

# **TRUMP'S RENEGES ON PROMISED SIGNIFICANT FOURTH AMENDMENT FILING**

Trump's court filing was more performance art and serial confession. What it was not is the promised significant Fourth Amendment filing he promised.

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# **THE UNLEARNED LESSONS OF OBAMA'S GUNS, GOD, AND RELIGION COMMENTS**

Hillary forgot one of the most important lessons of the 2008 primary: that you need to convince rural white voters – those famously clinging to their guns, god, and religion – of the importance of governance.

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# **FDL: LOOKING AT THINGS AS THEY WERE; DREAMING OF THINGS THAT NEVER WOULD BE**



There  
are  
multiple  
better  
voices  
here to  
address  
the  
apparent

demise of Firedoglake, whether briefly or at length. I was, in a way, an interloper by chance. By fortune, actually. Because I was asked, for inexplicable reasons I will never fully understand, but will always treasure, to join Emptywheel when it morphed from The Last Hurrah into the Emptywheel blog at Firedoglake. Yes, I had been a decent contributor to both Next Hurrah, and, often, FDL, but still it was a bit of a shock when it came.

I can honestly say I, as a result, encountered some of the finest and most genuine people in my life. That happened because of FDL, both as to the lifetime friendships with people that are here with us, including, most notably, Marcy, and all the others. Marcy, Rayne, Jim White, Ed Walker, Rosalind....and, please, let us not forget Mary and some of the others no longer here. All that came, at least for me, out of seeing Scooter Libby coverage early on nearly a decade ago. At FDL.

This medium may be digital, but it has wings and real life beyond the URL's and binary code or whatever. The people I have met and interacted with as a result of being around FDL were, with little exception, remarkable, intelligent, wonderful and I think the world has been made better by them.

So, to Jane Hamsher, Christy Hardin Smith, Siun, Pachacutec, Richard Taylor, Karl, Suzanne, Bev Wright (Bev and Book Salon was one of the most awesome things ever), Ellie, each and every one of the fantastic moderators who were the ones who kept the enterprise really alive for so long, and a host of others that allowed me to

participate with them, thank you. There are too many to list, and I love one and all. You will all be missed, and I apologize to the too many other friends I met there and have not listed. You know who you are, and thank you.

I am starting to see eulogies all over the web, and most are quite decent. FDL was right, and early so, about the rule of law, the Cheney Administration, torture, surveillance, marriage equality and ACA/Obamacare, just to name a few of the plethora of topics breached on her pages. The voices have not died, but, now, the common enterprise has.

I will leave it to others to say where exactly FDL fits into the hierarchy and history of the blogosphere, but it was certainly up there. Thanks, and vaya con dios FDL.

Update, from emptywheel: bmaz forgot to mention DDay, but I'm certain it was an oversight.

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## THE DISTURBING PARADOX OF THE DAVID BARRON NOMINATION

Barack Obama has a preternatural preference for ivory tower elites from Harvard when it comes to judicial and executive branch appointees, and David Barron is the latest



example. The White House is in the final stages of an all out push to insure David Barron gets confirmed to a lifetime Article III seat on the

First Circuit.

In this regard, Mr. Barron has gotten exactly the kind of fervent support and back channel whipping the Obama White House denied Goodwin Liu, and refused to give to the nominee at OLC that David Barron stood as the designated and approved Obama acting placeholder for, Dawn Johnsen.

It turns out Mr. Obama and his White House shop really can give appropriate support to nominees if they care, which seemed to be a trait entirely lacking earlier in the Obama Presidency. And by giving the ill taken legal cover to Mr. Obama for the extrajudicial execution of American citizens, that Obama had already attempted once without, Mr. Barron certainly earned the support of the Obama White House.

It would be wonderful if Mr. Obama were to give support to candidates for judicial seats and key legal agencies who protect the Constitution instead of shredding it for convenience, but it appears to not be in the offing all that consistently. Obama has never been the same since blowback from the release of the Torture Memos when he first took office. Even Federal judges like Mary Schroeder and Bill Canby who, less than a month after Obama took office, were stunned by the about face, and wholesale adoption, by Obama of the Bush/Cheney security state protocols. From a New York Times article at the moment:

During the campaign, Mr. Obama harshly criticized the Bush administration's treatment of detainees, and he has broken with that administration on questions like whether to keep open the prison camp at Guantánamo Bay, Cuba. But a government lawyer, Douglas N. Letter, made the same state-secrets argument on Monday, startling several judges on the United States Court of Appeals for the Ninth Circuit.

"Is there anything material that has happened" that might have caused the Justice Department to shift its views, asked Judge Mary M. Schroeder, an appointee of President Jimmy Carter, coyly referring to the recent election.

"No, your honor," Mr. Letter replied.

Judge Schroeder asked, "The change in administration has no bearing?"

