THE FIND EVERY TERRORIST AT ANY COST INDUSTRY

As a thought experiment, replace the word "terrorist" in this paragraph with "soldier" or "military."

> All terrorists fundamentally see themselves as altruists: incontestably believing that they are serving a "good" cause designed to achieve a greater good for a wider constituency—whether real or imagined—which the terrorist and his organization or cell purport to represent. Indeed, it is precisely this sense of self-righteous commitment and self-sacrifice that that draws people into terrorist groups. It all helps them justify the violence they commit. It gives them collective meaning. It gives them cumulative power. The terrorist virtually always sees himself as a reluctant warrior: cast perpetually on the defensive and forced to take up arms to protect himself and his community. They see themselves as driven by desperation——and lacking any viable alternative—to violence against a repressive state, a predatory rival ethnic or nationalist group, or an unresponsive international order.

The paragraph comes from Bruce Hoffman, a Georgetown Professor/ThinkTanker whose studies of terrorism predate 9/11 by decades. It forms part of his explanation, post Boston, for why people become terrorists: because they, like our own country increasingly, see violence as a solution to their grievance.

That's not all of Hoffman's description of what makes people terrorists, mind you. He goes onto discuss religion and the human relations that

might convince someone to engage in violence. But the paragraph has haunted me since I read it over a week ago for how clearly it should suggest that one of the few things that separates terrorism from our country's own organized violence is official sanction (and at least lip service about who makes an appropriate and legal target).

Which is one reason why Jack Levin, in a piece debunking four myths about terrorism, offers this as one solution.

> Somehow, we must reinstate the credibility of our public officials — our president, our Congress, and our Supreme Court Justices — so that alienated Americans do not feel they must go outside of the mainstream and radicalize in order to satisfy their goals.

Blaming terrorism on our dysfunctional political system feels far too easy, but it's worth remembering that in Afghanistan, Somalia, and parts of Yemen, Al Qaeda has at times won support from locals because it offered "justice" where the official government did not or could not.

In any case, the common sense descriptions Hoffman and Levin offer haven't prevented a slew of people responding to Boston — some experts, some not — from demanding that we redouble our efforts to defeat any possible hint of Islamic terrorism, no matter the cost.

Batshit crazy Texas Congressman Louie Gohmert claims the Boston attack is all Spencer's fault: because FBI purged some its training materials of some of the inaccurate slurs about Muslims (but did not even correct the training of Agents who had been taught that claptrap in the first place), it can no longer speak a language appropriate to pursuing terrorists. "They can't talk about the enemy. They can't talk about jihad. They can't talk about Muslim. They can't

talk about Islam." Which elicited the equally batshit crazy response from Glenn Kessler of taking Gohmert's premise as a valid one that should be disproven by weighing how much offensive language remains in FBI materials, rather than debunking the very premise that only people who engage in cultural slurs would be able to identify terrorists. I award Kessler four wooden heads.

Somewhat more interesting is this piece from Amy Zegart, another Professor/ThinkTanker. She admits we may not know whether Boston involved some kind of intelligence failure for some time.

> Finding out what happened will be trickier than it sounds. Crowdsourcing with iPhones, Twitter, and Lord & Taylor surveillance video worked wonders to nail the two suspects with lightning speed. But assessing whether the bombing constituted an intelligence failure will require more time, patience, and something most people don't think about much: understanding U.S. counter-terrorism organizations and their incentives and cultures, which lead officials to prioritize some things and forget, or neglect, others.

But that doesn't stop her from insisting FBI's culture remains inappropriate to hunting terrorists "pre-boom."

> But it is high time we asked some hard, public questions about whether the new FBI is really new enough. Transformation — moving the bureau from a crime-fighting organization to a domestic intelligence agency — has been the FBI's watchword since 9/11. And much has changed. Yes, the bureau has thwarted a number of plots and gotten much better at handling its terrorism portfolio. Yes, the bureau has tripled the number of intelligence analysts. And, yes, the FBI now generates thousands of pages of

> intelligence reports each year.
>
> But the silent killer of innovation in the FBI has always been culture – specifically, a century-old law enforcement culture that glorifies catching perps on a street rather than connecting dots behind a desk, that prizes agents above intelligence analysts, and that views job number one as gathering evidence of a past or ongoing crime for a day in court instead of preventing the next attack. Culture can have serious real-world consequences, coloring how talented people in the FBI do their jobs and, perhaps more importantly, what they think their jobs actually are.
>
> Case in point: What exactly does it mean to "investigate" a terrorist suspect like Tamerlan Tsarnaev*before* an attack transpires? Sounds straightforward. It isn't. The FBI has always been world-class at investigating a terrorist attack after the boom. Investigating before the boom is another matter.
>
> In the FBI's traditional law enforcement view of the world, pre-boom terrorism investigations are supposed to hunt narrowly for evidence that someone has committed a terrorist offense or is in the midst of breaking the law *right now*. In the intelligence view of the world, these investigations are supposed to search widely for information that someone could be a terrorist next month, next year, or next decade – or that they are somehow connected to others who might. These are two radically different perspectives.

Part of me would respond to her post – which, initial caveat notwithstanding, implicitly assumes every successful terrorist attack is an intelligence failure, which in turn seems to

assume that all such attacks are preventable — with Bruce Schneier's take.

> Connecting the dots in a coloring book is easy and fun. They're right there on the page, and they're all numbered. All you have to do is move your pencil from one dot to the next, and when you're done, you've drawn a sailboat. Or a tiger. It's so simple that 5-year-olds can do it.
>
> But in real life, the dots can only be numbered after the fact. With the benefit of hindsight, it's easy to draw lines from a Russian request for information to a foreign visit to some other piece of information that might have been collected.
>
> In hindsight, we know who the bad guys are. Before the fact, there are an enormous number of potential bad guys.
>
> How many? We don't know. But we know that the no-fly list had 21,000 people on it last year. The Terrorist Identities Datamart Environment, also known as the watch list, has 700,000 names on it.
>
> We have no idea how many potential "dots" the FBI, CIA, NSA and other agencies collect, but it's easily in the millions. It's easy to work backwards through the data and see all the obvious warning signs. But before a terrorist attack, when there are millions of dots — some important but the vast majority unimportant — uncovering plots is a lot harder.

Schneier's always good, but this one is particularly worth reading in full. So, too, is this column about how the investigation into Tamerlan would have looked from within the FBI's Domestic Investigations and Operations Guide, which I believe is already too lax.

But I wanted to add one thing.

Zegart offers, as proof, that the FBI was (in 2011, when it got Russia's tip on Tamerlan Tsarnaev) too focused on prosecuting post-boom rather than pre-boom, the fact that the 2008-2009 investigation into Nidal Hasan's emails to Anwar al-Awlaki only took 4 hours.

> Nearly a year before the attack, the bureau learned that he was emailing Anwar al-Awlaki, the dangerous and inspirational al Qaeda cleric in Yemen who was later killed in a drone strike. Yet the FBI's investigation of Hasan took just four hours.

Set aside whether you'd want to use events that happened in 2009 as proof about the state of the FBI and "intelligence" in 2011 (particularly given the amount of second-guessing that followed both the Nidal Hasan and UndieBomber attacks, not to mention expanded use of investigative tools after the Najibullah Zazi attempt) for any argument.

I'm fascinated by the notion that we're going to measure the adequacy of follow-up on leads based on how much time FBI officers spend (especially given that we know the San Diego FBI Agents had to spend 3 hours a day monitoring the Awlaki feed just to identify leads). No one ever calculates how much that time — whatever the appropriate amount of time to follow up on such a lead would be — would add up to across the (in the case of the Awlaki feed) 1,500 potential leads a month.

> Between March 2008 and November 2009, the JTTF team in San Diego reviewed over 29,000 intercepts. And the volume was growing: in earlier phases of the Hasan investigation, the San Diego team was averaging 1,420 intercepts a month; that number grew to 1,525 by the time of the Fort Hood attack. The daily average went from 65-70 intercepts a day to 70-75,

> though some days the team reviewed over 130 intercepts. And while he obviously had reasons to play up the volume involved, the Analyst on the San Diego team considered it a “crushing volume” of intercepts to review.

Even assuming just one in ten intercepts required follow-up, dedicating 4 hours to that follow-up would, by itself, keep 3 Agents busy every month. And all that’s before you consider how many people just follow, rather than interact with, radical sources (as Tamerlan Tsarnaev is alleged to have done with Awlaki’s work). A fascinating JM Berger study of the al-Shabaab twitter feed found that, before it was temporarily knocked offline, it had 21,000 followers. How much time would it take the FBI to dedicate an adequate amount of time, according to Zegart, to ensure none of them go on to bomb a sporting event?

But here’s the other problem with this measure. Even as the FBI missed one guy who would go on to kill 13 people and wound 29 and another guy who would go on to kill 4 and wound hundreds, they also missed a guy who would kill 12 and wound 58 in an Aurora movie theater, as well as a guy who would kill 20 first graders and 7 adults in Newtown.

