system of legalized corruption. While Karzai's corruption may be more blatant than our own, it's not like the Beltway has fought against its own system of legal influence peddling.

TSARNAEV: RIGHT TO COUNSEL, NOT MIRANDA, IS THE KEY

Since Dzhokhar Tsarnaev was taken into custody just over a week ago, the hue and cry in the public and media discussion has centered on "Miranda" rights and to what extent the "public safety exception" thereto should come into play. That discussion has been almost uniformly wrongheaded. I will return to this shortly, but for now wish to point out something that appears to have mostly escaped notice of the media and legal commentariat – Tsarnaev repeatedly tried to invoke his right to counsel.

Tucked in the body of this Los Angeles Times report is the startling revelation of Tsarnaev's attempt to invoke:

> A senior congressional aide said Tsarnaev had asked several times for a lawyer, but that request was ignored since he was being questioned under the public safety exemption to the Miranda rule. The exemption allows defendants to be questioned about imminent threats, such as whether other plots are in the works or other plotters are on the loose.

Assuming the accuracy of this report, the news of Tsarnaev repeatedly attempting to invoke right to counsel is critically important because now not only is the 5th Amendment right to silence in play, but so too is the right to counsel under *both* the 5th and 6th Amendments. While the two rights are commonly, and mistakenly, thought of as one in the same due to the conflation in the language of the Miranda warnings, they are actually somewhat distinct rights and principles. In fact, there is no explicit right to counsel set out in the Fifth at all, it is a creature of implication manufactured by the Supreme Court, while the Sixth Amendment does have an explicit right to counsel, but it putatively only attaches after

charging, and is charge specific. Both are critical to consideration of the Tsarnaev case; what follows is a long, but necessary, discussion of why.

In fact, “Miranda rights” is a term that is somewhat of a misnomer, the “rights” are inherent in the Constitution and cannot be granted or withheld via utterance of the classic words heard every day on reruns of Law & Order on television. Those words are an advisory of that which suspects already possess – a warning to them, albeit a critical one.

In addition to being merely an advisory of rights already possessed, and contrary to popular belief, advising suspects of Miranda rarely shuts them down from talking (that, far more often, as will be discussed below, comes from the interjection of counsel into the equation). As Dr. Richard Leo has studied, and stated, the impact of Miranda on suspects’ willingness to talk to interrogators is far less than commonly believed. One study has the effect rate of Miranda warnings on willingness to talk at 16%; from my two plus decades of experience in criminal defense, I would be shocked if it is really even that high.

On top of this fact, the Miranda warnings relate only to the admissibility of evidence or, rather, the inadmissibility – the exclusion – of evidence if it is taken in violation of Miranda. Professor Orin Kerr gives a great explanation here.

Since there is, without any real question, more than sufficient evidence to convict Tsarnaev without the need for admissibility of any verbal confession or other communicative evidence he may have provided the members of the HIG (High Value Detainee Interrogation Group), the real question was never “Miranda” but when Tsarnaev would be presented to the court which, in turn, would determine when he would be given access to counsel. Not surprisingly, one of the first people I saw to correctly point this out was Marcy Wheeler:

> Folks: FAR more important, IMO, than Miranda is presentment. If he sees a judge in 2 days she'll make sure he gets a lawyer.

That could not have been more true, as was demonstrated on Monday morning, April 22, when Magistrate Judge Marianne Bowler went to the Beth Israel Deconess Medical Center where Tsarnaev was receiving treatment in custody. Also present was William Fick and Miriam Conrad (fascinating look at Conrad and her history here) of the Federal Public Defender's office in Boston. Fick, who speaks fluent Russian, and Conrad met with Tsarnaev immediately before the formal initial appearance process and represented him in the brief actual initial appearance itself.

So, all is as it should be because Tsarnaev got the initial appearance he was entitled to by law, right? No.

First off, there is the timing of the initial appearance, sometimes also colloquially referred to as "presentment". The initial appearance is governed by Rule 5 of the Federal Rules of Criminal Procedure (FRCrP). While you may have seen mention of "within 48 hours", the rule itself provides only that an arrested person must be taken before a magistrate "without unnecessary delay". The "48 hours" standard for first court appearances comes from the 1991 case of *County of Riverside v. McLaughlin*, which held that 48 hours was the outside limit. The importance of the Rule 5 initial appearance was cemented by the Supreme Court as recently as 2009 in the case of *Corley v. United States* (which even suggests delays longer than six hours may be presumptively violative).