Once more, he said, "No, Your Honor." The position he was taking in court on behalf of the government had been "thoroughly vetted with the appropriate officials within the new administration," and "these are the authorized positions," he said.

Make no mistake, from my somewhat substantial knowledge of Mary Schroeder, that was the voice of shock and dismay. But it was an early tell of who and what Barack Obama, and his administration, would be on national security issues from there forward. And so, indeed, it has been.

What was unconscionable and traitorous to the rule of law and Constitution for Obama, and the Democratic majority in the Senate, under George Bush is now just jim dandy under Barack Obama. It is intellectual weakness and cowardice of the highest order.

So we come back to the case of David Barron. Frankly, it is not hard to make the argument that what Barron has done is actually worse than the travesties of John Yoo and Jay Bybee. As unthinkable, heinous and immoral as torture is, and it is certainly all that, it is a discrete violation of domestic and international law. It is definable crime.

But what David Barron did in, at a minimum, the Awlaki Targeted Kill Memo (there are at least six other memos impinging on and controlling this issue, at a minimum of which at least one

more is known to be authored by Barron, and we don't even deign to discuss those apparently), was to attack and debase the the very foundational concept of Due Process as portrayed in the Bill of Rights. Along with Habeas Corpus, Due Process is literally the foundation of American criminal justice fairness and freedom under our Constitution.

David Barron attacked that core foundation. Sure, it is in the so called name of terrorism today, tomorrow it will justify something less in grade. And something less the day after. Such is how Constitutional degradation happens. And there is absolutely nothing so far known in Mr. Barron's handiwork to indicate it could not be adapted for use domestically if the President deems it so needed. Once untethered from the forbidden, once unthinkable Executive Branch powers always find new and easier uses. What were once vices all too easily become habits. This is exactly how the once proud Fourth Amendment has disappeared into a rabbit hole of "exceptions".

This damage to Due Process occasioned by David Barron can be quite easily argued to be more fundamental and critical to the Constitution, the Constitution every political and military officer in the United States is sworn to protect, than a temporally limited violation of criminal statutes and international norms on torture as sanctioned by Yoo and Bybee. But it is not treated that way by cheering Dems and liberals eager to confirm one of their own, a nice clean-cut Harvard man like the President, to a lifetime post to decide Constitutional law. What was detested for Jay Bybee, and would certainly be were John Yoo ever nominated for a federal judgeship, is now no big deal when it comes to David Barron. Constitutional bygones baybee; hey Barron is cool on same sex marriage, what a guy! Screw Due Process, it is just a quaint and archaic concept in a piece of parchment paper, right?

If the above were not distressing enough, the

Barron nomination was supposed to, at a minimum, be used as leverage to get public release of the Barron handiwork legally sanctioning Mr. Obama to extrajudicially execute American citizens without a whiff of Due Process or judicial determination. Did we get that? Hell no, of course not. A scam was run by the Obama White House, and the Senate and oh so attentive DC press fell for it hook, line and sinker. We got squat and Barron is on the rocket path to confirmation with nothing to show for it, and no meaningful and intelligent review of his facially deficient record of Constitutional interpretation.

Barron cleared cloture late Wednesday and is scheduled for a floor vote for confirmation today, yet release of the "redacted memo" is nowhere remotely in sight. This framing on Barron's nomination, irrespective of your ultimate position on his fitness, is a complete and utter fraud on the American citizenry in whose name it is being played. And that is just on the one Awlaki Memo that we *already know* the legal reasoning on from the self serving previous release of the "white paper" by the Administration. Discussion of the other six identified pertinent memos has dropped off the face of the earth. Booyah US Senate, way to do your job for the citizens you represent! Or not.

Personally, there is more than sufficient information about David Barron's situational legal, and moral, ethics in the white paper alone to deem him unfit for a lifetime Article III confirmed seat on a Circuit Court of Appeal.

But, even if you disagree and consider Barron fit, you should admit the American citizenry has been ripped off in this process by the Democratically led Senate, and an Obama Administration who has picked a dubious spot to finally get aggressive in support of one of their nominees.

If Goodwin Liu and Dawn Johnsen, two individuals who had proven their desire to protect the Constitution, had received this kind of support,

this country, and the world, would be a better place. Instead, Mr. Obama has reserved his all out push for a man who, instead, opted to apply situational ethics to gut the most basic Constitutional concept of Due Process. That's unacceptable, but at a minimum we should have the benefit of proper analysis of Barron's work before it happens.

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## **OBAMA WHITE HOUSE SPONSORS YOUNG AND RICH NARCISSISTIC 1% FUCKTARDS THAT WILL RUIN THE WORLD**

Proving it is never too late to shine your lame duck ass for a new generation of 1% oligarchs, Barack Obama laid open the real constituency of national politicians. And proved certain any inference that such was only the constituency and province of the GOP, Koch Brothers et. al is false.