And it’s not just the first graders whose eventual killers get missed.

As far back as 2008, it was crystal clear that the emphasis on terrorism had gutted investigations into financial fraud and other crimes.

> The bureau slashed its criminal investigative work force to expand its national security role after the Sept. 11 attacks, shifting more than 1,800 agents, or nearly one-third of all agents in criminal programs, to terrorism and intelligence duties. Current and former officials say the

> cutbacks have left the bureau seriously exposed in investigating areas like white-collar crime, which has taken on urgent importance in recent weeks because of the nation's economic woes.
>
> [snip]
>
> Since 2004, F.B.I. officials have warned that mortgage fraud posed a looming threat, and the bureau has repeatedly asked the Bush administration for more money to replenish the ranks of agents handling nonterrorism investigations, according to records and interviews. But each year, the requests have been denied, with no new agents approved for financial crimes, as policy makers focused on counterterrorism.
>
> According to previously undisclosed internal F.B.I. data, the cutbacks have been particularly severe in staffing for investigations into white-collar crimes like mortgage fraud, with a loss of 625 agents, or 36 percent of its 2001 levels.
>
> Over all, the number of criminal cases that the F.B.I. has brought to federal prosecutors — including a wide range of crimes like drug trafficking and violent crime — dropped 26 percent in the last seven years, going from 11,029 cases to 8,187, Justice Department data showed.

Thus, even as crimes that cost the country trillions and caused millions of families to lose their homes unnecessarily developed, those of us watching in real time knew the FBI would not, perhaps could not, protect the country against such crimes.

Perhaps that was all by design (after all, Congress could have chosen to fund white collar investigators rather than give the people making billions off such crimes a series of tax cuts). President Obama is only now, with his budget

request, making minimal increases to financial crime investigations.

But ultimately, there is a limit, both financial and societal, to how much the country is willing to spend on investigative resources. So every demand that FBI take 6 hours rather than 4 in investigating 1,500 potential leads a day is also a demand that FBI shift resources from somewhere else.

And this navel-gazing, following every successful or near-miss attack, only serves to obscure the issue. We, as a society, have chosen to pursue gun crimes exclusively "post-boom." We have chosen to let financial criminals that have done far more damage than terrorism — at least in financial terms (though their crimes do have physical repercussions as well) — scot free. That may in fact be the outcome our country — or certainly the elites angling for political contributions — might want. But at the very least, we as a society need to be explicit that the choice has been made, not just to invest billions in surveillance technologies that affect us all, but to treat two brothers and their pressure cooker bombs as a far more heinous crime than school kids being gunned down in their classrooms or struggling families having their homes stolen by the million.

The "Find Every Terrorist at Any Cost Industry" is also, whether they acknowledge it or not, the "Let gunmen and banksters go free" industry. And that may well lead to more people turning to violence to address their grievances.

WE HAVE ALWAYS BEEN AT WAR IN IRAN

The NYT has a weird story on new allegations made by Iran, listing a bunch of ways the west

has sabotaged it.

> Iran said Tuesday that it had amassed new evidence of attempts by saboteurs to attack Iranian nuclear, defense, industrial and telecommunications installations, including the use of computer virus-infected American, French and German equipment.
>
> [snip]
>
> The accounts of sabotage came three days after the top Iranian lawmaker for national security and foreign policy, Aladdin Boroujerdi, said Iranian security experts haddiscovered explosives planted inside equipment bought from Siemens, the German technology company. Mr. Boroujerdi was quoted in Iran's state-run news media as saying the explosives, which were defused, had been intended to detonate after installation and derail Iran's enrichment of uranium.

It portrays—presumably intentionally—Iran as a crazed country lashing out in all directions.

My favorite line from the story, though, is this one.

> Siemens said its nuclear division had done no business with Iran since the 1979 Islamic Revolution, suggesting that the Iranians, who are prohibited from buying nuclear equipment under United Nations sanctions, bought the booby-trapped equipment from third parties.

The NYT seems to pretend that Iran doesn't know the US has imposed sanctions on it. It's so funny because I've actually seen NatSec types respond to this article asking whether this admission—effectively Iran listing what it has gotten via illicit channels—isn't more damning to Iran than vice versa. As if Iran and the rest

of the world don't know it shops at different markets than the US.

Compare that article with this Ellen Nakashima article repeating Joe Lieberman's claims that Iran is behind some crude cyberattacks on American banks.

> In particular, assaults this week on the Web sites of JPMorgan Chase and Bank of America probably were carried out by Iran, Sen. Joseph I. Lieberman (I-Conn.), chairman of the Homeland Security and Governmental Affairs Committee, said Friday.
>
> "I don't believe these were just hackers who were skilled enough to cause disruption of the Web sites," said Lieberman in an interview taped for C-SPAN's "Newsmakers" program. "I think this was done by Iran and the Quds Force, which has its own developing cyberattack capability." The Quds Force is a special unit of Iran's Revolutionary Guard Corps, a branch of the military.
>
> Lieberman said he believed the efforts were in response to "the increasingly strong economic sanctions that the United States and our European allies have put on Iranian financial institutions."

Somehow Nakashima doesn't distance herself enough from the absurd man making the accusations, because she goes on to make this absurd statement.

> Unlike the cyberattacks attributed to the United States and Israel that disabled Iranian nuclear enrichment equipment, experts said, the Iranian attacks were intended to disrupt commercial Web sites. Online operations at Bank of America and Chase both experienced delays this week.

> In a previously undisclosed episode, Iranian cyberforces attempted to disrupt the Web sites of oil companies in the Middle East in August by routing their efforts through major U.S. telecommunications companies, including AT&T and Level 3, according to U.S. intelligence and industry officials. They spoke on the condition that their names not be used because they were not authorized to speak to the press.

Granted, the StuxNet-related malware Gauss at least apparently serves to collect information from commercial bank sites, not disrupt the working of the site (though once the US collects the information they do a whole bunch of disruption through sanctions), but it does attack a bunch of commercial banks. And Flame went after suppliers of Iranian suppliers. So the US and Israeli cyberattacks have been targeting unrelated third parties for years. And yet we're supposed to be outraged because Iran effectively engages in a DNS attack (the kind, of course, that mysteriously brought WikiLeaks down in 2010).

Both these articles come in the wake of a Harold Koh speech saying this:

> Question 3: Do cyber activities ever constitute a use of force?
>
> Answer 3: Yes. Cyber activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law. In analyzing whether a cyber operation would constitute a use of force, most commentators focus on whether the direct physical injury and property damage resulting from the cyber event looks like that which would be considered a use of force if produced by kinetic weapons. *Cyber activities that proximately result in death, injury, or significant destruction would likely be*

> *viewed as a use of force.* In assessing whether an event constituted a use of force in or through cyberspace, we must evaluate factors: including the context of the event, the actor perpetrating the action (recognizing challenging issues of attribution in cyberspace), the target and location, effects and intent, among other possible issues. Commonly cited examples of cyber activity that would constitute a use of force include, for example: (1) operations that trigger a nuclear plant meltdown; (2) operations that open a dam above a populated area causing destruction; or (3) operations that disable air traffic control resulting in airplane crashes. Only a moment's reflection makes you realize that this is common sense: if the physical consequences of a cyber attack work the kind of physical damage that dropping a bomb or firing a missile would, that cyber attack should equally be considered a use of force.
>
> Question 4: May a State ever respond to a computer network attack by exercising a right of national self-defense?
>
> Answer 4: Yes. A State's national right of self-defense, recognized in Article 51 of the UN Charter, may be triggered by computer network activities that amount to an armed attack or imminent threat thereof. As the United States affirmed in its 2011 International Strategy for Cyberspace, "when warranted, the United States will respond to hostile acts in cyberspace as we would to any other threat to our country."

While I'm sure Koh would argue nothing we've done to Iran constitutes a use of force, certainly Iran could make the case that the US and Israel have been engaging in war on Iran since 2006.

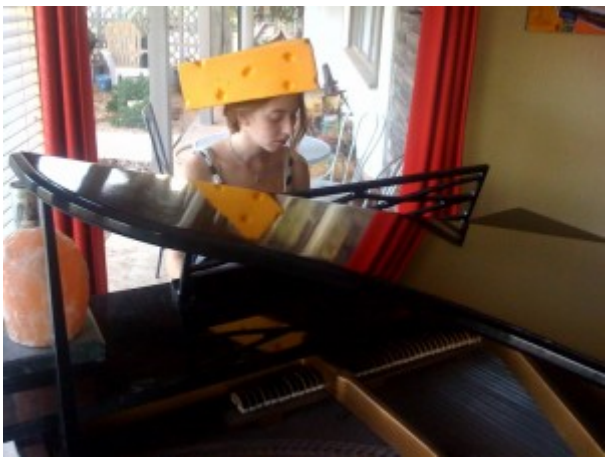
And these articles come at a time when—as Bob Baer notes—we're increasingly losing our intelligence assets in the Middle East, including in coutries aligned with Iran.

