CRIMES AGAINST SECRECY, CRIMES AGAINST THE CONSTITUTION

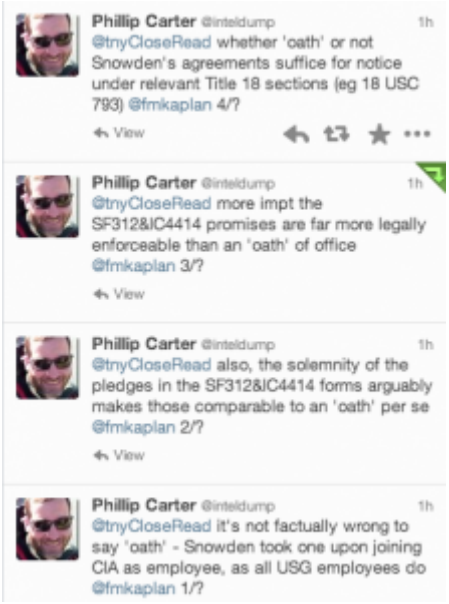
I'm not all that interested in the debate about offering Edward Snowden some kind of amnesty, as I think he could never accept the terms being offered, it arises in part out of NSA's PR effort, and distracts from the ongoing revelations.

But I am interested in this. Amy Davidson wrote a column refuting Fred Kaplan's assertion that because Snowden "signed an oath, as a condition of his employment as an NSA contractor, not to disclose classified information," comparisons with Jimmy Carter's pardon for draft dodgers are inapt. She notes (as a number of people have already) that the only "oath" that Snowden made was to the Constitution.

> To begin with, did Snowden sign "an oath…not to disclose classified information"? He says that he did not, and that does not appear to have been contradicted. Snowden told the Washington *Post's* Barton Gellman that the document he signed, as what Kaplan calls "a condition of his employment," was Standard Form 312, a contract in which the signatory says he will "accept" the terms, rather than swearing to them. By signing it, Snowden agreed that he was aware that there were federal laws against disclosing classified information. But the penalties for violating agreement alone are civil: for example, the government can go after any book royalties he might get for publishing secrets.
>
> Snowden did take an oath—the Oath of Office, or appointment affidavit, given

> to all federal employees:
>
> > I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.
>
> Now, some would argue—and it would have to be an argument, not an elision—that he violated this oath in revealing what he did; Snowden told Gellman that the revelations were how he kept it—protecting the Constitution from the officials at the N.S.A., which was assaulting it. Either way this is just not an oath, on the face of it, about disclosing classified information. [my emphasis]

Former Obama DOD official Phil Carter then attempted to refute Davidson on Twitter. He did so by pointing to the "solemnity" of the forms Snowden did sign, and then noting such "promises are far more legally enforceable than an 'oath' of office."



I don't dispute Carter's point that nondisclosure agreements are easier to enforce legally than an oath to the Constitution. And, as noted above, in her original piece Davidson admitted that Snowden had acknowledged there were laws against leaking classified information. No one is arguing Snowden didn't break any laws (though if our whistleblower laws covered contractors, there'd be a debate about whether that excuses Snowden's leaks).

Nevertheless, Carter's comment gets to the crux of the point (and betrays how thoroughly DC insiders have internalized it).

We have an ever-growing side of our government covered by a blanket of secrecy. Much of what that secrecy serves to cover up involves abuse or crime. Much of it involves practices that gut the core precepts of the Constitution (and separation of powers are as much at risk as the Bill of Rights).

Yet we not only have evolved a legal system (by reinforcing the clearance system, expanding the Espionage Act, and gutting most means to challenge Constitutional violations) that treats crimes against secrecy with much greater seriousness than crimes against the Constitution, but DC folks (even lawyers, like Carter) simply point to it as the way things are, not a fundamental threat to our country's

government.

That plight — where our legal system guards this country's "secrets" more greedily than it guards the Constitution — is the entire point underlying calls for amnesty for Snowden. He has pointed to a system that not only poses a grave threat to the Bill of Rights, but just as surely, to separation of powers and our claim to be a democracy.

Moreover, those who (like Carter) point to our failed branches of government as better arbiters of the Constitution than Snowden ignore many of the details in the public record. Just as one example, David Kris has suggested that the entire reason Colleen Kollar-Kotelly wrote a badly flawed opinion authorizing the Internet dragnet was because George Bush had created a constitutional problem by ignoring Congress' laws and the courts.

> More broadly, it is important to consider the context in which the FISA Court initially approved the bulk collection. Unverified media reports (discussed above) state that bulk telephony metadata collection was occurring before May 2006; even if that is not the case, perhaps such collection could have occurred at that time based on voluntary cooperation from the telecommunications providers. If so, the practical question before the FISC in 2006 was not whether the collection should occur, but whether it should occur under judicial standards and supervision, or unilaterally under the authority of the Executive Branch. [my emphasis]

And while Kris argued Congress' subsequent approval of the dragnets cures this original sin, the record in fact shows it did so only under flawed conditions of partial knowledge. Of course, these attempts to paper over a constitutional problem only succeed so long as

they remain shrouded in secrecy.

That the first response of many is to resort to legalistic attempts to prioritize the underlying secrecy over the Constitution raises questions about what they believe they are protecting. The next torture scandal? Covert ops that might serve the interest of certain autocratic allies but actually make Americans less secure? The financial hemorrhage that is our military industrial complex? The sheer ignorance our bloated intelligence community has about subjects of great importance? Petty turf wars? Past failures of the national security system we're encouraged to trust implicitly?

At some point, we need to attend to protecting our Constitution again. If Article I and III have gotten so scared of their own impotence (or so compromised) that they can no longer do so, then by all means lets make that clear by revealing more of the problems.

But we need to stop chanting that our Constitution is not a suicide pact and instead insist that our secrecy ~~oaths~~ non-disclosure agreements should not be suicide bombs.

THE CIVIL LIBERTIES CELEBRATION HANGOVER WEARS OFF

At the end of last week, I joked a little about privacy and civil liberties advocates having had the “best week ever”. It was indeed a very good week, but only relatively compared to the near constant assault on the same by the government. But the con is being put back in ICon by the Administration and its mouthpieces.