If this is not stupid and ugly to the common Democratic fanchild, it is hard to imagine what is, or could be. From the New York Times hagiography:

On a crisp morning in late March, an elite group of 100 young philanthropists and heirs to billionaire family fortunes filed into a cozy auditorium at the White House.

Their name tags read like a catalog of the country's wealthiest and most influential clans: Rockefeller, Pritzker, Marriott. They were there for a discreet, invitation-only summit hosted by the Obama administration to



find common ground between the public sector and the so-called next-generation philanthropists, many of whom stand to inherit billions in private wealth.

“Moon shots!” one administration official said, kicking off the day on an inspirational note to embrace the White House as a partner and catalyst for putting their personal idealism into practice.

“Moon shots!”

I guess the Obama White House couldn’t fathom a better phrase for coming in their pants over big money.

If there is a more sick comment on the perverted state of US national politics, it is hard to imagine what it would be.

We are ruled by a bunch of oligarchs, and political handmaidens that kiss the oligarch’s asses and hew their beck and call. If the fact the great once and forever symbol of the common citizen “hope and change”, Barack Obama, is such a distant leader, constantly beholden to not only the future of the moneyed class, but the current too, then there is no reality for the American public.

The well-heeled group seemed receptive. “I think it’s fantastic,” said Patrick Gage, a 19-year-old heir to the multibillion-dollar Carlson hotel and hospitality fortune. “I’ve never seen anything like this before.” Mr. Gage, **physically boyish with naturally swooping Bieber bangs**, wore a conservative pinstripe suit and a white oxford shirt. His family’s Carlson company, which owns Radisson hotels, Country Inns and Suites, T.G.I. Friday’s and other brands, is an industry leader in enforcing measures to combat trafficking and involuntary prostitution.

Oh my. And holy crap.

The New York Times penned a factual report of this sick instance. Will the New York Times, Washington Post, Wall Street Journal, or any of the other august opinion pages of national press, deign themselves honest enough to write opinion and/or editorial pieces recognizing this political cancer for what it really is?


If you did not view the video, and listen to the lyrics in the video above, do so. Because that is exactly the class of “super citizens” your elected leaders are beholden to. The handful of billionaires count for far more than the actual billions of people on this earth.

Want proof? Look no further than the “liberal”, “socialist”, “Democratic” Obama White House, who just demonstrated the problem in Technicolor.

And, before you chafe, of course it would be even worse with Republicans in charge. But the question is no longer just which party is in control of the levers of power (though it DOES matter for SCOTUS), but where the values of the country really are.

It is almost impossible to fathom the country’s values are with the pimple faced, Bieber banged, teenager scions of billionaires the Obama White House so calmly and coolly glad-hands.

[Seriously, watch the video from the one, the only, fantastic Tubes:



Young and rich  
Everything I desire  
Light bulbs with shades  
in every room  
And work is play—believe me  
Nothing must come too hard  
It comes in the mail  
most everyday

Maybe our leaders should find a more representative, and morally balanced, set of leaders for the future.]

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# 50 YEARS: THAT DAY, JFK AND TODAY



Where were  
you fifty  
years ago  
today? If  
you were  
old enough  
to  
remember  
at all,  
then you

undoubtedly remember where you were on Friday  
November 22, 1963 at 12:30 pm central standard  
time.

I was at a desk, two from the rear, in the left  
most row, in Mrs. Hollingshead's first grade  
class. Each kid had their own desk, and they  
were big, made out of solid wood and heavy. They  
had to be heavy, of course, because they were  
going to protect us when we ducked and covered  
from a Soviet nuclear strike. There were, as  
there were in most elementary school classrooms  
of the day, a large clock and a big speaker on  
the wall up above the teacher's desk.

I can't remember what subject we were working  
on, but the principal's voice suddenly came over  
the loudspeaker. This alone meant there was  
something important up, because that only  
usually occurred for morning announcements at  
the start of the school day and for special  
occasions. The voice of Mr. Flake, the  
principal, was somber, halting and different;  
perhaps detached is the word. There was a  
prelude to the effect that this was a serious  
moment and that the teachers should make sure  
that all students were at their desks and that  
all, both young and old, were to pay attention.

There had occurred a tragic and shocking event

that we all needed to know about. Our attention was required.

Then the hammer fell and our little world literally caved in.

President John Fitzgerald Kennedy had been assassinated. Shot and killed in Dallas Texas. Then without a moment's pause, we were told that the nation was safe, Vice-President Johnson was in charge, the government was functioning and that we need not have any concerns about our own safety. We were not at war.

Twenty four some odd little hearts stopped, plus one from Mrs. Hollingshead. You could literally feel the life being sucked out of the room like air lost to a vacuum. Many of us began looking out the window, because no matter what Mr. Flake said, if our President was dead, we were at war and the warheads were coming. They had to be in the sky. They were going to be there.

