

افغانستان آزاد – آزاد افغانستان

AA-AA

چو کشور نیاشد تن من مباد بدین بوم ویر زنده یک تن مباد
همه سر به سر تن به کشتن دهیم از آن به که کشور به دشمن دهیم

www.afgazad.com

afgazad@gmail.com

European Languages

زبان های اروپایی

<http://www.counterpunch.org/2013/08/13/obama-versus-snowden/>

Obama Versus Snowden

Of Words, Deeds and the Lawful Path

by ROB HAGER

August 13, 2013

Obama's recent media counteroffensive against Edward Snowden is unquestionably a tribute to Edward Snowden, who so far has managed to secure an offshore sanctuary from the strongest most far-flung empire in history where he might continue his premeditated acts of citizenship. Snowden's success and worldwide popularity for his sophisticated fight on behalf of his version of the Constitution has required the propagandist in chief to personally enter the fray against him. If Snowden ever does face a criminal jury, the trial will be very much a high-stakes popularity contest between Obama and Snowden.

Obama's approval ratings have receded back to the sub-50% range where they lingered from early in his first term, shortly after he revealed his inner Republican to the surprise of former avid supporters. The Romney bump around election time last year did not last. It soon succumbed to the surveillance state scandal initiated by Snowden, temporizing on the Trayvon Martin and Voting Rights cases, and such nagging Republican questions as those about Benghazi.

So on Friday, August 9, 2013 Obama emerged from his scripted safety zone to perform one of his rare solo press conferences, his first since Snowden went to Hong Kong. This was Obama's turn to put some points on the board which Snowden has mostly dominated. It was preceded the day before by shutting down Snowden's email server and a turn on Jay Leno, while what seems

to have been a concocted embassy terrorism alert Obama could bill as “recent ... threats to our nation,” punctuated by a cold-war evoking snub of Putin, set the right fearful undertone for his appearance before the press.

Taking the offensive, Obama scored his main objective by impugning Snowden’s motives, in effect prejudging Snowden’s legal defense by saying “I don’t think Mr. Snowden was a patriot.” “Quite a statement,” said Amy Davidson for the New Yorker, “about a man [Obama] has never spoken to, and who has not yet been convicted of anything.” In his personal war on whistle-blowers Obama has previously taken this executive-action “convict first in public, try later in private” approach. Obama was criticized for doing the same to Bradley Manning, though the Commander in Chief did get his message through to his troops to deliver the constitutionally illegitimate court-martial Espionage Act conviction he wanted.

Borrowing this page from his Manning victory manual to attack Snowden personally, Obama joined other politicians who, as Snowden’s father has said, “poisoned the well, so to speak, in terms of a potential jury pool.” That is Obama’s broader purpose. An acquittal of Snowden, whether in court or by the jury of public opinion, is tantamount to an indictment of Obama. This is a zero sum game. “After all, the fear seems to be that Snowden has to be a traitor or Obama would look like a tyrant,” as Jonathan Turley explains.

Snowden’s legal defense is essentially his patriotism, placing his loyalty to the Constitution he loves above very strong personal considerations. Only a jury can decide if his patriotic motive is well-founded in what they themselves find reasonable and if his prosecution itself is a violation of the Constitution.

Obama’s career depends upon his own fans judging him on his words, not his deeds. Those fans should symmetrically grant Snowden the same indulgence. Snowden’s only expressed motives are patriotic. He says: “I will be satisfied if the federation of secret law, unequal pardon and irresistible executive powers that rule the world that I love are revealed even for an instant. ... I don’t want public attention because I don’t want the story to be about me. I want it to be about what the US government is doing. ... I really want the focus to be on these documents and the debate which I hope this will trigger among citizens around the globe about what kind of world we want to live in. My sole motive is to inform the public as to that which is done in their name and that which is done against them.” Snowden’s words seem to match his deeds.