As I noted in the same post, Obama himself has already thrown cold water on the promise of his NSA Review Board report. Contrary to some, I saw quite a few positives in the report and thought it much stronger than I ever expected. Still, that certainly does not mean it was, or is, the particularly strong reform that is needed. And even the measures and discussion it did contain are worthless without sincerity and dedication to buy into them by the intelligence community and the administration. But if Obama on Friday was the harbinger of the walkback and whitewash of real reform, the foot soldiers are taking the field now to prove the point.

Sunday morning brought out former CIA Deputy Director Michael Morrell on CBS Face the Nation to say this:

> I think that is a perception that’s somehow out there. It is not focused on any single American. It is not reading the content of your phone calls or my phone calls or anybody else’s phone calls. It is focused on this metadata for one purpose only and that is to make sure that foreign terrorists aren’t in contact with anybody in the United States.

Morrell also stated that there was “no abuse” by

the NSA and that Ed Snowden was a “criminal” who has shirked his duties as a “patriot” by running. Now Mike Morrell is not just some voice out in the intelligence community, he was one of the supposedly hallowed voices that Barack Obama chose to consider “reform”.

Which ought to tell you quite a bit about what Barack Obama really thinks about true reform and your privacy interests. Not much. In fact, Morrell suggested (and Obama almost certainly agrees) that the collection dragnet should be expanded from telephony to also include email. Not exactly the kind of “reform” we had in mind.

Then, Sunday night 60 Minutes showed that fluffing the security state is not just a vice, but an ingrained habit for them. Hot on the heels of their John Miller blowjob on the NSA, last night 60 Minutes opened with a completely hagiographic puff piece on and with National Security Advisor Susan Rice. There was absolutely no news whatsoever in the segment, it was entirely a forum for Rice and her “interviewer”, Lesley Stahl, to spew unsupported allegations about Edward Snowden (He “has 1.5 million documents!”), lie about how the DOJ has interacted with the court system regarding the government surveillance programs (the only false statements have been “inadvertent”) and rehab her image from the Benghazi!! debacle. That was really it. Not exactly the hard hitting journalism you would hope for on the heels of a federal judge declaring a piece of the heart of the surveillance state unconstitutional.

Oh, yes, Susan Rice also proudly proclaimed herself “a pragmatist like Henry Kissinger which, as Tim Shorrock correctly pointed out, is not exactly reassuring from the administration of a Democratic President interested in civil liberties, privacy and the rule of law.

So, the whitewashing of surveillance dragnet reform is in full swing, let the giddiness of last week give way to the understanding that Barack Obama, and the Intelligence Community, have no intention whatsoever of “reforming”. In

fact, they will use the illusion of “reform” to expand their authorities and power. Jonathan Turley noted:

> Obama stacked the task force on NSA surveillance with hawks to guarantee the preservation of the program.

Not just preserve, but to give the false, nee fraudulent, patina of Obama Administration concern for the privacy and civil liberties concerns of the American citizenry when, in fact, the Administration has none. It is yet another con.

Or, as Glenn Greenwald noted:

> The key to the WH panel: its stated purpose was to re-establish public confidence in NSA — NOT reform it.

There may be some moving of the pea beneath the shells, but there will be no meaningful reform from the administration of Barack Obama. The vehicle for reform, if there is to be one at all, will have to come from the Article III federal courts. for an overview of the path of Judge Leon’s decision in *Klayman* through the DC circuit, see this piece by NLJ’s Zoe Tillman.

Lastly, to give just a little hope after the above distressing content, I recommend a read of this excellent article by Adam Serwer at MSNBC on the cagy pump priming for surveillance reform Justice Sotomayor has done at the Supreme Court:

> If Edward Snowden gave federal courts the means to declare the National Security Agency’s data-gathering unconstitutional, Sonia Sotomayor showed them how.
>
> It was Sotomayor’s lonely concurrence in U.S. v Jones, a case involving warrantless use of a GPS tracker on a suspect’s car, that the George W. Bush-appointed Judge Richard Leon relied on when he ruled that the program was

> likely unconstitutional last week. It was that same concurrence the White House appointed review board on surveillance policy cited when it concluded government surveillance should be scaled back.
>
> > "It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," Sotomayor wrote in 2012. "This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."

Give the entire article a read, Adam is spot on. If there is to be reform on the surveillance dragnet, it will almost certainly have to be the handiwork of the courts, and Justice Sotomayor planted the seed. The constant barrage of truth and facts coming from the Snowden materials, what Jay Rosen rightfully terms "The Snowden Effect" is providing the food for Sotomayor's seed to flower. Hopefully.

JAMES CLAPPER CLAIMS PUBLICLY ACKNOWLEDGED DETAILS ARE STATE

SECRETS WHILE BOASTING OF TRANSPARENCY

Between documents leaked by Edward Snowden, official court submissions, and official public statements, we know at least the following about the surveillance system set up after 9/11 and maintained virtually intact to this day:

- Around of 8-14% of the content collected under Bush's illegal program was domestic content (page 15 of the NSA IG Report says this constituted 8% of all the illegal wiretap targets but the percentage works out to be higher)
- Some of the content collected via ongoing upstream collection currently includes intentionally-collected domestic content (NSA refuses to count this, even for the FISA Court)
- Bush's illegal wiretap program targeted Iraqi Intelligence Service targets, as well as targets affiliated with al Qaeda and its associates (see page 8)
- NSA uses the phone metadata program with Iranian targets, as well as targets affiliated with al Qaeda and

its associates

- Both the illegal wiretap program and the Internet dragnet authorized under Pen Register/Trap and Trace in 2004 collected information that (because of the way TCP/IP works) would be legally content if treated as electronic surveillance
- The NSA still conducts an Internet dragnet via collection overseas, which not only would permit the metadata-as-content collection, but would permit far more collection on US persons; that collection is seamlessly linked to the domestic dragnet collection
- NSA uses the dragnets to decide which of content the telecoms have briefly indiscriminately collected to read

> That is, the surveillance system is not so much discrete metadata programs and content programs directed overseas, directed exclusively against al Qaeda or even terrorists. Rather, it is a system in which network analysis plays a central role in selecting which collected content to read. That content includes entirely domestic communication. And targets of the system have not always been — and were not as recently as June — limited to terrorists.
>
> These details of the surveillance system — along with the fact that AT&T and Verizon played the crucial role of collecting content and

"metadata" off domestic switches — are among the details James "Least Untruthful" Clapper, with backup from acting Deputy Director of NSA Frances Fleisch, declared to still be state secrets on Friday, in spite of their public (and in many cases, official) acknowledgement.