Unlike the hokey color coded terror alerts, ginned up fear mongering of Bush/Cheney, Ashcroft and Ridge, and today the terroristic fearmongering of Keith Alexander, James Clapper, Mike Rogers and Dianne Feinstein, things were dead nuts serious at the height of the cold war. If President Kennedy had been killed, we were at war; the missiles were on their way. Had to be. Looking back, the school officials and teachers had to have been as devastated and afraid as we were, yet they were remarkable. They kept themselves in one piece, held us together, talked and comforted us into calm.

We had not been back in class from lunch break for long; it was still early afternoon in the west. Before the announcement was made, the decision by the school officials had been made to send us home. The busses would be lined up and ready to go in twenty minutes. Until then there would be a brief quiet period and then the teachers would talk to us and further calm the situation. Then off we would go to try to forge a path with our families, who would need us as much as we needed them.

Except for me and a handful of other kids. My mother was an educator and was not at home, so I and a few other similarly situated kids were kept at school until we could be picked up. Somehow it wasn't right to be inside, so we all, along with another teacher, Mrs. Thomas, went outside and sat underneath a large palm tree in front of the school. We talked about how it could be that our President, our hero, our king, was dead. Maybe he wasn't really dead, maybe it was all a mistake. Maybe Soviet troops were on their way; possibly tanks. This kind of excited me and the other boys; we perked up at this thought, tanks were cool. The Russians probably had awesome tanks. Each minute that passed made us feel a little better because there were no missiles in the sky. That was a good sign.

In about half an hour, maybe an hour, I don't know any more, my mother drove up and off we went. My mother was also reassuring. It was good to be with her; mom saying it would all be alright meant a lot. Once home, we ate and sat dumbstruck and transfixed in front of the Curtis Mathes console television the rest of the afternoon and night. We watched Walter Cronkite on CBS and Chet Huntley and David Brinkley on NBC. These men were giants of news and journalism; to say that they don't make them like that anymore is a understatement of untold proportion. Things slowly, but surely, stabilized; but it took awhile. A long while.

Well, that was my day fifty years ago. What was your day? Take a moment and reflect back and share with those of us that know the traumatic event, and help those who are younger to understand what the day was like. The palpable sorrow. The sinking, abiding fear. The comfort of teachers, friends and family. And what it means to you today, on this anniversary.

The last time I wrote this basic post, five years ago today, I ended with, inter alia, these words:

There may be another Kennedy like figure in our midst, Barack Obama. He stands to

assume office in a similarly, albeit it from different factors, troubled time. The world roils and America's existence hangs in the lurch; not from Soviet missiles, but our own selfishness, avarice and stupidity.

Well, that was hopelessly idealistic, and not yet tempered by knowledge of the real Obama that would govern, as opposed to the false "Hope and Change" guy who captured the imagination and dreams of liberals and well meaning people throughout the land. We sit in a different posture today.

There is still hope; but the real change, whether on authoritarian government, government surveillance, financial reform, liberal judicial philosophy, environmental protection, income inequality, and a host of other critical concerns still is yet to be seen.

On the fiftieth anniversary of one of our worst days, let there be hope for better ones ahead.

[Most all of this post was taken from a previous one I did five years ago. I cannot kick the vivid memories I have of November 22, 1963 as a child. It is still all I think of when I think of this day. It is that seared into who, and what I am. So, absent a few additions, it is set forth again herein]

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## THE RETURN OF THE NFL: IT'S ON!!!

[Hey there Lugnuts!! We are having a fundraiser here at Emptywheel. Help the effort out! We have been really hesitant about doing this in the past. To the best of my recollection, we have not done one at all since leaving FDL. Marcy will not toot her own horn, but I will. The

level, depth, independence, and rationality, of what Ms. Wheeler does makes most "Main Stream" and other "blogs" look feeble. And it is not just her, Jim White, Rayne and, occasionally, I who also contribute. This is a valuable forum. We live for you, but we also need your help. To the extent you can give it, it would be remarkably well placed, and much appreciated. Thank you!]

I have been being heckled about this Trash Talk stuff forever. Marcy is just cranky jonesing for football and Jim White thinks the Devil Rays count. But this ain't called "Trash Talk" for nothing you know. Pre-season fake football and baseball in the swamps are not enough. Nosirree. Not in a sophisticated joint like this.

But there was a little smattering of real college football last Saturday, so there was primordial Trash. But, now, my friends, there is REAL, professional grade, NFL football in the queue. Let it be known, unless I meet a bigger margarita pitcher and burrito that looks like this tomorrow night, there will by Saturday morning be additional MAJOR LEAGUE Trash for the weekend. NCAA, NFL and the F1 Circus at Monza (yes, that really may be the bigger story worldwide. Formula One rules; get used to it).