Is the problem that Obama does not know patriotism when he sees it? It isn’t Snowden that is accused of violating the oath that he swore when he joined the military to support the Constitution. Obama is the one wrapping his arms around acts that many Americans consider to be fundamental violations of the Constitution and to constitute the essential practice of a totalitarian police state that the Constitution is designed to prevent. Obama may have some other definition of what makes a patriot. But you cannot love the country if you do not above all love and support the Constitution that created it and defines it. If Obama wants to apply another test, then Obama needs to amend the Constitution to change the constitutional oaths that now apply to him, as well as to the military and all other state and federal executive officials and judges.

For many people it is Obama's own patriotism, his fidelity to the Constitution, let alone truth, that is far more credibly in question than Snowden's. That leads to the defense portion of Obama's August 9 performance.

Obama announced that "at my direction the Department of Justice will make public the legal rationale for the government's collection activities." This unsigned and unsourced Administration White Paper document is embraced by Obama as his legal defense against the evidence provided by the Snowden revelations that Obama has blatantly violated the Fourth Amendment. This paper does not present a strong legal defense, and it does not even have a John Yoo willing to put his name on it. It's arguments are predictably weak, as was explained by the author in detail in a previous article, because Obama's case is weak. That is why Obama adopts the Vince Lombardi tactic: "The best defense is a good offense."

The oaths

Obama should remember his oath of office, having recited it almost three times. But in the offensive portion of his August 9 program Obama starts out by spinning his way out of that oath, misstating the paramount responsibility it imposes on him. Obama redraws constitutional priorities by defining "[his] number one responsibility as commander in chief, and that's keeping the American people safe."

There is no separate constitutional oath for the office of "commander in chief." The first and transcendent responsibility to which Obama is sworn, both as president and as "commander in chief," other than generally carrying out his presidential duties, is: "to the best of my Ability, preserve, protect and defend the Constitution of the United States." Art. II, Sec. 1, Cl 8. This is in addition to the lesser oath that Snowden and Manning also took to "support this Constitution."

Terrorism – the threat that Obama is prioritizing over his oath of office – is a tactic by definition limited to violence against soft civilian targets. By definition, then, those who would use the tactic of terrorism cannot themselves inflict any damage on the Constitution, any more than other private crimes of violence can threaten the Constitution. Only fear of terrorism can do that. So defending against terrorism itself is simply irrelevant to the paramount obligation to defend the Constitution, unless it is used, as Obama does, to excuse fearful undermining of the Constitution. To apply FDR's warning, it is the fear of terrorism that must be avoided to defend the Constitution.

Terrorism involves criminal activity that falls mainly within the general police powers of the states. States have responsibility for the general public safety in our federal system. The Constitution deliberately did not give the federal government such general police powers for the very reason that it could be used by a powerful central government to establish a national tyranny, just as Obama is doing.

Such action by a former Senior Lecturer on the Constitution from the University of Chicago has raised legitimate questions about his actual familiarity with the document. It is worth remembering, therefore, that the only mention of the word "Safety" in the Constitution is found under the powers of Congress, not of the president, in the habeas corpus suspension clause. Art.

I, Sec. 9 (2). The only other similar concessions of liberty that the Constitution makes to safety is, in time of war, to waive indictment of active duty military by a Grand Jury, Amend. V, and to allow the somewhat archaic-sounding quartering of soldiers “in any house”[1] according to law. Amend. III.

The preamble of the Constitution which mentions “the common defense” does not elevate that objective above the other fundamental goals of justice, general welfare and the blessings of liberty. The Declaration of Independence did not announce a new government dedicated to “life, liberty, and the pursuit of *safety*.” Pursuit of safety as an ultimate goal is for cowards. It did not, in Lincoln’s immortal words, bring “forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created *safe*.” There would have been no Revolution against tyranny, no Declaration, no Constitution, no abolition of slavery had the founders and later patriots prioritized their own safety. Patriots like Snowden and Manning did not prioritize their own safety. A free people does not prioritize their own safety if they want to retain their liberty.