But the 48 hour limit was not honored, in either spirit or letter, by the federal authorities in charge of the detention and interrogation of Dzhokhar Tsarnaev. The formal taking into custody of Tsarnaev, the arrest, was effected and announced at 8:45 pm EST Friday night April

19 and, as evidenced by the complaint cover sheet filed with the court, Tsarnaev was immediately in federal custody. The criminal complaint signifying the formal charging of Tsarnaev is noted by Judge Bowler to have been sworn out to her at 6:47 pm on Sunday, April 21. So, Tsarnaev was *charged* within 48 hours of his arrest, but he was not given his *initial appearance* within 48 hours, as required by Rule 5 FRCrP, *County of Riverside v. McLaughlin* and *Corley*.

The Rule 5 initial appearance was finally given to Dzhokhar Tsarnaev Monday morning April 22, as evidenced by the official transcript of the proceeding. The specific sequence and timing of these events is critical because of the nature and timing of the interrogation of Tsarnaev prior to him being advised of his Miranda warnings by Judge Bowler. It appears as if there were two substantive interrogation sessions by the HIG team, a fact reported by no less than Ray Kelly, based upon claimed briefing by the federal authorities:

> The police commissioner explained that was the original story that Dzhokhar told police when they began to interrogate him in the hospital, but that he later provided a more detailed account during a subsequent interview.
>
> Both interviews appear to have happened before authorities read the younger Tsarnaev brother his Miranda rights on Monday. According to Kelly, Dzhokhar was interrogated twice by authorities in the hospital, the first time on “Saturday evening into Sunday morning” and the second on “Sunday evening into Monday morning.” According to an Associated Press report from earlier today, the questioning lasted a total of 16 hours before Dzhokhar stopped cooperating upon being informed of his right to remain silent.

Remember, however, from above, that "Tsarnaev had asked several times for a lawyer, but that request was ignored since he was being questioned under the public safety exemption to the Miranda rule". This is where the Miranda, the public safety exception and right to counsel all intersect for Mr. Tsarnaev. Frankly, the government has issues on all of those fronts, but let us first look at the one that has been most discussed, and cowardly demagogued by the likes of House Intel Chairman Mike Rogers and NY Congressman Peter King, the most – Miranda and the "public safety exception".

Professor Erwin Chemerinsky, in the Los Angeles Times, explains the nuts and bolts of the "exception", and why it arguably does not apply to Tsarnaev's situation:

> Holder said on the Sunday talk shows that the government intended to invoke the "public safety exception" that allows suspects to be questioned without being given Miranda warnings in emergency circumstances. But this exception does not apply here because there was no emergency threat facing law enforcement.
>
> The emergency exception to Miranda that Holder embraced was announced by the Supreme Court in *New York vs. Quarles* in 1984. A woman told the police that she had been raped by a man with a gun. When the police caught the suspect in a grocery store, they saw an empty holster and no gun. The man was asked about the location of the gun, and he told the officer where to find it.
>
> The Supreme Court ruled that, although the suspect had not yet been given Miranda warnings, the statement about the gun was admissible against him because of the urgent need to find the gun. In other words, the public safety exception applies only when police are acting in an emergency to prevent

> serious immediate harm. If the police needed to question Tsarnaev as to the location of other bombs, the emergency exception would apply.

The *New York v. Quarles* case Chemerinsky discusses as setting out the public safety exception can be found here. In light of the fact that not only had multiple voices, from Attorney General Holder, to President Obama, to a myriad of investigation authorities, both local and federal, stated there was no evidence of further threat, there is some merit to Professor Chemerinsky's opinion on the *Quarles* exception not being applicable to Tsarnaev by the time his interrogation commenced on Saturday April 20.