> The incidents of the past two weeks suggest it may be time to admit that large parts of the Middle East have fallen off the cliff for the U.S., and large parts of it will be beyond the ken of intelligence for the foreseeable future. Something terrible is going on in Syria, but because it's too risky to put American intelligence officers on the ground there, it's unclear just how terrible it is and how it could be ended. There's simply no way for Americans to tell whether the armed rebellion is dominated by militant Islamists or Jeffersonian democrats. Nor can Americans get a picture of how the men leading the fighting forces on which Bashar Assad is most reliant might be turned.
>
> This problem isn't unique to Syria. A number of countries in the Middle East, from Lebanon to Yemen and from Jordan to Egypt, appear poised to fall into the political abyss. Consider Egypt: since the Muslim Brotherhood came to power, my sources tell me the army there is being purged of officers considered pro-American. I've been told that up to 4,000 officers have been let go, although I have no way to confirm that claim.

Things are quickly changing in the Middle East (and no doubt will change even more rapidly once Obama gets through the election). And whereas Iran once had reason to hide the many ways it had been sabotaged by the US, it seems likely that calculus has changed, both because of desperation in face of the sanctions, and because the power relations in the Middle East are rapidly changing.

The US has been waging war against Iran for years. It seems that Iran now has reason to make that clear.

LABORIOUS TRASH TALK



It is Labor Day weekend. Shockingly, my dictation program, Nuance Dictate for Mac, has gone beyond its normal complete worthlessness and now exists in the temporal-intellectual worthlessness of time and space. Seriously, for an application that claims to be useful for efficiency for the normal human, they are total crap. I have fought with them for nearly four years, and I am tired. You want to talk to me Nuance, here I am. Otherwise, go blow a goat.

Okay, now that I have gotten a little preliminary issue setting out of the way, let us get down to Trash Talk mofo's and……

Oooops! Major power outage at Casa de bmaz! Seriously, I have dick for connection, only 3G on my old iPhone (yes, I have been holding out for iPhone5, even my wife is about to kill me).

I am sorry, I Musta Got Lost. And my gmail tells me Marcy is on the warpath. Rightly so, despite monsoon season here. Oddly, the sky looks mostly clear, I have no reason why my AC, much less my DC, has been taken away from me. You laugh, but when it is 106, you need the juice for the air

conditioner. Bad. Somewhere below is a picture of the only light there was for a while, the moon. Vaya con dios Neil Armstrong, I thought well of you in the face of the moon tonight. If there was a measure of the childhood of my generation, it was the Moon Shot.

More Trash content will be on the horizon, like the storm front closing in, but not yet here. In the meantime, I am going to buy you all off with the evidence of my entertainment while I had no electricity. When you suddenly have no cable, no internet, no McIntosh, Adcom and B&W stereo; you have to make do. My daughter Jenna is providing the entertainment while all things I know are down.

UPDATE: Okay, I am back for a little bit. Man, lot of no power tonight and during, and after, then there was the tequila issue. What is a poor boy to do? Sing for a rock n' roll band?

Okay, South Carolina and Michigan State, both closer than expected but not so by me, both won to start the college football season. Nobody should take anything away from Vanderbilt nor Boise State though. Especially Boise. Sparty is good, and at home to open the season? The BCS should never, ever, dock Boise State because they do not try to play a difficult enough schedule. Previously they opened against the Oregon Ducks in Corvallis. Tell me again why they cannot play for a national championship?

But now, the most interesting game of the first weekend is on tap. Yep, the Wolvereenies versus Crimson Tide at JerryJonesBowl. I'll take Denard Robinson, seen below in a stirring segment, in an upset over the NickSabanDroids. Granted, I am completely sloshed and sitting on my front patio in a cactus patch, but that is my Karl Rove's Fathers' Solid Gold Cock Ring Lead Pipe Lock prediction. [All legal disclaimers imaginable applicable]. But wait! There is more! If you call right now we will double the offer! [Okay, not really].

The NFL has played the 4th and final presea son game, the one season ticket holders pay for, but that nobody understands, already. The Jets, Jets, Jets finally scored a touchdown. Yes that is one. But “yay”. There are interesting things going on in baseball, but the best is the return of the Rocket. Even if it is for the Skeeters. These are the young Pujols’s of the next generation and, through four innings, they can’t hit Rocket. Think the jurors from the trial and Reggie Walton are not watching the Rocket? Oh yeah, you bet your butt they are. Clemens will likely throw one more independent league game, likely against the Long Island Ueckers (not really; that was a little high and outside). And then a start for the Astros. Maybe two. Just cause.

But, far more globally important than football, baseball or that nimrod NASCAR, the Circus is coming back to town. Yep, Formula One. And where the spinning wheel stops is…..at Spa! Yes, the circuit that looks like a woman’s reproductive system. Or a Phaser. Whatever. Unlike those candy asses in left turn NASCARland, they run in the wet in F1.

Yes they do and it is wet at Francorchamps. Qualifying will go off not too long after I post this, and the race coverage o Speed TV begins at 7:30am EST and 4:30am PST on Sunday morning. Despite the safetied up new course at Spa, with a bit of wet, it is still a fast, dangerous and interesting layout. Ought to be fun.

There are certain people that have covered F1

forever. One of the best photographers, Paul Henri-Cahier, has been, and is, a friend to this blog. Paul is the, without question, premier F1 photographer in the world and he is second to his father, the legendary Bernard Cahier.Grand Prix does not get the attention it should here in the States. But one who does cover it up close and personal on track is Brad Spurgeon. Here is Brad's setup for this weekend:

> Formula One began the second part of its season after the long, five week summer break in August, with the practice sessions on Friday at the Spa-Francorchamps circuit in Belgium.
>
> But thanks to the typical Spa weather, and unfortunately for the thousands of spectators who showed up to take a €400 shower, it was as if the holidays had never ended.
>
> The cars may have managed to turn a few laps in the rain in the morning session – although only one car went out during the entire first half of the 1 hour and 30 minute session – but there was no track action at all in the afternoon session until 35 minutes of the same length session remained. And even then, six of the 22 drivers did not take to the track, and of those who did, none drove more than four laps.

Yep. Summer break is over, and it is time to go to Ardennes forest with the lads. With the wet

in the picture, Spa will be special.

So, there is Trash Talk for this week. Marcy is probably gonna come along and yammer about Nate Ebner and whatnot. I got one question though. Picture Walt Kowalski talking to an Ikea chair: Should the Cardinals pick up and immediately start Brian Hoyer? Bonus question: Do Watertiger's precious Jets need Hoyer even worse than the Cardinals?

Boogie the Trash!

BAHRAIN DRAIN: OPPRESSIVE US CLIENT STATE SUCKS THE LIFE OUT OF FORMULA ONE

[UPDATE] Qualifying went off without much hitch this morning, at least inside the circuit. Outside the circuit, the body of a protester was found, dead after a night of clashes with government authorities and police. Inside the confines of the circuit, Sebastian Vettel regained qualifying form and took his first pole of the season, followed by Lewis Hamilton, Mark Webber and Jenson Button. Schumacher didn't even manage to get out of Q1. Unlike the desolate practice yesterday, there were at least some fans observable in the main grandstand for qualifying today. But the scene was still as bleak and lifeless as I have ever seen for a F1 Grand Prix. It remains an embarrassment for FIA and the teams (FOTA) to be in Bahrain. And, as I pointed out yesterday, the lie that FIA and Bernie Ecclestone comfort themselves with – that they are being non-political by going and not giving in to international political concerns – is absurd and outrageous. The oppressive Sunni minority and the ruling Khalifa clan are using

the mere presence of F1 in Sakhir to paint the picture that everything is okay with the Shia majority in Bahrain. It is not, and F1 looks like a tool. – bmaz 10:30 am EST Sat Apr. 21

Formula One is in Bahrain. There is no good reason, save for greed, that Formula One is in Bahrain this weekend but, nevertheless, there it is. As I write this report, practice is underway. The most expensive and technologically sophisticated racing motorcars in the world are on the track and at speed. The factory Mercedes of Nico Rosberg and Michael Schumacher are fighting with the Red Bulls of Sebastian Vettel and Mark Webber for the fast times in practice. Ferrari and McLaren are trying to catch up.

The scene is surreal in how vacant and empty it is. There are no people, no crowds, no passenger cars in the surrounding lots, no motorhomes in the infield. There is no party. There is no circus. There are no people. F1 is not lovingly referred to by longtime aficionados as "the circus" for nothing, *it is the circus*. F1 brings the press, the families, the hangers on, the beautiful women, the beautiful people – and the press that follow them. It is a traveling roadshow party of epic proportions, and always has been.

But not now, not today, not in Bahrain. The cars are there, and there are apparently drivers piloting them, but save for the team engineers and pit hands, there does not appear to be a living sole at the Bahrain International Circuit in Sakhir. It looks like a scene from The Twilight Zone where all the people have been disappeared from the face of the earth.