In doing so, they are attempting to end the last remaining lawsuits for illegal wiretapping dating to 2006 by prohibiting discussion of the central issue at hand: the government has repeatedly and fairly consistently collected the content of US persons from within the US, at times without even the justification of terrorism. (For more background on Jewel v. AT&T, see here.)

Here's how Clapper, with a nod to Fleisch, lays out the rebuttal of the Jewel plaintiffs.

> the NSA's collection of the content of communications under the TSP was directed at international communications in which a participant was reasonably believed to be associated with al-Qa'ida or an affiliated organization. Thus, as the U.S. Government has previously stated, plaintiff's allegation that the NSA has indiscriminately collected the content of millions of communications sent or received by people inside the United States after September 11, 2001, under the TSP is false.

There are several weasel parts of this claim.

The "Terrorist Surveillance Program" and the "Other Target Surveillance Program"

First, to make this claim, Clapper (and Fleisch) revert to use of "Terrorist Surveillance Program," a term invented to segment off the part of the larger illegal wiretap program that George Bush was willing to confess to in December 2005, that involving international communications with a suspected al Qaeda figure. But as Fleisch admits — but doesn't explain — at ¶20, the TSP is just a subset of

the larger Presidential Surveillance Program. As I've noted above, we know the system was used and is currently used to target entities that are agents of states, not terrorist organizations. And Clapper's language suggests it is used with both "other foreign terrorist organizations" and to identify "many other threats."

> …and other foreign terrorist organizations to the United States
>
> [snip]
>
> to the extent classified information about the al-Qa'ida threat, from September 11, 2001 to the present, or the many other threats facing the United States,

Given the evidence that the program may (or may have) extend beyond even the Iranian and Iraqi targets the government has deemed "terrorists" so as to include them in this program, Jewel's plaintiffs might be able to argue it could include normal dissent.

The Internet metadata that is really content

Then the government hides details that would make it clear that both under Bush and Obama, NSA illegally collected US person content in the name of collecting "metadata."

The first tell here is how Clapper refers to the "metadata" collected under Bush (this carries over into the I Con's announcement of this declassification).

> President Bush authorized the NSA to collect (1) the contents of certain international communications, a program that was later referred to and publicly acknowledged by President Bush as the Terrorist Surveillance Program (TSP), and (2) telephony and Internet non-content information (referred to as "metadata") in bulk, subject to various conditions. [my emphasis]

While his reference varies, the emphasis on "non-content information (referred to as 'metadata')" suggests they're using a potentially uncertain definition of metadata.

This likely derives from the government's definition of content here. Both Clapper (footnote 1) and Fleisch (footnotes 4 and 11) note their discussion of the Internet "metadata" program defines content as defined under the pen register part of FISA. Here's Fleisch:

> The term "content" is used herein to refer to the substance, meaning, or purport of a communication, as defined in 18 U.S.C. § 2510(8), as distinguished from the type of addressing or routing information referred to herein as "metadata."

While they claim to be using "meaning" to distinguish from "metadata," both are also implicitly distinguishing this definition of content used in the pen register statute from that used for electronic surveillance, which is,

> "Contents", when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

At one level, this is just tautological game-playing. The method the NSA used to collect the domestic Internet dragnet until December 2011 was exactly the same as it used for the Section 702 upstream collection, collection, with some filtering, directly from AT&T and Verizon's switches; there is nothing in the method that distinguishes the Internet dragnet from what NSA treats as electronic surveillance of Internet content. So to define one object of collection as metadata and the other as content, they simply apply different definitions of content to

them.

Moreover, there is long-standing legal awareness of this problem. Colleen Kollar-Kotelly relied on the pen register definition on page 6 of the original dragnet opinion. But with it, she required that collection be limited to certain kinds of metadata, a requirement that we know NSA violated from the very start.

John Bates laid out the problems with adopting the pen register definition generally and therefore its definition of content specifically on pages 26 and following of his opinion authorizing the resumption of the Internet dragnet. That problem appears to pertain to the fact that the NSA was claiming that PR/TT allowed it to collect "dialing, routing, addressing, or signaling information" (DRAS), whether or not it was content, and data that was not content as defined under the pen register statute. Bates judged (see page 30 and following) that Congress intended to authorize DRAS collection only if it was not content. Since the Internet uses nested addressing, and subordinate addresses would be treated as content to the higher level routing entities, the government was effectively collecting metadata that was content (again, see Julian Sanchez' explanation of why this is significant from a legal standpoint).

But here we are, just 3 years after Bates described all this in a court ruling (and 2 years after he repeated some of the same analysis in another court ruling), and the government is making the argument that metadata collected using the same method as content is not content because it doesn't meet the "content" definition of the statute that doesn't allow you to collect content, even while it does meet the "content" definition of the statute that allows you to collect content.

Oh, and by the way, the collection of US person Internet metadata-that-is-also-content still goes on overseas; the government's assertion that that collection doesn't go on anymore makes

it clear it doesn't go on under the FISA pen register statute, without ruling out such collection under other authorities.

> In December 2011 , the U.S. Government decided not to seek re-authorization of the bulk collection of lnternet metadata under section 402.

Which is quite different from saying — as they have in unsworn statements — that they've shut down the program entirely.

The metadata that leads to the content

Finally, Clapper and Fleisch impose silence over the relationship between this metadata and content, declaring state secrets over both the scope of the TSP (and therefore implicitly, the PSP) and 702 collection, as well as,

> any other information related to demonstrating that the NSA has not otherwise engaged in the content-surveillance dragnet that the plaintiffs allege

Nowhere in their declarations is there any language akin to the language Teresa Shea, NSA Director of Signals Intelligence Directorate, used just a month ago in the Larry Klayman suit.