But, tonight, there are two games on the schedule. The biggest, of course, is a replay of last season's AFC Divisional Playoffs between the Denver Broncos and Baltimore Ravens. Ought to be a great game. Despite what the naysayers say, Peyton Manning's arm is turning bionic in its incredible strength. The Bronco's, however, are a bit wounded with Elvis Dumervil now on the Ravens and Von Miller suspended for the first six games. The Ravens have also lost a LOT of weight from last year's Superbowl team, including Ray Lewis and Ed Reed. As much as the media and fans have always focused on Ray Lewis, I cannot help but believe the absence of Ed Reed, one of the most incredible ball hawks in the history of the NFL, is every bit as big a loss. Broncos are at home and are PISSED about

that last minute loss last year to the Ravens.  
My money is on Peyton and the ARM OF HULK.

Secondarily, and I, (maybe you?) will probably have to DVR this, but the ASU Sun Devils are opening their season tonight at 10:00 pm EST against Sacramento State. Okay, this won't be much of a game. But, GO DEVILS!!

That's it for now. More later as promised. This is the best blog in the world, if I do say so from my completely neutral perch! Rock and roll my friends. Today's music is by Government Mule. Because Donkos and Peyton rock....and, because, the US Government, collectively, are a bunch of War Pigs.

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## **OPERATION BALLSACK LABOR DAY FOOTBALL TRASH TALK**

Hello. Is there anybody in there? Just nod if you can hear me.

I am not sure how well the Trash Talk Machine is greased after such egregious neglect. But, we can only do what we do, and carry on. And those skilz have NOT been forgotten jack. So saddle up cowboys and cowgirls.

You would think being a blogger is an easy, Cheetos filled, lifestyle. Not the case. It is hard work, hard work I tell ya. I have suffered the indignation of Marcy and Jim yammering about wanting "trash this" and "trash that". Weeeeelllllll that is so much SPAM! So, as I said earlier, it's not easy, you know. I get no respect!

To make a quick comment on the title of this 2013 football season opening trash, shit is truly fucked up and bullshit. We have Mr.



Constitutional Nobel Scholar President agitating to make unilateral bizarrely unnecessary war on Syria....apparently because he screwed up and drew a moronic "red line" in the sand and now has to prove he actually has balls, in addition to stupidity and hubris. The man who when seeking votes to be elected in 2007-2008 claimed war without Congressional assent was wrong, and whose Vice-President called such unsanctioned war bullshittery and an "impeachable offense", now insists without the UN, without the Brits, and with a coalition of effectively one (one who were previously described as "cheese eating surrender monkeys" not that long ago in American lore). But that is where we are now. Which is why the best name for this clusterfuck is "Operation Ballsack". Yes, it is all about Obama's balls, and his desperate need to prove he actually has a primordial pair.

Huh? Oh, wait! This was supposed to be football Trash Talk wasn't it?!?!

Yikes, better get to that then. Last night was a pretty exciting open to the NCAA 2013 schedule. The 'Ole Ball Coach Spurrier and the 'Cocks did not seem all that animated, but still clocked a fairly solid NC Tarheel team. Looked like Vady was gonna take a bite off the 'Ole Miss Rebels, but Ole Miss tailback Jeff Scott let loose with a 75 yard TD romp with 1:07 left, giving the Rebels a 39-35 last minute win. Good stuff. In other news, Lane Kiffin proves the question of why he has not been fired yet is still very salient by coaching a narrow win for Tommy Trojan over the Rainbows. Mighty Troy barely made it over the Rainbows. Yay. If that is all USC has, even the Sun Devils are going to wax them this year (a game I will be attending by the way). also, from Friday night, let me just say that Sparty has some VERY sticky fingered defenders. Look out BIG.

Well, what else is up I wonder? Hmmm, appears some fella named "Manziel" was suspended half a game for something. Guess it wasn't anything bad, cause Dez Bryant got suspended a whole

season for eating dinner with Neon Deion Sanders. I sign my name on things a lot too. I get paid to do so. Not sure who would sign thousands of items for zip, nuthin, free. Apparently the crack investigators and accountability specialists at the NCAA found no problem though. And you KNOW how sane they are, cause they banned Penn State from all bowls for four years without having any NCAA violation whatsoever present. Ugh.

Alright. Games. Real ones are being played this weekend. Battle manufactured where it should be. Naturally. By a nerd at ESPN instead of that fake Operation Obama Ballsack baloney.

The game of the weekend looks to be Georgia at Clemson. These are two top ten worthy teams, if not potential national championship contenders. Special players abound everywhere on both teams, including Sammy Watkins the super receiver for the Tigers, and Tajh Boyd his quarterback. For the Bulldogs, Aaron Murray may be the best QB in the conference, and that includes Johnny Football. Awesome game to have so early. Alabama hosting Virginia Tech is another unusual one to start off with. The Tide will roll them, but there could be a struggle. should be a way better game than the Tide expected.