It might have been like this last year, but Bahrain was yanked from the F1 calendar, with the sport's godfather like mafia don, Bernie Ecclestone, lamely saying at the time:

> "The truth of the matter is we put the calendar together and the teams race on the calendar," he said. "We were trying to help Bahrain, who have been very

> helpful to Formula One, and hoping they could get themselves sorted out.
>
> “I don’t know whether there is peace or not. I have no idea. The FIA sent somebody out to check and they said it was all OK. I think the teams had different information and they have the right to say they don’t want to change the calendar.”

The truth of the matter was that it pained Ecclestone greatly to not give Bahrain, and its heavy handed ruling Khalifa family, its cherished F1 race last year, and Bernie and the F1 moneychangers were not about to skip it a second year, so there they are.

I know people whose life it is to follow F1 and document it, it is their profession. It was their father’s profession before them. It is their life. They are not in Bahrain. Presumably, as effectively permanent attachments to the sport, they could have gotten in; they just refused to go. Just having the option is more than most journalists can say. From the AFP:

> Bahrain has denied visas to foreign journalists and photographers, including from AFP, to cover this Sunday’s controversial Grand Prix race.
>
> An AFP photographer, accredited by the sport’s governing body, the FIA (Federation Internationale de l’Automobile), was informed by Bahrain’s information affairs authority that there has been a “delay to your visa application, so it might not be processed.”
>
> Associated Press said two of its Dubai-based journalists were prevented from covering the Grant Prix because they could not receive entry visas, despite being accredited by the FIA.
>
> Meanwhile, cameramen already in Bahrain

> were required to keep fluorescent orange stickers on their cameras so that they would be easily recognisable to ensure they do not cover any off-track events, such as ongoing protests.

What might the journalists report on were they allowed in Bahrain? Maybe the petrol bomb attack members of the Force India racing team were caught up in. The incident so shook the team that it withdrew from the second practice session and at least one team member left the country due to safety concerns.

How is this occurring? Why is the race still being sanctioned? Money and hegemony.

F1 Grand Prix is big money. Really big money. As the New York Time's Brad Spurgeon explains:

> For the monarchy — and for Formula One — there are also overriding economic concerns. The Grand Prix is the kingdom's biggest sports event, drawing a worldwide television audience of roughly 100 million in nearly 200 countries, bringing in half a billion dollars in revenue and attracting thousands of visitors. When the race was canceled last year, Bahrain still had to pay Formula One a $40 million "hosting fee."

And, of course, there is the ever present United States hegemony at play as well. As NPR reported last year:

> The tiny island nation of Bahrain plays a big role in America's Middle East strategy. In fact, more than 6,000 U.S. military personnel and contractors are located just five miles from where government security forces violently put down demonstrations this week.
>
> Bahrain is also home to the U.S. Fifth Fleet, a major logistics hub for the

> U.S. Navy ships. The island is located halfway down the Persian Gulf, just off the coast of Saudi Arabia, and is something of a rest stop for U.S. Navy ships cruising the waters of the Gulf.
>
> "It has facilities that can provide support to our ships, including, you know, fuel, water provisions, resupply," retired Rear Adm. Steve Pietropaoli says.
>
> Those facilities have been resupplying warships for nearly a half-century, ever since Great Britain's fleet left the island. Bahrain provided major basing facilities and support for the armada of U.S. Navy ships sent for the first Persian Gulf War in 1990 and the Iraq War in 2003.
>
> "Bahrain is an outstanding partner," Pietropaoli says. "It has been the enduring logistical support for the United States Navy operating in the Persian Gulf for 50 years."

Big money and the mighty US war machine are a potent combination and, between the two of them, are permitting the disgrace occurring this weekend in Bahrain. It is a stain on international human rights, and it is a stain on Formula One. F1 and Ecclestone cravenly hide behind the false premise that they are a business and would be allowing themselves to be politicized if they were to cancel the Bahrain Grand Prix again. The governing body, basically an extension of Ecclestone, cites Article 1 of its charter in this regard:

> "The FIA shall refrain from manifesting racial, political or religious discrimination in the course of its activities and from taking any action in this respect."

This is a load of baloney from Bernie. The mere

fact that F1 is in Bahrain now, as a false front for the oppressive Bahrain government and Khalifa ruling family, is, itself, politicization of the worst kind.

WHISTLEBLOWERS CONCERNED THAT DOJ REFUSES TO JAIL SCOTT BLOCH, TOO

Last week, bmaz (with my kibbitzing) noted how outrageous is it that the federal government is fighting to prevent a government employee who destroyed an entire hard drive of evidence from spending even one day in jail.

> But given the record of this Administration—from the mantra of "look forward" to the refusal to charge Dick Cheney for illegal wiretapping Americans to the refusal to charge Jose Rodriguez for destroying evidence of torture—I think it's just that they refuse to send an official—one of their own—to jail. They cannot uphold the law, because the law might be upheld against them.
>
> So, back to I guess he won't see a cell Bloch Scott. Is DOJ really saying that a guy who wiped his hard drive shouldn't go to jail? Yes, and they are willing to fight for him and with him to see that such is indeed the case. First the government filed a Motion to Reconsider dated February 7, 2011 regarding Judge Robinson's 2/2/2011 ruling discussed and linked above. The Motion to Reconsider was basically five pages of whining that there was compelling authority to the effect the *criminal they were*

> *prosecuting* did NOT have to serve jail time. Yes, that is one hell of a strange argument for government prosecutors to be making.
>
> Then, the willingness of the government prosecutors to fight to keep the criminal Bloch from serving one lousy second in jail goes from the absurd to the ridiculous. A mere four days after having filed the whiny Motion to Reconsider, and before it was substantively ruled on, the government, by and through the ever ethical DOJ, suddenly files a pleading encaptioned "Governments Motion To Withdraw Its Motion To Reconsider The Court's February 2, 2011 Memorandum Opinion". In this pleading, the government suddenly, and literally, admits their February 2 Motion to Reconsider was without merit.
>
> [snip]
>
> Let me put that bluntly for you: the DOJ is helping a guy they have already convicted by way of guilty plea – that has already been accepted by the court – get out of that plea conviction. And they are already negotiating a different deal with the defendant, Bloch, to insure he doesn't serve one stinking day in jail.

Turns out bmaz and I aren't the only ones who find it utterly unbelievable that the government is engaging in embarrassing legal tactics to try to prevent a criminal from doing jail time. So do the whistleblowers whose lives Scott Bloch made hell. (h/t POGO)

> We, the undersigned, wish to bring to your attention an important issue: the effective and ethical prosecution by the Department of Justice of Scott J. Bloch, a man who has gravely damaged the federal civil service.

> As you undoubtedly know, Mr. Bloch began his tenure as head of the U.S. Office of Special Counsel, in 2003. The Office of Special Counsel's primary purpose is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. However, until his abrupt resignation in 2008, Mr. Bloch eroded workplace discrimination protection on the basis of sexual orientation, conducted a political purge of his own employees, attempted to intimidate subordinates from cooperating with outside investigators, deleted computer files and destroyed whistleblower cases, and made false and misleading statements under oath to Congress. After arrest by the Federal Bureau of Investigation and arraignment by the Department of Justice (DOJ) in 2008, Mr. Bloch pled guilty to criminal contempt of Congress in exchange for probation in sentencing. The prosecuting attorney, Glenn S. Leon, Assistant U.S. Attorney for the District of Columbia, supported the defendant's request in United States v. Scott J. Bloch through several court hearings and pleadings.

They argue the prosecutor, Leon, could not now, after having spent so much time helping Bloch avoid jail time, honestly represent the government's interest in prosecuting him in court.

> We are concerned, however, that Mr. Leon's official conduct up to now has rendered him unfit to prosecute the defendant. Rule 1.3 of the Model Rules of Professional Responsibility, Comment 1, states that "[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's

> behalf." (Emphasis supplied). In the instant case, Mr. Leon would have to contradict almost a year's worth of arguments in support of the defendant, and state the exact opposite in front of a judge or jury. This would erode his credibility and impartiality in the public light, as one would not reasonably expect that he would be able to zealously advocate the government's position given his track record. The government runs the risk of getting something less than his full effort, which warrants recusal.

And so they're asking the government appoint a special prosecutor for the trial.

> Attorney General Holder, we have long waited for Mr. Bloch to be held accountable in a court of law. For too many of us, the erosion of the rule of law and ethical conduct in government came with a heavy price. With our whistleblowing activities, we sought, and continue to seek, a government of laws, not of men. Please help us restore this noble and long-standing principle by appointing a special prosecutor to lead United States v. Scott J. Bloch.

After all, that's what this is about: the government's refusal to have even the most pathetic—but blatant—abuse of power be punished with jail time. A number of the people signing this letter (like Bradley Birkenfeld, whose efforts to expose rich tax cheats led to jail time for him but none for the cheats he exposed) have or are still doing jail time for their efforts to expose corruption.

It'd be nice to see one of the real criminals in our government join them.