The Constitution was written for a nation embarked on a brave new mission in pursuit of self-determined justice, equality, and the blessings of liberty. Having defeated the strongest empire in the world the founders were less worried about the ability of a free people to defend themselves against enemies from without than preventing enemies from within, especially their own government, from subverting the unique republic they had created. They wrote a charter that is a road-map for preventing tyranny by limiting government powers, not chasing the fantasy of pursuing perfect safety by expanding those powers. Obama’s revised Constitution for cowards – where somehow “safety” becomes the “number one responsibility” of its chief executive – allows tyranny to flourish, fertilized by often manufactured fears of little understood threats.

A step ahead of – or months behind – Snowden?

Couched in the watchword of all tyrants, “we’re here to help you,” Obama’s press conference tried to spin to himself the credit for making NSA spying more transparent. Since Edward Snowden already accomplished that, Obama, makes a major point that he had “called for a thorough review of our surveillance operations” on May 23, 2013, just before Snowden blew the whistle on them. But his supposed “call” occurred three days *after* Snowden left for Hong Kong, weeks after Snowden had started gathering documents, and months after he started corresponding with the well-known gadfly journalist Glenn Greenwald. Are we to believe that Obama’s vast expensive algorithm-driven Panopticon empire was totally clueless about a defector from inside the surveillance state itself who had run off with a good portion of their state secrets?

Obama impugns Snowden’s motives without providing any evidence why we should accept such a cynical view of what by all appearances is and exemplary demonstration of democratic citizenship. Obama speaks of “Mr. Snowden’s leaks.” repeatedly evoking the political conniving associated with the “I” word while altogether avoiding the correct principled term, “whistle-blower.”

The real question of motives is the one posed by Snowden, who describes a system of spying “which is done against the [e] public.” That Obama’s Panopticon seems incapable of stopping either what might have been a massive espionage operation from within if accomplished by one with different motives than Snowden’s or the Boston bomber’s act of terror suggests that the system might have such a different purpose and design than stopping terror. These failures do tend to support Snowden’s allegation that the surveillance state is instead designed to oppress citizens by gathering information about them like any Stasi state aspires to do. There is considerable evidence that the design of the system actually prevents detecting Obama’s “needle in the haystack” or drink from the fire-hose needed to detect such occasional threats, since Obama’s system is too obsessed with the altogether different objective of spying on the people themselves while keeping information about their government from the people.

Had Obama actually made a speech advocating the thorough review that he claims he did, there would be ground for suspicion about the timing, as suggested above. It might then be surmised that the system was working, Snowden detected, and Obama intentionally anticipated Snowden’s revelations, by getting out in front with his proposal for serious reform. But the vast gulf that normally resides between Obama’s word and deed, in the nature of the friendly-fascist, velvet draped tyranny he represents, always requires fact checking for the big lie. As Der Spiegel opined: “Soft totalitarianism is still totalitarianism.”

So when Obama claims on August 9, “I called for a thorough review of our surveillance operations before Mr. Snowden made these leaks,” it does not surprise to find no such phrase in his May 23, 2013 speech at the National Defense University. That would have been news. It was not. Instead what we do find is the same tired equivocating platitudes that we now know have no relationship to the single iron fist Obama consistently uses to crush all civil liberties, aside from those identity issues where considerations of profits and power of his corporate sponsors are simply not implicated.

None but the most naïve have retained any hope that Obama’s verbal acknowledgments of constitutional values and limits have any relationship to his actual behavior which sets records for Espionage Act prosecutions, sends New York Times journalist James Risen to jail, drone assassinate Americans without due process, seizes NDAA authority for indefinite detention, and so forth. Snowden would have been uncharacteristically naïve to think that any such “call” by Obama would actually be matched by any significant implementing action.

What Obama actually said, accordingly, was “in the years to come, we will have to keep working hard to strike the appropriate balance between our need for security and preserving those freedoms that make us who we are. That means reviewing the authorities of law enforcement so we can intercept new types of communication, but also build in privacy protections to prevent abuse. ... And that means ,, having a strong privacy and civil liberties board to review those issues where our counter-terrorism efforts and our values may come into tension.”