> Section 215 bulk telephony metadata complements other counterterrorist-related collection sources by serving as a significant enabler for NSA intelligence analysis. It assists the NSA in applying limited linguistic resources available to the counterterrorism mission against links that have the highest probability of connection to terrorist targets. Put another way, while Section 215 does not contain content, analysis of the Section 215 metadata can help the NSA prioritize for content analysis communications of

> non-U.S. persons which it acquires under other authorities. Such persons are of heightened interest if they are in a communication network with persons located in the U.S. Thus, Section 215 metadata can provide the means for steering and applying content analysis so that the U.S. Government gains the best possible understanding of terrorist target actions and intentions. [my emphasis]

To be fair, both of these passages use wonderfully vague language. "Content-surveillance dragnet" is something distinct from "content dragnet," the latter of which might refer to the collection but not review of content. And "content analysis" likewise assumes the content already got collected.

So both the effort to avoid describing and the effort to describe how the metadata ties directly into selecting which already-collected content to read gloss over that "already-collected" assumption (page 16 and following of the NSA IG Report describes some of this, and makes it clear the telecoms are using the metadata to pull the content for further analysis).

The thing is, the government likely has reason to be mighty uncertain about the legal status of this (or, even more likely, mighty certain but unhappy). While it is likely that the US person content systematically read using this system does not include the plaintiffs, the reason it doesn't is because the telecoms have already collected the plaintiffs' metadata (which, in the case of their Internet data, is also legally content) and because they've briefly held their content while they scan it against selected metadata identifiers selected by analyzing all metadata identifiers, including their own.

They might win an argument that this collection was not indiscriminate, but to win it, they'd have to reveal the many places in the process

where they had violated wiretap laws.

Thus, Clapper is instead using Bush and Obama's favorite strategy of declaring evidence of crime a state secret. All the while boasting of his own transparency in declassifying one more tiny chunk of Bush's illegal program.

CONNING THE RECORD, CONNING THE COURTS, DEFRAUDING THE PEOPLE

In the parlance of the once and forever MTV set, civil libertarians just had one of the "Best Weeks Ever". Here is the ACLU's Catherine Crump weighing in on the surprising results of President Obama's Review Board:

> Friday, the president's expressed willingness to consider ending the NSA's collection of phone records, saying, "The question we're going to have to ask is, can we accomplish the same goals that this program is intended to accomplish in ways that give the public more confidence that in fact the NSA is doing what it's supposed to be doing?"
>
> With this comment and the panel's report coming on the heels of Monday's remarkable federal court ruling that the bulk collection of telephone records is likely unconstitutional, this has been the best week in a long time for Americans' privacy rights.

That "federal court ruling" is, of course, that of Judge Richard Leon handed down a mere five days ago on Monday. Catherine is right, it has

been a hell of a good week.

But lest we grow too enamored of our still vaporous success, keep in mind Judge Leon's decision, as right on the merits as it may be, and is, is still a rather adventurous and activist decision for a District level judge, and will almost certainly be pared back to some extent on appeal, even if some substantive parts of it are upheld. We shall see.

But the other cold water thrown came from Obama himself when he gave a slippery and disingenuous press conference Friday. Here is the New York Times this morning capturing spot on the worthless lip service Barack Obama gave surveillance reform yesterday:

> By the time President Obama gave his news conference on Friday, there was really only one course to take on surveillance policy from an ethical, moral, constitutional and even political point of view. And that was to embrace the recommendations of his handpicked panel on government spying — and bills pending in Congress — to end the obvious excesses. He could have started by suspending the constitutionally questionable (and evidently pointless) collection of data on every phone call and email that Americans make.
>
> He did not do any of that.
> ….
> He kept returning to the idea that he might be willing to do more, but only to reassure the public "in light of the disclosures that have taken place."
>
> In other words, he never intended to make the changes that his panel, many lawmakers and others, including this page, have advocated to correct the flaws in the government's surveillance policy had they not been revealed by Edward Snowden's leaks.
>
> And that is why any actions that Mr.

> Obama may announce next month would certainly not be adequate. Congress has to rewrite the relevant passage in the Patriot Act that George W. Bush and then Mr. Obama claimed – in secret – as the justification for the data vacuuming.

Precisely. The NYT comes out and calls the dog a dog. If you read between the lines of this Ken Dilanian report at the LA Times, you get the same preview of the nothingburger President Obama is cooking up over the holidays. As Ken more directly said in his tweet, "Obama poised to reject panel proposals on 702 and national security letters." Yes, indeed, count on it.

Which brings us to that which begets the title of this post: I Con The Record has made a Saturday before Christmas news dump. And a rather significant one to boot. Apparently because they were too cowardly to even do it in a Friday news dump. Which is par for the course of the Obama Administration, James Clapper and the American Intel Shop. Their raison de'etre appears to be keep America uninformed, terrorized and supplicant to their power grabs. Only a big time operator like Big Bad Terror Voodoo Daddy Clapper can keep us chilluns safe!

So, the dump today is HERE in all its glory. From the PR portion of the "I Con" Tumblr post, they start off with Bush/Cheney Administration starting the "bulk" dragnet on October 4, 2001. Bet that is when it first was formalized, but the actual genesis was oh, maybe, September 12 or so. Remember, there were security daddies agitating for this long before September 11th.

Then the handcrafted Intel spin goes on to say this:

> Over time, the presidentially-authorized activities transitioned to the authority of the Foreign Intelligence Surveillance Act ("FISA"). The collection of communications content pursuant to presidential authorization ended in

> January 2007 when the U.S. Government transitioned the TSP to the authority of the FISA and under the orders of the Foreign Intelligence Surveillance Court ("FISC"). In August 2007, Congress enacted the Protect America Act ("PAA") as a temporary measure. The PAA, which expired in February 2008, was replaced by the FISA Amendments Act of 2008, which was enacted in July 2008 and remains in effect. Today, content collection is conducted pursuant to section 702 of FISA. The metadata activities also were transitioned to orders of the FISC. The bulk collection of telephony metadata transitioned to the authority of the FISA in May 2006 and is collected pursuant to section 501 of FISA. The bulk collection of Internet metadata was transitioned to the authority of the FISA in July 2004 and was collected pursuant to section 402 of FISA. In December 2011, the U.S. Government decided to not seek reauthorization of the bulk collection of Internet metadata.
>
> After President Bush acknowledged the TSP in December 2005, two still-pending suits were filed in the Northern District of California against the United States and U.S. Government officials challenging alleged NSA activities authorized by President Bush after 9/11. In response the U.S. Government, through classified and unclassified declarations by the DNI and NSA, asserted the state secrets privilege and the DNI's authority under the National Security Act to protect intelligence sources and methods. Following the unauthorized and unlawful release of classified information about the Section 215 and Section 702 programs in June 2013, the Court directed the U.S. Government to explain the impact of declassification decisions since June

> 2013 on the national security issues in the case, as reflected in the U.S. Government's state secrets privilege assertion. The Court also ordered the U.S. Government to review for declassification all prior classified state secrets privilege and sources and methods declarations in the litigation, and to file redacted, unclassified versions of those documents with the Court.