Honorable mentions goes to TCU and LSU in neutral Texas, Boise State/Washington and Cal versus Northwestern. Tell us what you have and why!

The one other thing I want to address is the noggins of the NFL. As you may have heard, there was a settlement this week, and it heavily favored the NFL. The craven plantation owners admitted nothing, gave up no liability findings, and gave up a ridiculously cheap total sum as hard settlement. By the time lawyer's fees and mandatory testing etc. is deducted, it is criminal how little was gotten for a class of at risk humans. Down the road, if these class members live, they and their representatives will be screaming bloody murder. Here is an outrageously great article laying out the

factors, and doing so with the tart and  
sarcastic truth it deserves

This long Labor Day weekend's music is from the  
one, the only, Ms. Linda Ronstadt. I have a real  
affinity for Linda, and have seen her numerous  
times including a couple of very special ones.  
If there has ever been a better pure female  
vocal talent, I am not sure I have seen it.  
Pure, and with a range to die for. The singing  
voice may be silenced, but Linda is rocking on  
and fighting for the causes she believes in. And  
they are, and always have been, great, and the  
right, ones. Oh, also, in case you didn't  
notice, she had a backup band on the first  
video. Chuck Berry, Keith Richards, Robert Cray  
and some other chaps. The second is the band she  
normally toured with (including Waddy Wachtel –  
but with Mike Botts on drums instead of Russ  
Kunkel, who I always saw) and, trust me, they  
were absolutely killer, and very cool people to  
boot.

That's it for now. Let Willis, and one and all,  
rock this joint. We are Livin In The USA. All  
things considered, it is still pretty fucking  
grand. Enjoy the holiday weekend my friends.

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## **FURTHER REFLECTIONS ON THE OBAMA AMICUS BRIEF IN PROP 8**

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g a post up for discussion and the crucible of discussion here and on Twitter – and a bit of sleep – I have some further thoughts on the amicus brief filed late yesterday by the Obama Administration in *Hollingsworth v. Perry*.

My ultimate conclusions on what the Obama amicus means and portends has not changed much, but there are several things that should be said both to explain my criticism and give a little more credit to the Administration where due. First an analogy explaining my criticism of the Obama brief.

Imagine if, when *Brown v. Board of Education* was being considered, the Eisenhower Administration had instructed it's Assistant Attorney General and OLC chief, J. Lee Rankin, to amicus brief that only Kansas and a handful of other similarly situated states, but not the rest of the country where the bigotry of segregation was at its most prevalent worst, should be granted desegregation. How would history have held Mr. Eisenhower and Mr. Rankin? That is, of course, not what happened in *Brown*; the Eisenhower Administration filed an amicus brief demanding equality and desegregation for all citizens, in all states.

Messrs. Obama, Holder and Verrilli, however, fell short of such a demand for equality for all in the civil rights moment, the *Brown v. Board*, of their time. Let the record reflect they did have the courage to join the game, which is in and of itself a commendable thing, just that they did not muster the full courage to play to win for all Americans, regardless of their particular state of domicile – and especially not for those in the states with the most sexual orientation bigotry and discrimination.

In this regard, I think our friend at Daily Kos, Adam Bonin, summarized the duality of the Obama amicus quite well:

■ To be sure, the brief argues all the right things about why laws targeting

gays should be subject to heightened scrutiny, and that none of the proffered justifications for treating their relationships differently have merit ("Reference to tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles.") Still, for those who were seeking a full-throated endorsement of 50-state marriage equality, you will find this brief lacking.

That said, from the day this suit was filed in May 2009, I have suggested that this limited path is the Court would ultimately take. And it can be dangerous to advance positions which the Court might reject, especially when they are not necessary for the resolution of the instant case. But, still, there was an opportunity for boldness here, and the Obama administration did not take it. As a great man once said:

Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law – for if we are truly created equal, then surely the love we commit to one another must be equal as well.

Adam's point about the fear of overreaching when the *Perry* litigation was originally filed is a good one. As I think he has evolved to having less fear in that regard over time, the explanation for such a shift comes from the changed nature of the ground underneath the larger issue. It is a testament to the genius of the *Perry* litigation in its inception, and even more so to the way Judge Vaughn Walker framed an actual trial that laid bare, with both evidence and the inability for haters to provide credible evidence, the hollow immorality and rank bigotry of the Proponents of Proposition 8.

The space created by Judge Walker's amazing decision created the headroom for a cascade of events in DOMA cases, equality legislation in states and popular votes in other states, all in favor of marriage equality. This past election cycle provided the once unthinkable result of marriage equality going four for four in popular votes.

The ground has so seismically changed, the momentum of social conscience so strong, that we simply occupy a different place now than existed at the start of the *Perry* litigation. And that is the ground the Supreme Court will have to recognize when they hear oral arguments on March 26 in *Hollingsworth v. Perry* and March 27 in the DOMA cases.