Of course, the DOJ did not rely on *Quarles* alone, they also invoked their now infamous ""Public Safety Exception Memo" first incarnated in a memo from Attorney General Holder dated October 19, 2010, and formally distributed in a cleaned up version dated October 21, 2010. The memo goes beyond the basic immediate public safety questions permitted by *Quarles* to allow further broader ranging questions:

> There may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation. [4] In these instances, agents should seek SAC approval to proceed with unwarned interrogation after the public safety questioning is concluded. Whenever feasible, the SAC will consult with FBI-HQ (including OGC) and Department of Justice attorneys before granting approval. **Presentment of an arrestee may**

> **not be delayed simply to continue the interrogation, unless the defendant has timely waived prompt presentment.**
> (Emphasis added)

Let us give the DOJ and HIG team the benefit of the doubt under *Quarles*, and even their own self-stated memo (which is neither binding nor controlling law in any regard), and grant that some base level of questioning of Tsarnaev was reasonable to confirm there were no outstanding bombs, weapons or other dangers, and no outstanding co-conspirators and/or terrorist ties, whether domestic or foreign. In fact, there is court precedent in a recent case via the decision of Judge Nancy Edmunds to uphold this use of the public safety exception, in the case of the "Undie Bomber", Umar Farouk Abdulmutallab

Grant all of these root questions, and the bolded language – from the Obama DOJ's own Public Safety Exception Memo – delineates why there is *still* a significant problem with the treatment of Tsarnaev. The Rule 5 initial appearance, i.e. "presentment", was not complied with as to Tsarnaev, and public safety questioning can neither appropriately nor legitimately delay it.

In fairness to the Obama DOJ, who has been roundly blasted for the Public Safety Exception Memo, they arguably could have gone further and not included the such strong guidance against violation of Rule 5. There is authority from both the Ninth Circuit in *United States v. DeSantis*, 870 F.2d 536, 541 (9th Cir. 1989), and the Fourth Circuit in *United States v. Mobley*, 40 F.3d 688, 692–93 (4th Cir. 1994), *cert. denied*, 514 U.S. 1129 (1995), for the proposition that, like Miranda, the right to counsel can give way briefly for the public safety exception under *Quarles*.

The extensions of the public safety exception to right to counsel by the courts in *Desantis* and *Mobley*, however, give little, if any, support to

the government's actions vis a vis Mr. Tsarnaev, because the intrusion into the constitutional right to counsel in both the other cases was so fleeting – in both it was no more than a question or two about a weapon on the premises of a search while the search warrant was actively being executed. Nothing whatsoever like the 16 hours of interrogation applied to Tsarnaev, across at least two sessions, over a period of at least two days. The "public safety" interrogation of Tsarnaev was not immediate to potential danger, was not narrow and limited, and occurred long after he had been taken into custody. And, apparently, at least as to one of those sessions, the "Sunday evening into Monday morning" session, the interrogation occurred well after formal charges had been filed with Judge Bowler.

Let's take a look at the "right to counsel", why it differs, and is arguably far more important in the Tsarnaev scenario than utterance of the "Miranda warnings". The right to counsel during custodial police interrogations emanates from the seminal 1964 case of *Escobedo v. Illinois*. The language of the decision syllabus reflects the bright line rule announced by the court:

> …where a police investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect in police custody who has been refused an opportunity to consult with his counsel and who has not been warned of his constitutional right to keep silent, the accused has been denied the assistance of counsel in violation of the Sixth and Fourteenth Amendments; and no statement extracted by the police during the interrogation may be used against him at a trial.

Escobedo, as direct law, was implicitly obviated two years later by the decision in *Miranda v. Arizona*, where the court suddenly, and somewhat curiously, placed the right to custodial interrogation counsel under the umbrella of the

Fifth Amendment instead of the Sixth.

The primacy, and fundamental nature of the right to custodial interrogation counsel, however, was confirmed in the 1981 decision of *Edwards v. Arizona*, where the court held suspects have the right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation, as declared in Miranda, and that right cannot be invaded absent a clear and valid waiver. While it is true, under *Berghuis v. Thompkins*, a suspect must affirmatively invoke his right to counsel as opposed to simply standing silent, there is no authority for interrogators to simply ignore and frustrate, over an extended period, a suspect's express request for counsel as appears to have occurred in Tsarnaev's case.

Once, however, a defendant is presented to the court for initial appearance, he will be afforded counsel, and counsel will in almost all cases stop immediate questioning, both to prevent incrimination and to preserve evidence as leverage for plea negotiations. That is exactly what a defense counsel should do, and exactly what our constitutional system of justice and protections contemplates. This is also exactly why the Rule 5 presentment, and not "Miranda", has always been the critical concern in analyzing the Tsarnaev case, and still is. Once legitimate general questions as to public safety had been asked, Tsarnaev should have been afforded his Rule 5 initial appearance and access to counsel. Clearly Judge Bowler was available on Sunday the 21st, since, as previously noted, she was available to accept the swearing and filing of the criminal complaint.