Obama’s transparency proposals

1. A New Board? Such a board was also among Obama's four point plan announced August 9 as an alternative reform to Snowden's sunshine approach to protecting civil liberties. Obama reported on August 9 that "we're forming a high level group of outside experts." Actually Obama has already formed such a Board, by appointing the government officials who comprise a high level ex officio group of presumed experts, many of them from "outside" the then Bush administration which had itself been caught in unconstitutional spying on Americans.

Obama's May 23d mention of such a Board may have referred to this President's Board on Safeguarding Americans' Civil Liberties created by George W. Bush's Executive Order 13353 of August 27, 2004. Or it may have referred to the "Privacy and Civil Liberties Oversight Board" Congress created in 2004, which Obama expressly mentioned in his prepared August 9 presentation, and which under current law is already "established as an independent agency within the executive branch." It latter Board is comprised of experts who are required by law to not be government officials, and who have broad legal powers to do the same task what Obama says he wants to "form" such a Board do. Indeed the law requires that the Board shall—

“(1) analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and

“(2) ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism. See Public Law 110–53, Aug. 3, 2007, Secs. 801-803.

Of course the existence of this Board with all Obama appointees has had no impact on Obama's constitutional violations. So even though he has already appointed exactly the same Board that he deceptively says he is "forming," this "independent Board" fig leaf /rubber stamp combination is such a tried and true propaganda mechanism that Obama goes back to the same well again to either recreate or just pretend that he is newly creating such a Board, which should have been functioning all along under federal law. Obama's statement "if I had simply appointed this review board" reinforces the deception as if he has not already appointed two boards, one official and one independent.

Obama says "I'm tasking this independent group to ... consider how we can maintain the trust of the people." It thus appears that Obama is assigning the Board propaganda responsibilities not expressly included in their governing statute.

After Snowden's revelations people are less likely to trust the government who is spying on them, and have like James Clapper been lying about it. They may not obey when government officials tell the people to just never mind, This when "independent expert," non-government propagandists are needed to put lipstick on the pig. This is not a reform for greater transparency. This is an age-old propaganda technique used famously in the Warren Commission, the 9/11 Commission and other such "independent groups" designed to "maintain the trust of the people" in government lies and half truths. And in this case, it is not even new. Obama is deceptively referring to a propaganda mechanism already in place as if it is a his new initiative on his four point program.

Obama depends upon a cooperative mass media to keep the public uninformed about such transparent chicanery as his pretense of initiating a new reform that already exists.

2. Foreign Intelligence Surveillance “Court.” In a similar spirit of announcing new propaganda initiatives as if they are reforms, a second of Obama’s four proposals was that “we should consider some additional changes to the FISC“ which would dress up this unelected group of judges that has been secretly exercising legislative powers so as to make it look more like a court. But adding some notional adversary process to a secret tribunal whose job has been to collude with the executive branch in exercising essentially legislative, not judicial, powers to approve mass surveillance will not convert FISC involvement in anything other than individual cases into a proper judicial process.

This is again mostly window dressing for a violation of the Constitution’s separation of powers, what James Madison, in *Federalist* #47, “pronounced the very definition of tyranny.” The purpose is the propaganda goal that Obama stated, “to improve the public’s confidence,” not to improve his own compliance with the Constitution, or the FISC’s, which Obama rather thinks has done “a fine job.”

3. Patriot Act. In another of the four proposals Obama said he “will work with Congress to pursue appropriate reforms to Section 215 of the Patriot Act, the program that collects telephone records.” Since a large bi-partisan minority of back-benchers in Congress already worked on their own reform that nearly cut back Obama’s program to constitutional proportions, it is no surprise that Obama would want to “work with Congress” to derail likely future such efforts at real reform by substituting some innocuous change that he can spin as reform.