This is merely an antiseptic version of the timeline of lies that has been relentlessly exposed by Marcy Wheeler right here on this blog, among other places. What is not included in the antiseptic, sandpapered spin is that the program was untethered from law completely and then "transitioned" to FISC after being exposed as such.

Oh, and lest anybody think this sudden disclosure today is out of the goodness of Clapper and Obama's hearts, it is not. As Trevor Timm of EFF notes, most all of the "I Con" releases have been made only after being forced to by relevant FOIA and other court victories and that this one in particular is mostly germinated by EFF's court order (and Vaughn index) obtained.

So, with that, behold the "I Con" release of ten different declarations previously filed and extant under seal in the *Jewel* and *Shubert* cases. Much of the language in all is similar template affidavit language, which you expect from such filings if you have ever dealt with them. As for individual dissection, I will leave that for later and for discussion by all in comments.

The one common theme that I can discern from a scan of a couple of note is that there is no reason in the world minimally redacted versions such as these could not have been made public from the outset. No reason save for the conclusion that to do so would have been

embarrassing to the Article II Executive Branch and would have lent credence to American citizens properly trying to exercise and protect their rights in the face of a lawless and constitutionally infirm assault by their own government. The declarations by Mike McConnell, James Clapper, Keith Alexander, Dennis Blair, Frances Fleisch and Deborah Bonanni display a level of too cute by a half duplicity that ought be grounds for sanctions.

The record has been conned. Our federal courts have been conned. All as the Snowden disclosures have proven. And the American people have been defrauded by pompous terror mongers who value their own and institutional power over truth and honesty to those they serve. Clapper, Alexander and Obama have the temerity to call Ed Snowden a traitor? Please, look in the mirror boys.

Lastly, and again as Trevor Timm pointed out above, these are just the declarations for cases the EFF and others are still pursuing. What of the false secret declarations made in *al-Haramain v. Obama*, which the government long ago admitted were bogus? Why won't the cons behind "I Con" release those declarations? What about the frauds perpetrated in *Mohamed v. Jeppesen* that have fraudulently ingrained states secrets cons into the government arsenal?

If the government wants to come clean, here is the opportunity. Frauds have been perpetrated on our courts, in our name. We should hear about that. Unless, of course, Obama and the "I Cons" are really nothing more than simple good old fashioned cons.

[By the way, Christmas is a giving season. If you have extra cheer to spread, our friends like Cindy Cohn, Trevor Timm, Hanni Fakhoury and Kurt Opsahl et al at EFF, and Ben Wizner, Alex Abdo, Catherine Crump et al at the ACLU all do remarkable work. Share your tax deductible love with them this season if you can. They make us all better off.]

CIA AIMS TO HIDE ITS SEKRIT FILES AT SECOND CIRCUIT AGAIN

Roughly four years ago, then National Security Advisor James Jones submitted a nearly unprecedented sealed declaration to the Second Circuit in the ACLU's torture FOIA lawsuit. In it he argued the government needed to keep secret a short reference making it clear the torture program operated under Presidential authorization.

The following May — perhaps not coincidentally just months after America's first attempt to execute Anwar al-Awlaki by drone strike and as OLC was scrambling to come up with some justification for doing so — the Second Circuit granted the government's request, deeming the language an intelligence source or method, and giving the request particular weight because the language pertained to intelligence activities unrelated to torture.

On October 1, the Second Circuit heard the ACLU and NYT's appeal of Colleen McMahon's decision to dismiss their FOIA on documents relating to the Awlaki killing.

At the hearing, this exchange occurred.

> JUDGE NEWMAN: In one of your sealed excerpts from your briefs, I am not going to disclose a secret. There is a statutory reference from Title 50. You're probably familiar with it. It has to do with whether affidavits are sufficient. It's Title 50. I think it's Section 430(f)(2). Does that ring a bell at all?
>
> MS. SWINGLE: I believe so, your Honor.

> JUDGE NEWMAN: Is that a correct citation? Because I couldn't find it.
>
> MS. SWINGLE: I can check and provide the information for your Honor. Off the top of my head, I can't say that I know either.
>
> JUDGE NEWMAN: Do they have it there?
>
> MS. SWINGLE: Again, your Honor, that would be information we could provide separately to the Court, to the extent it is something that's only in the classified part.
>
> JUDGE NEWMAN: Just the statutory reference. Is it the right statute? That's all I want to know.

Citing this passage, on Thursday the government asked to submit an ex parte filling clarifying both the answer Swingle gave, as well as the answer to an unidentified question raised in the hearing.

> During the oral argument on October 1, 2013, a member of the panel asked the government to clarify a citation contained in a classified declaration in the record. See Tr. 73-74. The government's proposed supplemental classified submission provides the clarification requested by the Court. The proposed supplemental classified submission also provides an additional answer to a question posed during oral argument that could not be adequately and completely answered in a public setting.

Both the NYT and the ACLU objected to this ex parte clarification of the answer (the NYT doesn't object to such a filing pertaining to the citation), given that the Court didn't ask for any further clarification.

> The Government's motion does not at any point include information about the nature of the "additional answer" that the Government is providing to the Court or the question to which it is addressed. The Court did not request such a supplemental answer, and there is no basis for a party to unilaterally provide itself with a further opportunity to extend argument — especially in secret — after the conclusion of oral argument.