Again, the timing of the interrogation, and requests for counsel, will prove critical. There are still many questions and facts to be locked down on these issues including, but not limited to:

> When in the timeline did Dzhokhar Tsarnaev first invoke by requesting

> counsel?
>
> How many times did he attempt to do so?
>
> In light of the fact much of his communication to the HIG interrogators was reportedly written, were his attempts to invoke in writing too?
>
> How did the interrogation team document Tsarnaev's non-written responses in light of the difficulty he had in communicating?
>
> Was there a video or audio record made to preserve the evidence?
>
> Did Tsarnaev provide any evidence that would warrant continuation of the *Quarles* public safety questioning?
>
> In light of the fact that Undie Bomber Abdulmutallab (who actually *had* layers of foreign terrorist ties and activities outside of the continental US) was only questioned for 50 minutes under the public safety exception, why did Tsarnaev (who had no such ties or activity) require 16 hours of interrogation over two full days, substantial portions of which were *after* charges were filed?

The bottom line is this: not telling a suspect about his rights in order to try obtain brief, immediate and emergency public safety information is one thing. Straight out denying and refusing a defendant constitutional rights he is legally entitled to, and has tried to invoke, is quite another. The government has issues on both fronts as to Tsarnaev.

The other thing that must be remembered is all of the foregoing likely only affects the admissibility of evidence communicated in the relevant period by Tsarnaev, not the legality of his detention and not the ability of the government to convict him. At best, it involves evidentiary exclusion principles only. There is,

by all accounts, more than enough evidence to convict the man without anything he communicated being admitted in a trial (if indeed there ever is a trial). Dzhokhar Tsarnaev will not be walking free in society again no matter how it sorts out. Big and emotionally fraught cases of national interest rarely make for good, and sound, creation of law and the Tsarnaev case is no exception.

How the Tsarnaev facts and case is discussed, sorted out in court, and what foundation it lays for future cases – and there will be future cases – does, however, speak loudly as to who we are as a nation. Are we the cowering nation of supposed leaders such as Mike Rogers and Peter King, or are we the strong and resolute one envisioned by our Founding Fathers and protected by the constitutional rights they bequeathed us with? Recent polls have shown that Americans are increasingly "skeptical about sacrificing personal freedoms for security." The people have that right, we should listen to them.

FACEBOOK A BETTER SPOOK THAN RAY KELLY

We have been discussing the FBI's apparent inability to use the multiple images of the Tsarnaev brothers from the Boston Marathon to ID them using facial recognition software.

So I wanted to circle back to two things. First, point to the passage of BoGlo's comprehensive account of the hunt for the brothers that pertains to this question.

Of note, it says photo analysts had isolated the video of Dzhokhar dropping his backpack by Wednesday morning.

> When Alben, of the State Police, saw the results of the analysts' work on

> Wednesday morning, he couldn't believe it: they had captured an image of the young man in a white hat dropping a backpack outside the Forum restaurant and then walking away.
>
> "There was a eureka moment . . . It was right there for you to see," said the colonel. "It was quite clear to me we had a breakthrough in the case."
>
> They had faces. Now they needed names.

The account remains unclear about why the FBI was unable to match the images, relying on speculation about the quality of the images.

> Even after authorities isolated the images of the two suspected bombers, they weren't able to pinpoint the suspects' identities — an essential puzzle piece that was still missing Wednesday.
>
> The FBI has poured millions of dollars into facial recognition technology over the years so it can quickly cross-check an image against millions of other pictures in government databases.
>
> In this case, both brothers were already in existing government databases, including the Massachusetts Registry of Motor Vehicles and federal immigration records. They were legal immigrants from the former Soviet republic of Kyrgyzstan, in theory allowing the FBI to find their names.
>
> But it's not clear which databases the FBI checked. And it may not have mattered. The pictures, taken from surveillance cameras above street level, were likely far too grainy when zoomed in on the brothers' faces. And the older brother was wearing sunglasses, making their task even harder.
>
> In addition, unlike in a traditional mug

> shot, the camera wasn't looking at their faces head-on.
>
> Investigators worked feverishly Wednesday trying to identify the men, searching other photos and video, trying to find high-definition images.
>
> "We still needed more clarity," said Alben, of the State Police. "As good as the videos were, we needed more clarity."