FINAL JEOPARDY ANSWER: SOMETHING THAT DOESN'T OBSTRUCT OR IMPEDE JUSTICE

Alex, I'm going with – "What is getting a prosecutor fired for not complying with your political agenda?"

The investigation (not of the U. S. Attorney firings despite misleading headlines) into the Iglesias firing is done. bmaz is ready to change his name to Carnac and Holder's Department of Justice has shot off a letter-ary masterpiece to the House Judiciary Committee (HJC). As per ~~Carnac's~~ bmaz's predictions, no charges.

What bmaz could not have predicted, but did link to in his post, is the actual content of the letter sent to Conyers. I don't think anyone would have predicted the cavalier way in which Holder's DOJ reaches its seemingly predetermined decision, while providing a roadmap to other legislators who'd also like to get a prosecutor fired for political convenience. Dannehy and Holder explain to Members of Congress – if a Federal prosecutor isn't filing or refraining from filing the cases you want, feel free to covertly conspire to get him fired. As long as you don't make any misguided attempt to "influence" him before you get him fired, you're good to go. Oh, and btw, phone calls to him at home to fume over his handling – not to worry, those doesn't count as an attempt to influence.

Stripped and shorn, Holder and Dannehy have said –

1. We aren't gonna investigate anything but Iglesias and we aren't saying why: "The

investigative team also determined that the evidence did not warrant expanding the scope of the investigation beyond the removal of Iglesias."

WHAT EVIDENCE? They freakin didn't expand the scope of the investigation to see what evidence there was, then they decide, *oh well, we don't have any of the evidence we didn't look for so we shouldn't look for it since we don't have it* … whatever.

2. Hey, yeah, Domenici DID make a contact to smack on Iglesias about the handling of a matter currently in front of the USA's office but: "The evidence about the call developed in the course of Ms. Dannehy's investigation, however, was insufficient to establish an attempt to pressure Mr. Iglesias to accelerate his charging decisions."

So similar to the lack of intent to torture — I mean, if Domenici in good faith thought he was just gathering intel on the status of political prosecutions … um, let's move on.

3. Instead of trying influence Iglesias, Holder and Dannehy think that Domenici *just* got Iglesias fired for not pursuing political bias in his prosecutions. "The weight of the evidence established not an attempt to influence but rather an attempt to remove David Iglesias from office, in other words, to eliminate the possibility of any future action or inaction by him."

4. This, they say, is fine. Seriously. They say there's nothing DOJ can do about it. It's no problem for politicians to get DOJ lawyers fired for not being political lapdogs. But to be fair, they then finish up by saying both, "In closing, it is important to emphasize that Attorney General Holder is committed to ensuring that partisan political considerations play no role in the law enforcement decisions of the Department" and (bc that wasn't really the closing after all) "The Attorney General remains deeply dismayed by the OIG/OPR findings related

to politicization of the Department's actions, and has taken steps to ensure those mistakes will not be repeated."

HUH? They've just said it is perfectly legal for politicians to get USAs who won't do their political bidding fired by covert contacts with the WH, but Holder is "committed" to ensuring partisan political considerations play no role at DOJ? WTH? I guess if you put those two concepts together and held them in your mind for long, you'd end up committed too.

5. Anyway, they pull all of this off by giving a Bybee-esque review of "18 U.S.C. § 1503 [that] punishes anyone [at least, anyone the DOJ selectively decides to prosecute] who '*corruptly* . . . influences, obstructs, or impedes, or *endeavors to influence, obstruct, or impede*, *the due administration of justice.*" It's a simple thing — according to Holder and Dannehy, Domenici didn't try to "influence" Iglesias, he just had Iglesias fired. Which obviously isn't an attempt to obstruct or impede. I mean, there's nothing that *doesn't impede* a case like getting the prosecutor handling it fired.

They also explain to us that they can't go after Domenici for trying to get, then getting, Iglesias fired — at least, not under 18 USC 1503, because that section "penalizes only forward-looking conduct." So Domenici would have to be doing something that would involve forward-looking conduct. And after all, as they just said (see 3 above) Domenici wasn't trying "in other words, to eliminate the possibility of any future action or inaction by [Iglesias]." Oh, except for, you know, they actually say in the letter that's exactly what Domenici WAS doing. Trying to affect future action or inaction — in a forward-looking way with his forward-looking conduct.

This clarifies so many things. Who knew, until now, that the only person who got things right during the Saturday Night Massacre was Robert Bork?

Nixon wrote the first act in DOJ's current play (which is only fair, since he also wrote their anthem that it's not illegal if the President does it) when he arranged for the firing of prosecutors who were bugging him, but in response to a livid Congressional response, using words like impeachment and obstruction, said:

> "…[I]n all of my years of public life, I have never obstructed justice. And I think, too, that I can say that in my years of public life that I've welcomed this kind of examination, because people have got to know whether or not their President's a crook. Well, I'm not a crook!"

And now Dannehy and Holder have made that chapter and verse – nothing wrong with firing some prosecutors if they aren't playing politics. Poor Karl Rove – so much trouble could have been avoided if he had just known that a Democratic administration's DOJ would take the position that it would be perfectly ok for him to get Bush to fire Fitzgerald (something that apparently made even Buscho lawyers Gonzales and Miers flinch) – no obstruction, no impeding – as long as Rove never tried to "influence" the prosecutor first.

And now DOJ prosecutors now know exactly how things work. It's been spelled out. No one will try to influence them. It's just that if they aren't making Obama's favorite politicians and fundraisers happy, well – their career may have a little accident.

With AGeewhiz's like Holder, we can rest easy. Gonzales may have been afraid to come out and state DOJ's policy plainly. He never quite coughed out the admission that it is DOJ policy that Republican Senators who conspire with the Republican WH to get prosecutors fired for not carrying out the Republican Senator's political agenda are acting well within their rights. Holder is not nearly so timid. He's spelled it

out. Prosecutors are fair game for Congresspersons, at least those with the right WH ties.

I guess we should be grateful he hasn't handed out paintball guns to Democratic legislators and encouraged them to mark the weak links in his legal herd – the ones that haven't been compliant enough to keep their jobs.

At least, not yet.

And besides, haven't we already learned what Holder just told Conyers in that letter?

Firing the Republicans in 2006 and 2008 didn't impede or obstruct the attacks on the rule of law one little bit.

Update: On the good news front – Happy Day fatster!

SCOTT BLOCH COPS A PLEA FOR BLOCHING JUSTICE

Scott Bloch, the former head of the Office of Special Counsel is copping a plea.

GOVERNMENT CONTINUES TO AVOID COURT RULINGS ON DOMESTIC

SURVEILLANCE

Three significant pieces of news, taken together, show that the Courts continue to chip away at Bush-and-now-Obama's domestic surveillance programs.

FISA Court Encourages Government to Stop Collecting Some Metadata

First, and potentially most importantly, the FISA Court, after learning more about what the collection of telecom metadata entailed, raised some concerns with the government, leading them to voluntarily stop collecting it.

> The Foreign Intelligence Surveillance Court, which grants orders to U.S. spy agencies to monitor U.S. citizens and residents in terrorism and espionage cases, recently "got a little bit more of an understanding" about the NSA's collection of the data, said one official, who spoke on the condition of anonymity because such matters are classified.
>
> The data under discussion are records associated with various kinds of communication, but not their content. Examples of this "metadata" include the origin, destination and path of an e-mail; the phone numbers called from a particular telephone; and the Internet address of someone making an Internet phone call. It was not clear what kind of data had provoked the court's concern.
>
> [snip]
>
> The NSA voluntarily stopped gathering the data in December or January rather than wait to be told to do so, the officials said. The agency had been collecting it with court permission for several years, officials said.

Curiously, Adam Schiff is quoted in the story specifically addressing VOIP.

Al-Haramain Agrees to Vaughn Walker's Judgment

Next, on Friday, al-Haramain responded to Vaughn Walker's tidy judgment on FISA—which I have argued was crafted to be rather tempting to the government—by basically accepting his judgment and backing off any further constitutional claims associated with the suit. In their proposed judgment, al-Haramain basically:

- Asks for the $61,200 in damages defined by the statute ($20,400 for each of three plaintiffs, which comes from $100/day for each day of violation)
- Asks for $550,800 total in punitive damages ($183,600 for each of three plaintiffs)
- Asks for legal fees (bmaz estimates these might run to around $3,375,000)
- Dismisses all other constitutional claims and claims against Robert Mueller as an individual
- Requests a declaration that "the defendants' warrantless electronic surveillance of plaintiffs was unlawful as a violation of FISA"
- Requests an order that the government purge all information illegally collected (except that which would be exculpatory)

In short, al-Haramain is basically saying, “gosh what a nifty solution you’ve crafted, Judge Walker. Let’s see what Eric Holder thinks of it.”

Now, the government might have some complaint about the particular description of its illegal wiretapping. And I’m betting they’re going to have operational troubles with purging the illegally collected information, particularly if it means purging a lot of poisoned fruit along with it. But I still do think the government will try to find a way to accept Walker’s nifty solution.