Now, it's entirely unclear what the erroneous citation in the classified government brief is. Though 50 USC 431(f) may describe this section of the National Security Act on to CIA files being FOIAed (though 50 USC 403 includes definitions and roles of CIA).

> (f) Whenever any person who has requested agency records under section 552 of title 5, United States Code (Freedom of Information Act), alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, United States Code, except that—
>
> (2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;

In which case, surprise surprise, this is about hiding CIA files.

But we already knew that.

And unsurprisingly, the two questions that DOJ's Sharon Swingle referred back to the classified documents to answer also pertained to the CIA's SEKRIT role in drone killing Americans.

One — which gets repeated several times — pertains to why DOJ's prior disclosure that OLC wrote one drone killing memo for DOD forces DOJ to use a No Number No List response because admitting there were other OLC memos would also entail admitting an Other Government Agency carries out those drone killings.

> JUDGE NEWMAN: I come back to saying, why can't you have a redacted Vaughn index, at least on legal reasoning. Because I don't understand your argument that if we say there are five of them, that somehow tells people more information. What does it tell them? It says five lawyers were working.
>
> MS. SWINGLE: With respect, your Honor, it says that OLC on five separate instances wrote advice memoranda about the use of targeted lethal force. It now tells us, and I do think this is critical, that on four of those instances, it did not involve the Department of Defense. Because we have acknowledged there is a single responsive document as to the Department of Defense. I think that is really significant information. And it is not information that has been made public by the U.S. government.
>
> JUDGE NEWMAN: That's a secret.
>
> MS. SWINGLE: It is.
>
> JUDGE NEWMAN: Despite Mr. Panetta's statement, that's a secret.
>
> MS. SWINGLE: We have never disclosed operational details as to what part of the U.S. government conducts lethal force.
>
> JUDGE NEWMAN: No one is asking for that.
>
> MS. SWINGLE: I would urge the Court to look at the classified declaration that discusses the need for this, in part

> because we do have real interest in maintaining our ability not to talk about what parts of our government do any kind of operations and where. [my emphasis]

I know I — and I suspect, many of the others who have been following this suit — had no idea that the disclosure of a single DOD OLC memo ruled out there being other DOD memos. Thanks to Swingle for making it crystal clear that is the case. And Sharon? If you ever want to play poker, I'm game.

The other instance where Swingle refers to classified documents in an answer to the Court is closely related, though more interesting. In correcting Judge Rosemary Pooler's assertion that DOJ prepared the drone killing White Paper for the Intelligence Committees, Swingle pointed to the District Court decision.

> JUDGE POOLER: Counsel, you said that you prepared the White Paper for release.
>
> MS. SWINGLE: Yes.
>
> JUDGE POOLER: I thought you prepared it for the Senate Intelligence Committee and the House Permanent Committee on Intelligence. Didn't you?
>
> MS. SWINGLE: That is not correct, your Honor. There is a limit to how much I can talk about this in a public session. I would suggest the Court might wish to look in particular at the District Court classified decision on this record which makes clear I think the precise point your Honor is asking about.
>
> JUDGE NEWMAN: I'm surprised to hear you say the government should be penalized. You are aware with the attorney-client privilege comes the waiver doctrine and the privilege is waived in cases all over America. Lawyers don't get up and say we should be penalized. If there is

> a waiver, there is a waiver. And sometimes the waiver arises because of a significant disclosure. So no one is talking about penalizing you. The question is, having gone so far, should you be protected. And my ultimate question is why should you be protected. You say, well, that's a policy decision. Seems to me it is rather wrapped up with law. You're from the Department of Justice. This is an OLC document. So the Department must have a position on why they don't want to release this.
>
> MS. SWINGLE: Absolutely, your Honor. It is classified.

It's odd that Swingle refers to the District Court decision seemingly to answer a question about the White Paper, since the White Paper was not publicly released until several weeks after McMahon released her opinion. If McMahon addressed it, it would suggest the government provided her a copy.

But recall that the White Paper is dated November 8, 2011, during precisely the period when White House Counsel Kathryn Ruemmler was arguing in a situation room meeting they couldn't release the Awlaki memo because doing so would weaken the government stance in FOIA lawsuits fighting against releasing that same memo (?!). And the White House stalled the White Paper release to the Judiciary — not Intelligence — Committees until the day after DOJ had responded to ACLU's FOIA.

I highly doubt the government told McMahon they had written a White Paper so as to gain advantage in the very lawsuit by ACLU she was presiding over. But I also doubt the timing is coincidental. And I wouldn't be surprised if they provided some excuse for how ACLU lawsuits are so dangerous they make transparency itself dangerous — more so even than drone assassinations in a democracy!

In any case, Swingle points to the classified District opinion to explain why they could release the White Paper but not an OLC memo, or something like that.

Again, these are very closely related, which makes me suspect that's the secret mulligan DOJ is trying to win for itself: another opportunity to explain how it can release the White Paper under FOIA to Jason Leopold but not release the OLC memo it is based off of.

For the record, I don't think this is another case where the government argues that the existence of a Presidential Finding authorizing torture or killing — actually, the same Glove Come Off Memorandum of Notification — is itself a source or method (the government brief, which marks its classified sections, seems to have more interesting things to say about its Exemption 3 claims than its Exemption 1 claims).

But it does seem to be arguing that even acknowledged covert programs are immune from FOIA, as if covert status is not about secrecy but about deniability and nothing more.

SAY HELLO TO OUR NEW FRIENDS AT JUST SECURITY

We do a lot of things here at Emptywheel including occasionally, goofing off. But our primary focus has always been the intersection of security issues, law and politics. I think I can speak for Marcy and Jim, and I certainly do for myself, we would love it if that intersection were not so critical in today's world. But,

alas, it is absolutely critical and, for all the voices out there in the community, there are precious few that deep dive into the critical minutiae.

Today we welcome a new and important player in the field, the Just Security Blog. It has a truly all star and broad lineup of contributors (most all of whom are listed as “editors” of one fashion or another), including good friends such as Steve Vladeck, Daphne Eviatar, Hina Shamsi, Julian Sanchez, Sarah Knuckey and many other quality voices. It is an ambitious project, but one that, if the content already posted on their first day is any indication, will be quite well done. The home of Just Security is the New York University School of Law, so they will have ample resources and foundation from which to operate for the long run.