And in the middle of this account, BoGlo suggests that briefing Deval Patrick about being able to ID the face of the suspect led directly to the mistaken press reports — based on solid sources, the outlets insisted at the time — that authorities were ready to arrest a suspect.

> Colonel Alben, the State Police chief, briefed Patrick on Wednesday about the key piece of video showing Dzhokhar abandoning his backpack. Alben described the clip and showed the governor photographs culled from the footage, information that Patrick called "chilling."
>
> "We have a break," Patrick remembers him saying. "We think we have a face."
>
> If further proof was needed that the city was on edge, the anxiety soon spilled over into view. By 1 p.m., news reports began surfacing that a suspect had been not only identified but arrested, and was headed to the federal courthouse.

I'm still not satisfied with this explanation (and do hope Congress does some hearings on why facial recognition software failed to fulfill its promise, if in fact it did). But it does seem to suggest the FBI had solid images of the brothers for 18 hours before they released them to the public (a decision made by the FBI, the

BoGlo reports) and set off the manhunt that shut down the city.

Also, remember our questions about Ray Kelly's boast of having pictures of the Dzhokhar in Times Square, as the law enforcement community tried to use a half-baked plan to escape to New York and set off pressure cooker bombs in Times Square?

It appears from the coverage that the pictures derived not from NYC's ring of steel, but from the picture Dzhokhar put on Vkontakte. CBS national makes that explicit, and this image from CBS local admits the picture is a personal one.

Dzhokhar Tsarnaev in Times Square. (credit: Personal Photo)

The NYDN, in a story I won't link because of the way it identifies potentially innocent friends of Dzhokhar's who have been detained for visa violations, uses the same image.

In other words, Ray Kelly's Ring of Steel is no match for Dzhokhar's own (Russian) Facebook page, along with his Twitter account that described another trip to NYC.

Granted, fully-trained terrorists wouldn't be so sloppy with their social media use as this kid recruited by his brother just before the attack.

But in this instance, Facebook appears to have been just as important a surveillance tool as all the private videos that gave pictures, but reportedly not the ID, of the brothers.

Update: I meant to mention this bit from the

BoGlo article, too.

> The global positioning system on the vehicle, which emitted tiny traceable electronic signals, showed that the Mercedes was less than 5 miles from their apartment — and heading Reynolds's way.

It suggests, as I've wondered about repeatedly, that it was the Mercedes' location device, not the hostage's phone, that alerted the cops to where the SUV was.

WAS THERE EVEN A BB GUN?

Over the weekend, we heard the story that when Tamerlan Tsarnaev rushed the small group of cops who were trying to arrest him, he was strapped with a suicide vest. In addition, we were told, the brothers had two handguns, an M-4 rifle, and a BB gun. The brothers, we were told, were planning further attacks.

At this point, the support for the claim Tamerlan had a suicide vest has disappeared (as it should have as soon as his brother ran over him with the SUV, though that detail, too, may not be entirely true). Ray Kelly — who never met a fear he didn't want to magnify — tells us the brothers were headed out not to conduct further attacks, but to party in NYC. And according to the AP, just one handgun was found at the site of the shootout, and none was found on Dzhokhar when he was arrested.

> Officials also recovered a 9 mm handgun believed to have been used by Tamerlan from the site of an April 18 gunbattle

> that injured a Massachusetts Bay Transportation Authority officer, two U.S. officials said.
>
> The officials told the AP that no gun was found in the boat where Dzhokhar was hiding. Boston police Commissioner Ed Davis said earlier that shots were fired from inside the boat.
>
> Asked whether the suspect had a gun in the boat, Davis said, “I’m not going to talk about that.”
>
> But Kurt Schwartz, director of the Massachusetts Emergency Management Agency, said a police officer was shot within half a mile of where Tsarnaev was captured, “and I know who shot him.”
>
> Authorities had previously said Dzhokhar exchanged gunfire with them for more than an hour Friday night before they captured him inside a tarp-covered boat in a suburban Boston neighborhood backyard. But two U.S. officials said Wednesday that he was unarmed when captured, raising questions about the gunfire and how he was injured.