Government Backs Down in Request to Access Stored Emails without Warrant

Finally, in another case in Denver, the government backed down a request that Yahoo turn over the stored emails of one of its customers without a warrant. Yahoo, EFF, and a bunch of other privacy advocates had made a stink, and rather than face an adverse judgment, the government backed down.

> In the face of stiff resistance from Yahoo! and a coalition of privacy groups, Internet companies and industry coalitions led by EFF, the U.S. government today backed down from its request that a federal magistrate judge in Denver compel Yahoo! to turn over the contents of a Yahoo! email user’s email account without the government first obtaining a search warrant based on probable cause.
>
> The EFF-led coalition filed an amicus brief this Tuesday in support of Yahoo!’s opposition to the government’s motion, agreeing with Yahoo! that the government’s warrantless seizure of an email account would violate both federal privacy law and the Fourth Amendment to the Constitution. In response, the Government today filed a brief claiming that it no longer had an investigative

> need for the demanded emails and withdrawing the government's motion.

As EFF points out, the government has repeatedly backed down when challenged on this type of collection and related collection.

> This is not the first time the government has evaded court rulings in this area. Most notably, although many federal magistrate judges and district courts have ruled that the government may not conduct real-time cellphone tracking without a warrant, the government has never appealed any of those decisions to a Circuit Court of Appeals, thereby preventing the appeals courts from ruling on the issue. Similarly, a federal magistrate judge in New York, Magistrate Judge Michael H. Dolinger, has twice invited EFF to brief the court on applications by the government to obtain private electronic communications without a warrant, and in each case, the government withdrew its application rather than risk a ruling against it (in one case the government went so far as to file a brief anticipating EFF's opposition before finally dropping the case).

Which I think illustrates the common theme here. While we don't yet know what the Obama Administration will do in the case of al-Haramain, in the two other cases, they have backed off of surveillance activities to avoid any adverse ruling from Courts. That's partly a testament to their discomfort with their own legal position with regards to these activities. But it's also an indication that they'd rather continue their programs in some lesser form than risk having a Court declare the whole program unconstitutional.

If I'm right about all this, it means the government is balancing facing an Appeals Court

on FISA and State Secrets, versus paying less then $4 million to close the chapter on Bush's most egregious form of domestic surveillance while still protecting executive programs that engage in similar collection.

WHY DOJ IS LIKELY TO ACCEPT VAUGHN WALKER'S RULING

As I posted earlier, Judge Vaughn Walker ruled against the government in the al-Haramain case today. Basically, Walker ruled that al-Haramain had been illegally wiretapped and the case should move to ~~settlement~~ judgment (corrected per some lawyer).

But there's more to it. I think Walker has crafted his ruling to give the government a big incentive not to appeal the case. Here's my thinking.

As you recall, last year when Walker ruled that al-Haramain had standing and therefore its lawyers should get security clearance that would allow them to litigate the case, the government threatened to take its toys—or, more importantly, all the classified filings submitted in the case—and go home. After some back and forth, Walker instructed the parties to make their cases using unclassified evidence; if the government wanted to submit classified evidence, Walker said, then al-Haramain would have to be given clearance to look at and respond to the evidence. The move did two things: it neutralized the government's insistence that it could still use State Secrets to moot Walker's ruling that al-Haramain had standing (and, frankly, avoided a big confrontation on separation of powers). But it also forced the government to prove it hadn't

wiretapped al-Haramain illegally, since it had refused to litigate the case in the manner which Congress had required.

The government basically refused to play. It made no defense on the merits. Which made it easy for Walker to rule in al-Haramain's favor.

That's the big headline: that Walker ruled the government had illegally wiretapped al-Haramain.

But there were two more parts of the ruling that are important. First, Walker refused al-Haramain's request that he also issue an alternate ruling, one that relied on his review of the wiretap log and other classified filings, that would amount to a ruling on the merits. He basically said that such a ruling would muddy up the record if and when this case was appealed.

He also dismissed al-Haramain's suit against the only remaining individual named as an individual defendant, Robert Mueller.

These last two parts of the ruling are, I think, the big incentives Walker has given for the government to just accept this ruling.

If this ruling stands, al-Haramain will get a ruling that the wiretapping was illegal. The government will be directed to purge any records it collected from its databases (I'll explain in a later post why I think this will present some problems). And it'll be asked to pay a fine, plus legal fees. But the fines, at least ($100 per day per day of illegal wiretapping) might end up being a relative pittance—tens of thousand or hundreds of thousand of dollars. Sure, there will be punitive fines and legal fees for four years of litigation. But the government was happy to settle Hatfill and Horn for millions, why not have this be done for the same range of millions?

What al-Haramain won't get—unless it litigates some of the other issues in the case, which likely can be dismissed with State Secrets—is access to what the government was doing. Or details of how it came to be wiretapped

illegally.

I'm betting that the government will be willing to accept the ruling that it illegally wiretapped al-Haramain in exchange for the ability to leave details of how and what it did secret, leaving the claim of State Secrets largely intact.

There is little risk that other people will sue on the same terms al-Haramain did, because few, if any, other people are going to be able to make the specific prima facie case that they were wiretapped that al-Haramain did. Few people are going to be able to point to public FBI statements and court documents to prove their case, as al-Haramain was able to. And anyone who does sue will end up before Walker, who has dismissed all other suits precisely because they lacked the specific proof that they were wiretapped that al-Haramain had. Plus, with the extent to which Congress has already gutted FISA, there's little risk someone could sue going forward.

Since Walker dismissed the suit against Mueller, the government doesn't have any individuals on the hook still for this illegal activity.

And, finally, by accepting this ruling—which argues that only if Congress has provided very specific guidance about court review, will a law automatically trump State Secrets—the government preserves the status quo on State Secrets largely intact (unless and until the full 9th Circuit panel upholds the Jeppesen decision, but I have increasing doubts they will).

So you decide. If you're President Obama and Attorney General Holder, both of whom have already said that the illegal wiretap program was illegal, which are you going to choose? Accepting a ruling that says it was illegal, in exchange for keeping the details of that illegality secret? Or the invitation to take your chances with an appeal?

THE FOUR OLC OPINIONS RETROACTIVELY JUSTIFYING TELECOM DATA COLLECTION

Alright. I lied. I'm not going to post on why I think FBI went to the trouble of getting an OLC opinion that, apparently, opens a huge loophole in privacy protections from data collection until I first lay out all four OLC opinions that we know of that appear to be at least partly responses to Glenn Fine's efforts to make FBI clean up this program. These are:

- January 15, 2009: OLC says FBI only has to inform journalists that their data has been subpoenaed if the person approving the subpoena could be expected to know that the subpoena would collect reporters' data, regardless of the intent of the person who prepared the subpoena
- November 8, 2008: OLC says that ECPA normally bars the use of sneak-peek and hot number searches
- January 16, 2009: OLC says that Acting DADs (and certain other acting officials) are authorized to sign NSLs

- January 8, 2010: OLC says that ECPA allows the FBI to ask for and obtain certain call records on a voluntary basis from the providers, without legal process or a qualifying emergency

Note that of these, only the November 8, 2008 (which is, perhaps not incidentally, the one that restricted, rather than expanded, FBI conduct) has been released by OLC. And of course, two of the opinions appear to have been rushed through in the last days of the Bush Administration, possibly even by Steven Bradbury (though given the delays on approving Dawn Johnsen, fat lot of difference that made).

In this post, I want to show how these opinions appear to be responses to (at a minimum) Glenn Fine's work, Though, as I said before, probably also to pressure about the warrantless wiretap program.

Notice to Journalists

The January 15, 2009 OLC opinion is at least partly a response to two incidences in which FBI collected or almost collected reporters' data in the course of leak investigations but had not yet—as of 2009—told the reporters.

In one, a case agent asked AT&T representative at CAU for boilerplate language to use to get "to and from" data for specific target calls. The case agent would have known this would collect information on communication with a reporter, though the prosecutor in the case had notes showing the case agent had said the contrary. Later, after talking to another FBI agent, the prosecutor realized the request from AT&T would collect reporters' calls. The prosecutor had the case agent remove all the data from the computer and seal it. In this case, the reporter was not told her data might have been collected, because any collection was

inadvertent and no one used it.

In the second case, a Special Agent served a subpoena on an AT&T's onsite person for toll billing records. Following that, the Special Agent provided the AT&T person a reporter's cell phone number because the analyst "asked for" it. The AT&T analyst basically did a "sneak peak" on the reporters' calls and found no record of calls related to the leak investigation. Then, working through one of CAU's supervisors, the AT&T analyst "requested" information on the reporters calls of the Verizon and MCI analysts. The Company B (Verizon?) analyst did find responsive data, though the FBI claims that it was not in the database when checked. There is no further discussion in the IG Report of whether this reporter was informed that cell records had been searched.