Obama and his leadership vigorously opposed the Amash reform Amendment. As Rep. Amash tweeted “Pres Obama opposes my #NSA amendment, but American people overwhelmingly support it, ... Will your Rep stand with the WH or the Constitution?” Obama has no intention of actually confining what he calls his “programmatically surveillance” within the framework of warrants connected to individual judicial cases that the Constitution requires. As former NSA and CIA director Michael Hayden observed, Obama “didn’t suggest he was going to operationally change this program,” which he thinks is “lawful, effective, and appropriate” as it is.

Again, these Patriot Act proposals will, as Obama said, be designed “to give the American people additional confidence” without making any operational change, but only such cosmetic changes are necessary to defuse the nearly successful defense of the Constitution led by Reps. Amash and Conyers.

4. NSA. Finally Obama proposes a new propaganda organ at NSA – a website that “will give Americans and the world the ability to learn more about what our intelligence community does and what it doesn’t do, how it carries out its mission, and why it does so,” and also an NSA “full time civil liberties and privacy officer.” Before the Bush/Obama militarization of domestic law enforcement, such inward looking measures were unnecessary because the military, under the 1878 Posse Comitatus Act, was excluded from domestic law enforcement. The FBI already has a privacy officer and the Department of Homeland Security has an Officer for Civil Rights

and Civil Liberties who both sit on the existing Board on Safeguarding Americans' Civil Liberties discussed above. By law the Director of National Intelligence, and the Director of the Central Intelligence Agency are both required to have such an officer. These officers have accomplished no more than a new counterpart at NSA will in assuring compliance with the Constitution. Such changes simply serve to institutionalize the military's new role in domestic law enforcement while expanding the coordination mechanisms designed to cover-up, not prevent, constitutional and other violations.

Obama's bundle of reforms are presumably the product of his desired "orderly and lawful process to ... come up with appropriate reforms" that he patronizingly criticizes Snowden with stereotypical activist short-circuiting "in a very passionate, but not always fully informed way." Of course Snowden has been the very model of phlegmatic intelligent decorum, letting his well-informed documentation do most the talking with no arm waving whatsoever. Central-casting could not have better assigned the role of Obama's foil to disarm his stylistic quarrel with activists, who his former Chief of Staff more colorfully called "f—ing retarded." But Obama doesn't have much, so he is sticking with his and his former chief's stereotype.

Obama's "appropriate reforms" add up to no more than any new government propaganda initiative "designed to ensure that the American people can trust that our efforts are in line with our interests and our values" without actually so aligning them. Publicity about these "steps ... we're going to be taking very shortly" is aimed at Snowden and the heightened public consciousness of constitutional violations he has stimulated. They have nothing to do with remedying those violations. They are designed to to win a PR battle.

Legal advice about the lawful path

Like the pretense that he had already announced pre-Snowden his intention to make such meaningless proposals, Obama similarly suggests in cleverly deceptive language that he had already signed an Executive Order extending federal whistle blower protection to the intelligence community that Snowden should have used. Obama thus argues there "were other avenues available for somebody whose conscience was stirred and thought that they needed to question government actions." Obama would have us believe the indefinite "somebody" he refers to must include Snowden. But again, the mandatory research of Obama's deceptions reveals that it refers to somebody else.

The referenced "Presidential Policy Directive 19, signed by Obama out of public view on Oct. 10, 2012, has been criticized as lacking due process protection and because PPD 19 does not cover contractor employees in any event. Even the DOD implementation of PPD-19 ordered on July 8, 2013, in its Directive-type Memorandum (DTM) 13-008, after being urged to do so by a respected whistle blower organization, according to that organization's August 7, 2013 statement, "notably neglected to address intelligence community contractors, like Edward Snowden, who may continue to turn to outside channels if the DoD and other agencies do not extend PPD-19 protections to contractors with access to classified information."

Another whistle blower advocate warned: "We are concerned that national security employees may think that this directive gives them some much-needed protections when it does not," The

new protection was solely for internal reports of fraud waste and abuse. The Pentagon itself had released an assessment in 2012 criticizing denial or protection by the relevant office of the Inspector General for, among other reasons, insufficient evidence to support findings of non-reprisal against whistle-blowers and erroneously defining as harmless retaliatory actions against whistle-blowers in most cases.