All that’s not to say the brothers weren’t dangerous. There is still the matter of the additional pressure cooker bomb thrown at the site of the shootout, and some pipe bombs thrown during the chase, some of which exploded. They had already shot a cop at point blank range, apparently in a failed attempt to get a second handgun (though, as the NYT version of this story makes clear, the video from that murder don’t even conclusively show that it was the brothers). The NYT even notes that Dzhokhar was not — as reported Friday — outside the search perimeter in Watertown, but within it.

But a number of the original details describing how dangerous the two were haven’t survived as the fog of the chase has lifted.

How much of that earlier picture arose from embarrassment that Dzhokhar escaped the police shootout, leading to the shutdown of all of Boston? How much of it arose from a long-cultivated image of what Islamic terrorists do, as distinct from what two disgruntled American immigrants might do?

Especially given Sean Collier's murder, I'm not faulting the cops for being careful. But to what extent are we running from ghosts the terror industry has created over the last 10 years?

THE SHUT-DOWN QUESTION

While I think it's a crucial question to debate going forward, at this point I am agnostic about whether the decision to shut down the entire city of Boston on Friday was the right one or not. Furthermore, thus far the question has been presented as an either/or choice: to shut down all of Boston, or none of it. It is possible the best decision would have been to shut down Watertown.

My biggest concern, however, is the possibility that the decision communicates to potential terrorists that they can shut down an entire city with 4 pressure cooker bombs and one dead cop.

All that said, I think as we discuss the question going forward, we need to be clear that the analysis probably needs to evaluate three steps in the process:

- The decision to release the photos of the brothers on Thursday night
- The actions surrounding the

firefight in Watertown
- The decision to shut down Boston

After all, the only thing that changed between Tuesday — when Boston remained open — and Friday — when it was shut down — is the murdered MIT officer and the hijacked Mercedes. The brothers were on the loose, presumed very dangerous, the entire time. Indeed, there might have been more reason to lock the city down immediately, to prevent their getaway. But the city did not shut down unti Friday, after they had been flushed out by release of the pictures. So to some degree, you need to start with the decision to release the pictures.

The NYT suggests law enforcement did not delay, after getting a clean image of Dzhokhar, to try to ID the brothers using facial recognition.

> "We were working the videos, and the footage was getting better and better as the week went on, and by Thursday we got a good frontal facial shot," a senior law enforcement official said. "That tipped it."
>
> The official added: "With that type of quality photo, there was no doubt about who they were. We had these murderers on the loose, and we couldn't hold back, and we needed help finding them."

I've been wondering since that time whether waiting 12 more hours to do more facial recognition might have IDed the brothers, allowing law enforcement to set up a raid on the brothers in a way where law enforcement controlled the circumstances. Had they facially IDed them when they released the pictures? If not, how long would that have really taken?

But, according to the NYT, they released the pictures because so much time had elapsed they were worried the culprits might get away or strike again.

The WaPo provided a slightly different rationale for releasing the photos, which has everything to do with the media coverage of the story.

> Law enforcement officials debated whether to release the photos, weighing the risk of the suspects fleeing or staging another attack against the prospect of quicker identification. Officials said they went ahead with the public appeal for three reasons:
>
> - *Investigators didn't want to risk having news outlets put out the Tsarnaevs' images first, which might have made them the object of a wave of popular sympathy for wrongly suspected people, as had happened with two high school runners from the Boston area whose photos were published on the front page of the New York Post under the headline "Bag Men." At the news conference, FBI Special Agent in Charge Richard DesLauriers sternly asked the public to view only its pictures or risk creating "undue work for vital law enforcement resources."*
> - *During a briefing Thursday afternoon, President Obama was*

> *shown the photos of the suspects by senior members of his national security team. Senior administration officials said that although Obama was not asked to approve release of the images by the FBI, the president offered a word of caution after viewing them. Be certain that these are the right suspects before you put the pictures out there, he advised his national security team, according to the administration officials.*
>
> - *Investigators were concerned that if they didn't assert control over the release of the Tsarnaevs' photos, their manhunt would become a chaotic free-for-all, with news media cars and helicopters, as well as online vigilante detectives, competing with police in the chase to find the suspects. By stressing*

> *that all information had to flow to 911 and official investigators, the FBI hoped to cut off that freelance sleuthing and attend to public safety even as they searched for the brothers.*