Ironically, it was little more than three years ago (September 1, 2010 actually) that the Lawfare Blog went live to much anticipation (well, at least from me). Whether you always agree with Ben Wittes, Bobby Chesney, Jack Goldsmith and their contributors or not, and I don’t always, they have done this field of interest a true service with their work product, and are a fantastic and constantly evolving resource. There is little question but that Just Security intends to occupy much of the same space, albeit it in a complimentary as opposed to confrontational manner. In fact, it was Ben Wittes who hosted the podcast with Steve Vladeck and Ryan Goodman that serves as the multi-media christening of Just Security.

Orin Kerr (who is also a must read at Volokh conspiracy), somewhat tongue in cheek, tweeted that the cage match war was on between Lawfare and Just Security. That was pretty funny actually, but Orin made a more serious point in his welcome post today, and a point that I think will greatly interest the readers of Emptywheel:

> Whereas Lawfare tend to have a center or center-right ideological orientation, for the most part, Just Security‘s

> editorial board suggests that it will have a progressive/liberal/civil libertarian voice.

From my understanding, and my knowledge of the people involved, I believe that to be very much the case. And that is a very good thing for us here, and the greater discussion on so much of our work.

So, say hello to our new friends at Just Security, bookmark them and give them a read. Follow them on Twitter. You will be better informed for having done so.

CANDIDATE OBAMA'S TRIBUTE TO "COURAGE AND PATRIOTISM" OF WHISTLEBLOWERS DISAPPEARS 2 DAYS AFTER FIRST SNOWDEN REVELATIONS

Sunlight Foundation discovers the Obama Administration has removed access to his 2008 campaign promises from the White House website. It suggests one of the promises Obama may want to hide has to do with his support for whistleblowers.

> While front splash page for for Change.gov has linked to the main White House website for years, until recently, you could still continue on to see the materials and agenda laid out by the administration. This was a particularly helpful resource for those looking to

> compare Obama's performance in office against his vision for reform, laid out in detail on Change.gov.
>
> According to the Internet Archive, the last time that content (beyond the splash page) was available was June 8th — last month.
>
> Why the change?
>
> Here's one possibility, from the administration's ethics agenda:
>
> > Protect Whistleblowers: Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud, and abuse of authority in government. Obama will ensure that federal agencies expedite the process for reviewing whistleblower claims and whistleblowers have full access to courts and due process.
>
> It may be that Obama's description of the importance of whistleblowers went from being an artifact of his campaign to a political liability.

To be fair, Obama did extend whistleblower

protection beyond that of the law last year — though he did it largely in secret.

Of course, that came at the same time as Obama rolled out an Insider Threat Detection system that seems designed to discourage anyone from speaking out … about anything.

And then there's the issue of all the whistleblower prosecutions.

But if Obama did hide his campaign promises specifically to hide this tribute to the "courage and patriotism" of whistleblowers, then I find the timing particularly interesting. June 8 was just two days after the first Edward Snowden release (at a time, moreover, when the Guardian had reported only issues that went to lies James Clapper and Keith Alexander had told, making Snowden's claim to be unable to go through regular channels quite credible).

Mind you, Obama could be hiding other promises. I still think promises about mortgages and homes are his biggest failure.

HIDING THE 215 INDEX FROM DEFENDANTS, TOO

Adam Liptak reviews one of the issues I laid out in this post and the ACLU first laid out here. The government is reneging on multiple promises made over the course of the Amnesty v. Clapper case — including to SCOTUS itself — to make sure defendants could challenge evidence collected under "the program" (then defined as Section 702 of the FISA Amendments Act).

But I'm particularly interested in Liptak's focus on the government's use of "derived from" here.

> If the government wants to use information gathered under the surveillance program in a criminal prosecution, [Solicitor General Don Verrilli] said, the source of the information would have to be disclosed. The subjects of such surveillance, he continued, would have standing to challenge the program.
>
> Mr. Verrilli said this pretty plainly at the argument and even more carefully in his briefs in the case.
>
> In one brief, for example, he sought to refute the argument that a ruling in the government's favor would immunize the surveillance program from constitutional challenges.
>
> "That contention is misplaced," he wrote. "Others may be able to establish standing even if respondents cannot. As respondents recognize, the government must provide advance notice of its intent to use information obtained or derived from" the surveillance authorized by the 2008 law "against a person in judicial or administrative proceedings and that person may challenge the underlying surveillance." (Note the phrase "derived from.")
>
> In February, in a 5-to-4 decision that split along ideological lines, the Supreme Court accepted Mr. Verrilli's assurances and ruled in his favor. Justice Samuel A. Alito Jr., writing for the majority in the case, Clapper v. Amnesty International, all but recited Mr. Verrilli's representation.
>
> "If the government intends to use or disclose information obtained or derived from" surveillance authorized by the 2008 law "in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected

> person may challenge the lawfulness of the acquisition." (Again, note the phrase "derived from.")
>
> What has happened since then in actual criminal prosecutions? The opposite of what Mr. Verrilli told the Supreme Court. [my emphasis]

It's time to broaden the focus of this discussion, finally. It's time to include both Section Section 215 collection (metadata) and 702 collection (content) in this discussion together.

As I have noted, the government has claimed these are "distinct issues" and that 215 metadata collection is not part of the 702 content creation.

But in an interview, Edward Snowden claims the metadata is used to identify and pull content.

> In most cases, content isn't as valuable as metadata because you can either re-fetch content based on the metadata or, if not, simply task all future communications of interest for permanent collection since the metadata tells you what out of their data stream you actually want.

And James Clapper described metadata as a kind of Dewey Decimal system that allows the government to pull selected conversations from its giant library of all conversations.

> 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. But first let me say that I and everyone in the intelligence community all– who are also citizens, who also care very deeply about our– our privacy and civil liberties, I certainly do. So let me say that at the outset. I think a lot of what people are– are reading and seeing in the media is a lot of hyper– hyperbole.
>
> 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.
>
> There are no limitations on the customers who can use this library. Many and millions of innocent people doing min– millions of innocent things use this library, but there are also nefarious people who use it. Terrorists, drug cartels, human traffickers, criminals also take advantage of the same technology. 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.
>
> You think of the li– and by the way, all these books are arranged randomly. They're not arranged by subject or topic matter. And they're constantly changing. And so when we go into this library, first we have to have a library card, the people that actually do this work.
>
> Which connotes their training and certification and recertification. 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.