The protection that Obama invokes for that “somebody” who might limit their whistle blowing to the accepted channels is in fact inadequate to protect them from great risk of internal reprisals, were they to believe Obama. It is naïve to think a bureaucracy works any other way than to protect itself by suppressing dissent. Obama’s reference to his ineffective PPD-19 was a propaganda ploy to disguise the truth – and an essential element of Snowden’s defense – that Snowden’s only practical means to defend the Constitution was to appeal to the public.

Not only did Obama wrongly suggest that he had extended whistle blower protections that would cover Snowden, protections that are highly defective in any case, but they have not even yet been extended to cover contractor employees like Snowden. The reader can decide if this is just another mistake by Obama or the kind of calculated mendacity that close observers have come to routinely expect from him.

Conclusion

Giving more negligent, had it been solicited, legal advice Obama asserts: “If, in fact, he believes that what he did was right, then ... he can come here, appear before the court with a lawyer and make his case.” As a patriot, Snowden has better legal alternatives for the time being. Obama’s purpose is to give credence to the concept that Snowden’s decision to take refuge abroad rather than subject himself to the possible torture and silencing and denial of constitutional rights inflicted upon Bradley Manning somehow delegitimizes him as a patriot.

Obama thus concluded his presentation by dangling a lead-in to the question about Snowden’s patriotism that did predictably follow, saying “I believe that those who have lawfully raised their voices on behalf of privacy and civil liberties are also patriots who love our country.” Using this classic divide and conquer strategy for isolating effective activists like Snowden from others who lack his courage, Obama thus praises as patriots those who – perhaps as professional activists providing Obama support and cover – have “lawfully” (and impotently) merely “raised their voices,” and been ignored or who, as whistle-blowers, have buried their more credible voices within the bureaucracy and risked reprisals for that.

To Obama a whistle blower who puts his oath of loyalty to the Constitution above considerations of legalities applied to keep those violations secret from the public, and who actually exposes criminally unconstitutional conduct that should trump such lesser legalities in a fair court of law, and who thereby also stimulates an essential national debate on the subject sufficient to draw Obama out of his lair to face a press conference for the first time since April, is not a patriot because he has been indicted. Indicted by the constitutional offenders themselves. Is a more technical principle-avoidance argument even possible?

Obama's unfamiliarity with the unscripted performance format was displayed when he allegedly himself violated the law and judicial secrecy during the press conference question period. He did so in the interest of scoring a political point that he is on the trail of the Benghazi attackers. Revealing a sealed indictment would be acting "unlawfully" in pursuit of a higher political purpose. Elsewhere Obama has said: "If I was to release stuff, information that I'm not authorized to release, I'm breaking the law." That is what he is accused of doing at his press conference while he was in the very act of hanging a hyper-technical "broke the law" sign around Snowden's neck.

From Obama's selective release of politically expedient leaks we already know about the asymmetric enforcement of such obligations in the Obama administration. Obama's uneven practice falls within a general category that Snowden labeled "unequal pardon." Obama can pardon his own law-breaking or James Clapper's lies, but no similar leniency about technical legal violations, whether in pursuit of higher goals like the Constitution or lower goals like political point-scoring, will be shown Snowden by a guilty Obama.

Rob Hager is a public-interest litigator who filed a Supreme Court amicus brief in the 2012 Montana sequel to the Citizens United case, American Tradition Partnership, Inc. v. Bullock, and has worked as an international consultant on legal development and anti-corruption issues.

Notes.

[1] An updated application of the Third Amendment could perceive permanent NSA spying on one's private electronic communication that originate from home as a modern form of quartering. A living Constitution requires such re-conceptualization for modern application to new technologies of such deeper principles as those embodied in the Third Amendment banning military imposition upon civilian life without consent except in case of war within the United States.