In spite of the lack of any comment about notice to the reporter in the second case, Fine describes the OLC opinion pertaining to notice to reporters in the context of the first instance. (PDF 125 to 126)

> The Criminal Division and the OIG asked the Department's Office of Legal Counsel (OLC) to opine on the questions when the notification provision in the regulation would be triggered. OLC concluded in an informal written opinion dated January 15, 2009, that the notification requirement would be triggered if, using an "objective" standard and based on the totality of the circumstances, a reasonable Department of Justice official responsible for reviewing and approving such subpoenas would understand the language of the subpoenas to call for the production of the reporters' telephone toll numbers, the subpoenas would be subject to the notification requirement of subsection (g)(3), regardless of the subjective intent of the individuals who prepared them.

> The OLC opinion also concluded that the notification requirement would be triggered even if reporters' toll billing records were not in fact collected in response to such a subpoena.

Based on the OLC opinion, the Criminal Division did not inform the reporters in the first case that records had been subpoenaed. As I said, it is unclear whether the second instance—in which the reporter data was gathered after a subpoena was issued—resulted in notification to the journalist in question.

The baseless exigent letters

As to the three other OLC memos, they all seem to arise at least partly out of Fine's findings that the FBI had no legal basis for which to collect some of the phone records it did, starting in 2007. The March 2007 IG Report on NSLs (which includes a section on exigent letters) has the following to say about the FBI's efforts to retroactively invent a legal basis for their use. (PDF pages 146-147)

> As of March 2007, the FBI is unable to determine whether NSLs or grand jury subpoenas were issued to cover the exigent letters. However, at FBI-OGC's direction, CAU is attempting to determine if NSLs were issued to cover the information obtained in response to each of the exigent letters. If CAU is unable to document appropriate predication for the FBI's retention of information obtained in response to the exigent letters, the Deputy General Counsel of NSLB stated that FBI will take steps to ensure that appropriate remedial action is taken. Remedial action may include purging of information from FBI databases and reports of possible IOB violations.
>
> The Assistant General Counsel also told

> us that a different provision of ECPA could be considered in weighing the legality of the FBI's use of the exigent letters: the provision authorizing voluntary emergency disclosures of certain non-content customer communications or records (18 U.S.C. 2702(c)(4)). The Assistant General Counsel stated that while the FBI did not rely upon this authority in issuing the exigent letters from 2003 through 2005, the FBI's practice may in part be justified by the ECPA's recognition that emergency disclosures may in part be justified by the ECPA's recognition that emergency disclosures may be warranted in high-risk situations. The Assistant General Counsel argued that in serving the exigent letters on the telephone companies the FBI did its best to reconcile its mission to prevent terrorist attacks with the strict requirements of the ECPA NSL statute.
>
> The FBI General Counsel told us that the better practice in exigent circumstances is to provide the telephone companies letters seeking voluntary production pursuant to the emergency voluntary disclosure provision of 18 U.S.C. 2702 (c)(4) and to follow up promptly with NSLs to document the basis for the request and capture statistics for reporting purposes. But the General Counsel said that, if challenged, the FBI could defend its past use of the exigent letters by relying on ECPA voluntary emergency disclosure authority. The General Counsel also noted that the manner in which FBI personnel are required to generate documentation to issue NSLs can make it appear to an outsider that the records requested without a pending investigation when in fact there is a pending investigation that is not referenced in the approval documentation

> due to the FBI's recordkeeping and administration procedures. 132
>
> 132 FBI-OGC attorneys told us that the FBI's acquisition of telephone toll billing records and subscriber information in response to the exigent letters has not been reported to the IOB as possible violations of law, Attorney General Guidelines, or internal FBI policy. We believe that under guidance in effect during the period covered by our review these matters should be reported as possible IOB violations.

This passage makes several things clear. From the first IG Report on the exigent letters practice, Fine held out the possibility that if FBI couldn't fix this problem, they would have to purge information and/or report inappropriate collection to the Intelligence Oversight Board (which could lead to further investigation). And faced with that threat, both the AGC and the GC suggested they might rely on 2702(c)(4) rather than 2709(b)(1) or to rationalize their collection activity.

Fine responded to this suggestion by pointing out all the reasons doing so didn't make any sense. (PDF 148 to 149)

> Moreover, the FBI's justification for the exigent letters was undercut because they were (1) used, according to information conveyed to an NSLB Assistant General Counsel, mostly in non-emergency circumstances, (2) not followed in many instances within a reasonable time by the issuance of national security letters, and (3) not catalogued in a fashion that would enable FBI managers or anyone else to validate the justification for the practice or the predication required by the ECPA NSL statute.
>
> We also disagree with the FBI's second

> justification: that use of the exigent letters could be defended as a use of ECPA's voluntary emergency disclosure authority for acquiring non-content information pursuant to 18 U.S.C. 2702(c)(4). First, we found that the exigent letters did not request voluntary disclosure. The letters stated, "Due to exigent circumstances, it is requested that records … be provided" but added "a subpoena requesting this information has been submitted to the United States Attorney's Office and "will be processed and served formally … as expeditiously as possible." In addition, we found that the emergency voluntary disclosure provision was not relied upon by the CAU at the time, the letters were not signed by FBI officials who had authority to sign ECPA voluntary emergency disclosure letters, and the letters did not recite the factual predication necessary to invoke that authority.
>
> We are also troubled that the FBI issued exigent letters that contained factual misstatements. The exigent letters represented that "[s]ubpoenas requesting this information have been submitted to the U.S. Attorney's Office who will process and serve them formally to [information redacted] as expeditiously as possible." In fact, in examining the documents CAU provided in support of the first 25 of the 88 randomly selected exigent letters, we could not confirm one instance in which a subpoena had been submitted to any United States Attorney's Office before the exigent letter was sent to the telephone companies. Even if there were understandings with the three telephone companies that some form of legal process would later be provided to cover the records obtained in response to the exigent letters, the FBI made factual

> misstatements in its official letters to the telephone companies either as to the existence of an emergency justifying shortcuts around lawful procedures or with respect to steps the FBI supposedly had taken to secure lawful process.

Thus, at this point, FBI was faced with either trying to legally rationalize how they had collected all this information, or purging it from their databases (without adequate record-keeping to show what they'd have to purge).

One thing the FBI did in response to Fine's report, was to issue new guidelines on June 1, 2007 limiting who could sign NSLs. While that guidance appears to have provided needed management guidance for the NSL process, it also created a problem with earlier attempts to clean up the exigent letter problems. In 2006, FBI issued a series of "blanket NSLs" basically providing cover for all the exigent letters for which providers still hadn't received a subpoena. Yet the people who signed those (in 2006) were not eligible to sign under the June 1, 2007 guidelines.

Then, five months after that first IG Report—in the aftermath of the passage of the Protect America Act and at a time when the debate on the FISA Amendments Act was ratcheting up—the FBI asked OLC for clarity on the meaning of Electronic Communication Privacy Act. (PDF 86)

> On August 28, 2007, the FBI OGC requested a legal opinion from the Department's Office of Legal Counsel (OLC) regarding three questions relating to the FBI's authority under the ECPA, including sneak peeks. One question stated that, "on occasion, FBI employees may orally ask an electronic communications provider if it has records regarding a particular facility (e.g., a telephone number) or person." The request asked whether under the ECPA the FBI can lawfully "obtain information

> regarding the existence of an account in connection with a given phone number of person," by asking a communications service provider, "'Do you provide service to 555-555-5555?' or 'Is John Doe your subscriber?'"
>
> However, based on information we developed in our investigation, we determined that the hypothetical example used by the FBI OGC in the question it posed to the OLC did not accurately describe the type of information the FBI often obtained in response to sneak peek requests. As described above the FBI sometimes obtained more detailed information about calling activity by target numbers, such as whether the telephone number belonged to a particular subscriber, the number of calls to and from the telephone number within certain date parameters, the area codes [redacted] called, and call duration.

The response to that query did not come until November 5, 2008—after the FAA was already passed. Tellingly, at least twice during the debate over the FAA, NSA and SSCI personnel tried to prevent DOJ's IG (that is, Fine) from having any involvement in the IG review of the warrantless wiretap program. While Fine didn't end up leading that process, he did contribute his own report.

Here is that November 2008 OLC opinion and its three general conclusions:

> The Federal Bureau of Investigation may issue a national security letter to request, and a provider may disclose, only the four types of information—name, address, length of service, and local and long distance toll billing records—listed in 18 U.S.C. § 2709(b)(1).

> The term “local and long distance toll billing records” in section 2709(b)(1) extends to records that could be used to assess a charge for outgoing or incoming calls, whether or not the records are used for that purpose, and whether they are linked to a particular account or kept in aggregate form.
>
> Before issuance of a national security letter, a provider may not tell the FBI whether that provider serves a particular customer or telephone number, unless the FBI is asking only whether the number is assigned, or belongs, to that provider.

This ruling included one piece of good news for those trying to conduct massive surveillance using phone records: it interpreted the meaning of “toll records” for counterterrorism broadly, including any data that tracked individual calls, regardless of whether the phone company actually used the data in that way. But it ruled against the use of sneak peeks (where a provider tells the FBI whether they have data on a customer) explicitly, though Fine argues that the FBI misrepresented what they were doing to OLC and as a result may have gotten sneak peeks approved even though the practice should not be legal. Fine would come back to the specific language of this OLC opinion in his recent IG Report.