Regardless of the messy way in which it did so, the Supreme Court (and its Chief Justice, John Roberts) proved in the ACA cases that they are aware of, and attend to, the legacy of the court. It is crystal clear that marriage equality, and equality for sexual orientation, is happening. The only question at this point is how complete, how fast.

This is the great civil rights measure of this period in American history; I find it hard to believe Justice Anthony Kennedy, who has already displayed his social conscience in *Lawrence v. Texas*, wants to be on the wrong side of history. In August of 2010, on the release of Vaughn Walker's historic trial court opinion, I quoted Linda Greenhouse in laying out why I thought Justice Kennedy would swing the majority in favor of marriage equality when *Perry* made its way to the court for review:

As the inestimable Linda Greenhouse noted recently, although the Roberts Court is increasingly dogmatically conservative, and Kagan will move it further in that direction, the overarching influence of Justice Anthony Kennedy is changing and, in some ways, declining. However, there is one irreducible characteristic of Justice

Kennedy that still seems to hold true; she wrote of Kennedy:

...he embraces whichever side he is on with full rhetorical force. Much more than Justice O'Connor, whose position at the center of the court fell to him when she left, Justice Kennedy tends to think in broad categories. It has always seemed to me that he divides the world, at least the world of government action – which is what situates a case in a constitutional framework – between the fair and the not-fair.

The money quotes of the future consideration of the certain appeal and certiorari to come on Judge Walker's decision today in *Perry v. Schwarzenegger* are:

Laws designed to bar gay men and lesbians from achieving their goals through the political process are not fair (he wrote the majority opinion striking down such a measure in a 1996 case, *Romer v. Evans*) because "central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."

.....

In a book titled "Justice Kennedy's Jurisprudence," a political scientist, Frank J. Colucci, wrote last year that Justice Kennedy is animated by an "ideal of liberty" that "independently considers whether

government actions have the effect of preventing an individual from developing his or her distinctive personality or acting according to conscience, demean a person's standing in the community, or violate essential elements of human dignity." That is, I think, a more academically elegant way of saying fair versus not-fair.

So the challenge for anyone arguing to Justice Kennedy in the courtroom, or with him as a colleague in the conference room, would seem to be to persuade him to see your case on the fair (or not-fair, depending) side of the line.

I believe that Linda is spot on the money with her analysis of what drives Anthony Kennedy in his jurisprudence. And this is exactly what his longtime friend, and Supreme Court advocate extraordinaire, Ted Olson will play on and argue when the day arrives.

Well, that day is upon us now. Honestly, with the tide of momentum headed in the direction it is, I am less and less convinced John Roberts wants to be on the wrong side of civil rights history either.

But giving the Justices the moral and sociological headroom to grant equality to *all* the citizens, in *all* the states, especially those in the discriminatory swaths of the country, is key to the cause. The *Perry* Plaintiffs have done their part. Yesterday, the Obama Administration had the opportunity to go the distance, and they pulled up slightly short.

I feared Obama might come up so short their



brief could be counterproductive; that did not occur. The song could have been, and should have been, stronger; but credit where due, they hit the necessary notes. It is filed and done, and it is overall an important and powerful thing. Perry Plaintiffs' attorney Ted Boutsous put it well:

Their arguments from start to finish would apply to other states," he said. "The argument of the day (against same-sex marriage) is the responsible pro-creation argument. The United States takes it apart piece by piece. It's those same types of arguments that are used in other jurisdictions to justify the exclusion of gays and lesbians from marriage.

And as Marcia Coyle observed in the National Law Journal BLT article the Boutsous quote above came from:

And the heightened scrutiny analysis, he added, is "exceedingly important," not just in the marriage context but in other contexts where gay men and women face discrimination.

Marcia is exactly right (and her report well worth a read), and between the Perry Plaintiffs' merits brief and the Obama Administration amicus brief, there is a foundation from which to argue to all the Justices, but especially Anthony Kennedy and John Roberts, for equality for all across the board.

Mr. Obama and Mr. Holder can help immeasurably in the coming days leading up to oral argument and decision by the Justices by using their bully pulpit to advocate for full heightened scrutiny equal protection for all, in all states. The cause endures and their duty maintains. And we, as citizens can give them the support and positive feedback to help them do so. Let the final push for full equality begin.

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# THE OBAMA DOJ FILES A TIMID BRIEF IN PERRY/PROP 8!

The news was broken, right around 2:00 pm EST by NBC's Pete Williams, that the Obama Administration would indeed file a brief in support of



marriage equality in *Hollingsworth v. Perry*. Here was the original tweet by NBC's Williams:

Obama Justice Dept to file Supreme Court amicus brief today opposing Prop 8 in Calif and expressing support for same-sex marriage to resume.