And according to William Arkin, the 215 metadata database, called MAINWAY, is considered a "signals navigation database."

In other words, the 215 database is at least sometimes used as a roadmap to all the other collections the NSA gathers.

As I'll show in a follow-up post, how that roadmap is used may go to the heart of the legitimacy of investigations into American.

I'm not entirely sure what discovery obligations the government thinks it has with this tool. But given that it's a moment where the government claims to be exercising reasonable cause analysis (in secret) it sure ought to be disclosed.

IN BID TO PLACATE LEGACY MEDIA, DOJ MOVES CLOSER TO INSTITUTING OFFICIAL PRESS

The First Amendment was written, in part, to eliminate the kind of official press that parrots only the King's sanctioned views. But with its revised "News Media Policies," DOJ gets us closer to having just that, an official press.

That's because all the changes laid out in the new policy (some of which are good, some of which are obviously flawed) apply only to "members of the news media." They repeat over and over and over and over, "news media." I'm not sure they once utter the word "journalist" or "reporter." And according to DOJ's Domestic Investigation and Operations Guide, a whole slew of journalists are not included in their definition of "news media."

> DIOG does include online news in its definition of media (PDF 157).
>
> > "News media" includes persons and organizations that gather, report or publish news, whether through traditional means (e.g., newspapers, radio, magazines, news service) or the on-line or

> > wireless equivalent. A “member of the media” is a person who gathers, reports, or publishes news through the news media.

But then it goes on to exclude bloggers from those included in the term “news media.”

> > The definition does not, however, include a person or entity who posts information or opinion on the Internet in blogs, chat rooms or social networking sites, such as YouTube, Facebook, or MySpace, unless that person or entity falls within the definition of a member of the media or a news organization under the other provisions within this section (e.g., a national news reporter who posts on his/her personal blog).

Then it goes onto lay out what I will call the “WikiLeaks exception.”

> > As the term is used in the DIOG, “news media” is not intended to include persons and entities that simply make information available. Instead, it is intended to apply to a person or entity that gathers information of potential interest to a segment of the general public, uses editorial skills to turn raw materials into a distinct work, and distributes that work to an audience, as a journalism professional.

The definition does warn that if there is any doubt, the person should be treated as media. Nevertheless, the

> definition seems to exclude a whole bunch of people (including, probably, me), who are engaged in journalism.

The limitation of all these changes to the "news media" is most obvious when it treats the Privacy Protection Act — which should have prevented DOJ from treating James Rosen as a suspect. They say,

> The Privacy Protection Act of 1980 (PPA), 42 U.S.C. § 2000aa, generally prohibits the search or seizure of work product and documentary materials held by individuals who have a purpose to disseminate information to the public. The PPA, however, contains a number of exceptions to its general prohibition, including the "suspect exception" which applies when there is "probable cause to believe that the person possessing such materials has committed or is committing a criminal offense to which the materials relate," including the "receipt, possession, or communication of information relating to the national defense, classified information, or restricted data "under enumerated provisions. See 42 U.S.C. §§ 2000aa(a)(1) and (b)(1). Under current Department policy, a Deputy Assistant Attorney General may authorize an application for a search warrant that is covered by the PPA, and no higher level reviews or approvals are required.
>
> First, the Department will modify its policy concerning search warrants covered by the PPA involving members of the news media to provide that work product materials and other documents may be sought under the "suspect exception" of the PPA only when the member of the news media is the focus of a criminal investigation for conduct not connected to ordinary newsgathering activities. Under the reviews policy,

> the Department would not seek search warrants under the PPA's suspect exception if the sole purpose is the investigation of a person other than the member of the news media.
>
> Second, the Department would revise current policy to elevate the current approval requirements and require the approval of the Attorney General for all search warrants and court orders issued pursuant to 18 U.S.C. § 2703(d) directed at members of the news media. [my emphasis]

The PPA, however, applies to all persons "reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."

> Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce;

I'm clearly covered by the PPA. But the FBI could easily decide to exclude me from this "news media" protection so as to be able to snoop into my work product.

Congratulations to the "members of the news media" who have been deemed the President's official press. I hope you use your privileges wisely.

Update: I've learned that the issue of whom this applied to did come up in background meetings at DOJ; in fact, DOJ raised the issue. The problem

is, there is no credentialing system that could define who gets this protection and DOJ didn't want to lay it out (and most of the people invited have never been anything but a member of the news media, making it hard for them to understand how to differentiate a journalist).

Ultimately, I think DOJ is so anxious for Congress to pass a shield law (which they say elsewhere in their report) because it'll mean Congress will do the dirty work of defining who is and who is not a journalist.

FEDERAL COURT STRIKES DOWN OBAMA DOJ'S STATE SECRETS DEFENSE

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

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

> Having thoroughly considered the parties' papers, Defendants' public and classified declarations, the relevant legal authority and the parties' arguments, the Court GRANTS the Jewel Plaintiffs' motion for partial summary adjudication by rejecting the state secrets defense as having been displaced by the statutory procedure prescribed in 50 U.S.C. § 1806(f) of FISA. In both

> related cases, the Court GRANTS Defendants' motions to dismiss Plaintiffs' statutory claims on the basis of sovereign immunity. The Court further finds that the parties have not addressed the viability of the only potentially remaining claims, the Jewel Plaintiffs' constitutional claims under the Fourth and First Amendments and the claim for violation of separation of powers and the Shubert Plaintiffs' fourth cause of action for violation of the Fourth Amendment. Accordingly, the Court RESERVES ruling on Defendants' motion for summary judgment on the remaining, non-statutory claims.
>
> The Court shall require that the parties submit further briefing on the course of this litigation going forward.

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

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

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

> The analysis of whether the state secrets privilege applies involves three

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

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

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

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

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

Citing one of the interlocutory appellate decisions in *al-Haramain* and the underlying logic of then trial judge Vaughn Walker), Judge

White said:

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

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

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

> the surveillance of the aggrieved person was lawfully authorized and conducted.

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

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