But first, the FBI tried to clean up the problem created on June 1, 2007, when its own guidelines on who could sign NSLs seemingly invalidated the blanket NSLs used to clean up the exigent letters in 2006. In another last minute Bush OLC opinion (the other being the one that limited the requirements for journalist disclosure) the FBI asked OLC about whether certain people could sign NSLs. The response came back on January 16, 2009 (185-186):

> Michael Heimbach, then a Section Chief for the ITOS-I of the CTD, signed the

> July 5 [2006] blanket NSL. At the time he was temporarily assigned as an Acting Deputy Assistant Director (Acting DAD) of the CTD. Heimbach signed the NSL as Acting DAD. At the time Heimbach signed this NSL, the FBI had not issued guidance on whether FBI personnel serving as Acting DADs were authorized to sign NSLs. The FBI OGC later issued guidance on June 1, 2007, stating that Acting Deputy Assistant Directors are not authorized to sign NSLs. However, on January 16, 2009, the Department's Office of Legal Counsel (OLC), in response to a request for a legal opinion by the FBI General Counsel Caproni, opined that Acting DADs (and certain other acting officials) are authorized to sign NSLs under three of the NSL statutes, including the ECPA NSL statute, 18 USC 2709. Caproni notified the OIG in March 2009 that the FBI is revising its June 1, 2007 guidance in light of the OLC opinion.

How much do you want to bet those "certain other acting officials" signed other documentation that would be even more interesting? In any case, with this OLC opinion, FBI eliminated one problem with the story it told about how it had cleaned up its exigent letter problem, by verifying that all those who had signed retroactive authorizations were legally authorized to do so.

But that left the November 5, 2008 OLC opinion, with Glenn Fine continuing to work on both the exigent letter report and (as I point out here) his report on the warrantless wiretapping program.

Fine used the OLC opinion's comments on "sneak peeks" to argue that it also ruled out of use of hot numbers (in which a provider "follows" a number and tells the FBI if there is activity on it). (PDF 100 to 101)

> [T]he Department's Office of Legal Counsel concluded, and we agree, that the ECPA ordinarily bars communications service providers from telling the FBI, prior to service of legal process, whether a particular account exists. We also concluded that if that type of information falls within the ambit of "a record or other information pertaining to a subscriber to or customer of such service" under 18 USC 2702(a)(3), so does the existence of calling activity by particular hot telephone numbers, absent a qualifying emergency under 18 USC 2702(c)(4).
>
> [snip]
>
> Therefore, we believe that the practice of obtaining calling activity information about how numbers in these matters without service of legal process violated the ECPA.
>
> [snip]
>
> We believe the FBI should carefully review the circumstances in which FBI personnel asked the on-site communications service providers [redacted] "hot numbers" to enable the Department to determine if the FBI obtained calling activity information under circumstances that trigger discovery or other obligations in any criminal investigations or prosecutions.

And Fine goes on in his report to read the 2008 memo fairly broadly.

> On November 5, 2008, the OLC issued its legal opinion on the three questions posed by the FBI. In evaluating if a provider could tell the FBI consistent with the ECPA "whether a provider serves a particular subscriber or a particular phone number," the OLC concluded that the ECPA "bars providers from complying

> with such requests." In reaching its conclusion, the OLC opined that the "phrase 'record or other information pertaining to a subscriber' [in 18 USC 2702(a)(3)] is broad" and that since the "information [requested by the FBI] is associated with a particular subscriber, even if that subscriber's name is unknown" it cannot be disclosed under the ECPA unless the disclosure falls within one of the ECPA exceptions.

Which brings us to the conclusions that Fine made by July 2009, when the FBI asked OLC for another memo. We know his draft of the warrantless wiretap program warned that DOJ might need to reveal how that information was collected to terrorism defendants.

> Based upon its review of DOJ's handling of these issues, the DOJ OIG recommends that DOJ assess its discovery obligations regarding PSP-derived information, if any, in international terrorism prosecutions. The DOJ OIG also recommends that DOJ carefully consider whether it must re-examine past cases to see whether potentially discoverable but undisclosed Rule 16 or Brady material was collected under the PSP, and take appropriate steps to ensure that it has complied with its discovery obligations in such cases. In addition, the DOJ OIG recommends that DOJ implement a procedure to identify PSP-derived information, if any, that may be associated with international terrorism cases currently pending or likely to be brought in the future and evaluate whether such information should be disclosed in light of the government's discovery obligations under Rule 16 and Brady.

And the exigent letters IG report recommended that DOJ review existing FISA surveillance to

make sure it didn't come from improperly collected information. (PDF 141 to 142; 301)

> We recommend that the FBI, in conjunction with the NSD, should determine whether any FISA Court orders for electronic surveillance or pen register/trap and trace devices currently in place relied upon declarations containing FBI statements as to the source of subscriber information for telephone numbers listed in exigent letters or the 11 blanket NSLs. If the FBI and the NSD identify any such pending orders, we recommend that the FBI and the NSD determine if any of the statements characterizing the source of subscriber information are inaccurate or incomplete. If any declarations are identified as containing inaccurate or incomplete statements, we recommend that the FBI and the NSD determine whether any of these matters should be referred to the FBI Inspection Division or the Department's Office of Professional Responsibility for further review.

It also recommended that DOJ review to make sure information was not collected pursuant to hot numbers.

> The FBI should carefully review the circumstances in which FBI personnel asked the on-site communications service providers [redacted] on specified "hot numbers" to enable the Department to determine if the FBI obtained calling activity information under circumstances that trigger discovery or other obligations in any criminal investigations or prosecutions.

Curiously, however, he does not warn DOJ about information collected using communities of interest (he says it can be appropriate if the

person approving the EC agrees that the community itself is relevant to the investigation, but he makes clear that that didn't happen with the thousands of numbers now in FBI databases collected through exigent letters; he also says they need to develop better guidelines on its use, and he says they need to make sure they haven't effectively subpoenaed other journalist call records in addition to those identified in this report). And he does not warn that the fruit of sneak peeks should be purged (perhaps because the FBI claims that the 2008 OLC opinion authorized it, even though, Fine claims, they misrepresented what they were doing).

Now, that left two obvious loopholes apparently still open. The 2008 OLC opinion contained this caveat:

> The conclusions in this memorandum apply only to disclosures under section 2709. We do not address other statutory provisions under which law enforcement officers may get information pertaining to electronic communications. See, e.g., 18 U.S.C. § 2702(b)(8), (c)(4) (West Supp. 2008) (authorizing disclosure of communications and customer records to governmental entities if the provider reasonably "believes that an emergency" involving "danger of death or serious physical injury to any person" justifies disclosure of the information); id. § 2703(a) (authorizing disclosure to a governmental entity of "the contents of a wire or electronic communication" pursuant to a warrant).

And it also did not take a stand on purging information.

> In a passage that the FBI Memorandum cites, the House Judiciary Committee Report for the 1993 amendments stated that "[t]he Committee intends . . . that the authority to obtain subscriber

> information . . . under section 2709 does not require communications service providers to create records which they do not maintain in the ordinary course of business." H.R. Rep. No. 103-46, at 3 (1993), reprinted in 1993 U.S.C.C.A.N. 1913, 1915. While the legislative history of ECPA therefore suggests that the statute does not require a provider to "create" new records, it does not follow that the statute would authorize the FBI to seek, or the provider to disclose, any records simply because the provider has already created them in the ordinary course of business. The universe of records subject to an NSL is still restricted to the types listed in the statute.5
>
> 5 We do not address whether the FBI must purge its files of any additional information given to it by communications providers.

I find this particular one interesting: In 2007 Fine said the FBI would have to purge improperly collected information. We know that in fall 2007, the FBI did an extensive purge of information collected pursuant to exigent letters (purging up to a third of what it had gotten from some providers). But now his discussion on FISA and hot number reviews doesn't include a discussion of purging this information? Is there some opinion somewhere that says that doesn't have to occur? Or is it part of the January 8, 2010 opinion?

In any case, some time around or after July 2009, the FBI asked OLC for yet another opinion. Fine describes it this way:

> The FBI presented the issue to the OLC as follows: "Whether Chapter 121 of Title 18 of the United States Code applies to call detail records associated [2.5 lines redacted]

And he describes the response this way:

> On January 8, 2010, the OLC issued its opinion, concluding that the ECPA "would not forbid electronic communications service providers [three lines redacted]281 In short, the OLC agreed with the FBI that under certain circumstances [~2 words redacted] allows the FBI to ask for and obtain these records on a voluntary basis from the providers, without legal process or a qualifying emergency.

While we have only hints at what remaining problem this OLC opinion was designed to solve (did it solve discovery problems associated with FISA collections and/or community of interest collections?), it seems to be yet another attempt to clear up ongoing problems with the illegal collection that occurred under Bush.