Now, I am, to a significant extent, very sympathetic with this thinking, to a point. If the FBI hadn't honed attention on the real (suspected) culprits, any number of innocent Saudis or Moroccan-Americans or Indians who were at the Marathon were at great risk. But is the solution to set off a SUV car chase early (which is what I jokingly suggested CNN was trying to do when they mistakenly claimed there was an arrest earlier int he week)? Or is the solution to shame the irresponsible things the 24-hour press did (and applaud the good reporting, such as that from Pete Williams), and come up with better ways to use crowd sourcing for you (this may be an important lessons learned question moving forward)? Also, there's an irony that the government wanted to reclaim control of the investigation, given that within minutes after they gave up their search, a citizen gave them the tip that would locate Dzhokhar. Ultimately, citizens — the injured racer, the SUV owner, and the boat owner — were the ones who provided the crucial leads in this investigation.

NYT's sources admit that they didn't anticipate how much chaos releasing the pictures would cause.

> The authorities knew that broadly distributing the images — some captured by ubiquitous surveillance cameras and cellphone snapshots and winnowed down using sophisticated facial-recognition software — would accelerate the digital

> dragnet, but they did not realize the level of chaos it would create.
>
> Intelligence and law enforcement officials said the authorities in Boston weighed the risks of some mayhem against their growing fear that time was slipping away and that heavily armed and increasingly dangerous men, and possibly accomplices, could wage new attacks in the Boston area or beyond.

Which brings us to the gunfight in the early hours of Friday morning (really, still night time). This interview, from the Watertown Police Chief, is enormously helpful on what happened there.

The cops have not provided a robust explanation either of how Dzhokhar was able to flee Friday morning or how they failed to find him, hidden and bleeding just one block outside their search radius, during the day. Here's how the WaPo describes how Dzhokhar got away.

> Tamerlan Tsarnaev, now out of his car, attempted to lob a makeshift bomb at police, but the device exploded in his hand. While Tamerlan Tsarnaev was firing a pistol with the other hand, police tackled and tried to subdue the 200-pound amateur boxer.
>
> Dzhokhar Tsarnaev, apparently intending to help his brother, tried to ram the officers with the Mercedes. Instead, the officers lunged out of the vehicle's path and he ran over his brother and dragged him along the street before speeding off with police in pursuit.
>
> Officers found the Mercedes abandoned and quickly sealed off neighborhoods in Watertown as they began a street-by-street search for the suspect. But police acknowledged later that there were not enough officers to establish a solid perimeter and that the suspect,

> who may have been wounded, had escaped.

Update: This BoGlo article has new details, including that the brothers were still in separate cars (presumably the stolen Mercedes and Tamerlan's Honda) when the firefight started. It also says the officers were wrestling with Tamerlan when Dzhokhar hit him with the SUV.

I suspect one problem had to do with the number and training of the cops who responded to the chase. The Watertown police chief, above, says only 6 cops were in the immediate firefight (though others were in the vicinity). And recall that the critically injured policeman on scene was a transit cop; while he should be lauded for his response, he presumably does not deal with or train on these kinds of standoffs regularly. Also, the FBI issued a press release at 3AM indicating it had no clue what was going on, suggesting some of the folks who do deal with such standoffs were nowhere near the location. So between the IED explosion (which has been described both as a dud and as a real explosion) and the effort to save the transit cop's life, it's understandable that Dzhokhar got away from the handfull of local cops, though also understandable that cops more generally aren't entirely forthcoming — and perhaps a bit embarrassed — that what looked like a giant manhunt from the outside failed to catch him.

But if the problem is that the manhunt wasn't prepared for a manhunt in the hours after setting it off, then why weren't such forces more prepared after they released the pictures, for such a response?

I also wonder, given that he was found just a block outside the perimeter of the search, whether Dzhokhar had found a way to monitor police communications and therefore knew how far he had to get to evade the search. A lot of people asked during the day why cops' communications aren't encrypted. It's probably a good time to ask that question again.

Also, given that he was found just outside the perimeter, to what extent were dogs, who wouldn't have been constrained by a search perimeter, used to search for him?

Finally, there's the question of how much the cops knew after Dzhokhar got away. If they believed he could get far in the SUV, I get shutting down a wider area. But when did they find the SUV? It can't have gotten far.

As I said, this is actually a crucial question to debate as we learn more facts. But the debate needs to cover a range of activities, starting from the crappy media coverage in the days after the attack, through the ultimate decision to shut down the city.