Here was Williams' followup story at NBCNews.com. The inherent problem with the original report was that it tended to indicate the Obama Administration was briefing only on the restricted *Romer v. Evans* posture heinously crafted by Judge Stephen Reinhardt in the 9th Circuit.

So, we were left hanging wondering exactly how the Obama Administration really briefed the issue, was it a limited *Romer* brief, or one for full marriage equality and heightened scrutiny under the equal protection and due process clauses that would give all citizens, nationwide, equality as I argued for earlier

this week?

We now have the answer, and the brief, and here it is the brief in all its not quite glory:

The Obama Administration has, shockingly (okay, I do not mean that in the least), tried to nuance its way and split babies. Typical cowardly bunk by Mr. Obama. Lyle Denniston at SCOTUSBlog depicted it thusly:

The historic document, though, could give the Court a way to advance gay marriage rights, without going the full step – now being advocated by two California couples who have been challenging Proposition 8 since 2009 – of declaring that marriage should be open to all same-sex couples as a constitutional requirement.

Administration sources said that President Obama was involved directly in the government's choice of whether to enter the case at all, and then in fashioning the argument that it should make. Having previously endorsed the general idea that same-sex individuals should be allowed to marry the person they love, the President was said to have felt an obligation to have his government take part in the fundamental test of marital rights that is posed by the Proposition 8 case. The President could take the opportunity to speak to the nation on the marriage question soon.

In essence, the position of the federal government would simultaneously give some support to marriage equality while showing some respect for the rights of states to regulate that institution. What the brief endorsed is what has been called the "eight-state solution" – that is, if a state already recognizes for same-sex couples all the privileges and benefits that married couples have (as

in the eight states that do so through “civil unions”) those states must go the final step and allow those couples to get married. The argument is that it violates the Constitution’s guarantee of legal equality when both same-sex and opposite-sex couples are entitled to the same marital benefits, but only the opposite-sex couples can get married.

Honestly, I think Mr. Denniston is being kind. President Obama’s position bears the mark of a full throated coward. Clearly, when Mr. Obama said this to ABC News, he was blowing smoke up the posterior of the American public:

...obviously, my personal view, which is that I think that same-sex couples should have the same rights and be treated like everybody else. And that’s something I feel very strongly about and my administration is acting on wherever we can.

That statement would say that Obama actually supports full equal protection for ALL Americans. But the position staked out today in the Administration’s brief filed by his Solicitor General puts the lie to Obama’s rhetoric.

Mr. Obama has consistently lied about his dedication to civil liberties, privacy and the Fourth Amendment, I guess it should not be shocking that he would lie about his dedication to civil rights for all, across all the states, in the form of marriage equality. And that is exactly what he has done. And as Denniston’s article makes clear, this decision bore the active participation and decision making of Obama personally. The cowardice is his to bear personally. Thanks for the fish Mr. Obama.

That is the biggest of the *Hollingsworth v. Perry* briefing news today, but certainly not the entirety of it. Also filed today, among others,

was a brief by a group of 14 states led by Massachusetts and New York and an interesting brief by NFL players Chris Kluwe and Brendon Ayanbadejo. The brief by the 14 states is helpful in the way it portrays marriage in the states, both straight and gay, and in that it, on page four, adopts the position of Olson, Boies and the Prop 8 Plaintiffs that the Supreme Court must find for full heightened scrutiny protection for sexual orientation under the Equal Protection and Due Process Clauses. The Kluwe and Ayanbadejo brief, frankly, is not particularly helpful in that regard as it only discussed the limited *Romer* based finding that would leave marriage equality up to the states.

The same group of American businesses who weighed in on the DOMA cases also filed a brief today in *Hollingsworth v. Perry*. In a more negative development, former Solicitor Walter Dellinger also filed an amicus brief today that is literally loathsome and dangerous in its argument against even giving standing for appeal to the Supreme Court. Dellinger embarrassed himself, but so too did Barack Obama. Must be something in the water of centrist Democratic thought.

So, there you have it. It was a rather important, if not quite as fulfilling as should have been, day in the life of the *Hollingsworth v. Perry* litigation. I guess credit should be given to Mr. Obama even for weighing in at all, and undoubtedly most media and pundits will slather him with praise for just that. Somehow, I cannot. The full measure of greatness was there for the taking, and Barack Obama, Eric Holder and Donald Verrilli, Jr. whiffed at the full mark of greatness. They will be remembered for their support, and their failure to truly step up will likely dissipate with time; but let it be said here and now.

In spite of the cowardly and restrictive actions by the "liberal President Obama" the cause of true heightened scrutiny protection for ALL Americans endures and lives on. Just not with

the support of the President of the United States of America. that "leader" took the cheap "states rights" cowardly way out. Let us hope Anthony M. Kennedy and the majority of the Supreme Court have higher morals and muster as men.

[As always on these Prop 8 posts, the absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Please visit Mirko and check out his stock of work.]