

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 Boutrous 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 Boutrous 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.

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.]

OBAMA, HOLDER, VERRILLI AND THE MARK OF CIVIL RIGHTS HISTORY

Leaving aside the heinous 3/5 compromise set forth by James Wilson and Roger Sherman at the founding Philadelphia Constitutional Convention, American history is marked by significant moments of dedication to civil rights for its citizens. Far from perfect, it has been a

struggle and evolution. As Ralph Waldo Emerson noted:

Nothing great was ever achieved without enthusiasm.

Which is certainly true, from the Founding Fathers, to Lincoln and the Emancipation Proclamation, to the 19th Amendment protecting the right of women to vote, to the Civil Rights Act of 1964, moments of enthusiasm, sweat, toil and, eventually, greatness mark the struggle for equality for all in the United States.

And here we are on the cusp on the next defining moment in the quest for equality for all in the US. It is not for origin, not for skin color, not for gender, but for something every bit as root fundamental, sexual identity and preference. Marriage equality, yes, but more than that, equality for all as human beings before the law and governmental function.

For all the talk of the DOMA cases, the real linchpin for the last measure of equality remains the broad mandate achievable only through *Hollingsworth v. Perry*, the Proposition 8 case. The case for full equality in *Hollingsworth* has been made beautifully, and strongly, in the Respondent's Brief penned by Ted Olson, David Boies, Theodore Boutrous and Jeremy Goldman.

But there is still a missing voice in the discussion, that of the United States government. The government has the voice, and spoke it loudly in the DOMA litigation, first in a policy declaration letter to Congress, then in lower court briefing and finally in Supreme Court briefing. Mr. Obama's initial policy declaration noted that we must "suspicious of classifications based on sexual orientation" and concluded:

...that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section

3 of DOMA is unconstitutional.

Indeed that is true, but it only takes the equality movement so far, it still leaves room and ability for bias against sexual orientation by individual states, most notably on the front of marriage equality, but potentially a host of other invidious modalities as well.

That is not good enough. It is time for the government, by and through the Obama Administration, to take the final step in cementing full equality for all citizens, not just as to the federal government, but as to the states as well. The government needs to file an amicus brief supporting full equality in *Hollingsworth v. Perry*.

Three men are in the crucible – President Barack Obama, Attorney General Eric Holder and Solicitor General Donald Verrilli, Jr. History will remember these men either way, but they have the opportunity to be remembered among the giants in civil rights history. It is a defining moment for their once and future legacy.

What a major moment in history this is, and will be, if the if the Obama Administration Solicitor General files a brief in support of full heightened scrutiny based protection for sexual orientation.

It brings to mind the scene from “Lincoln” where President Lincoln says

“Now, Now, Now”

and forces the 13th amendment through because “Now” was the moment to eradicate slavery in one fell swoop and waiting posed unconscionable risks and further damning inequality.

Such is exactly the time and place now as to the last recognized measure of fundamental equality, sexual orientation. The *Perry* Plaintiffs’ team has argued well in their brief for the broad principles of due process and equal protection heightened scrutiny that would resolve these

issues “Now”. All the stars are aligning. Prominent Republicans have filed an amicus brief. So too a broad swath of leading American businesses. Openly gay Congress members are calling for it.

Now is the time to seize the moment and eradicate discrimination across the board against gay men and women. This is the moment for enthusiasm, and President Obama, Attorney General Holder and Solicitor General Verrilli have a historic opportunity to help make it happen. This is the moment, and they need to step up. Great men take such great steps.

The time is “Now, Now, Now”.

File the amicus brief for full equality in *Hollingsworth v. Perry* gentlemen.

SENECA FALLS, SELMA, AND STONEWALL

I’ll have more to say later today about the President who declared a decade of wars are ending on the same day as he let off another drone in Yemen.

But I do think he gave a kickass speech. These two paragraphs, I’m sure, will be talked about for years.

We, the people, declare today that the most evident of truths – that all of us are created equal – is the star that guides us still; just as it guided our forebears through Seneca Falls, and Selma, and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great Mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is

inextricably bound to the freedom of every soul on Earth.

It is now our generation's task to carry on what those pioneers began. For our journey is not complete until our wives, our mothers, and daughters can earn a living equal to their efforts. 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. Our journey is not complete until no citizen is forced to wait for hours to exercise the right to vote. Our journey is not complete until we find a better way to welcome the striving, hopeful immigrants who still see America as a land of opportunity; until bright young students and engineers are enlisted in our workforce rather than expelled from our country. Our journey is not complete until all our children, from the streets of Detroit to the hills of Appalachia to the quiet lanes of Newtown, know that they are cared for, and cherished, and always safe from harm.

The best thing Obama's DOJ has done—under Assistant Attorney General Thomas Perez—has been to fight for equal rights. I'm glad Obama paid tribute to it so movingly in his speech. The full speech is below the rule.

Vice President Biden, Mr. Chief Justice, Members of the United States Congress, distinguished guests, and fellow citizens:

Each time we gather to inaugurate a president, we bear witness to the enduring strength of our Constitution. We affirm the promise of our democracy. We recall that what binds this nation together is not the colors of our skin or the

tenets of our faith or the origins of our names. What makes us exceptional – what makes us American – is our allegiance to an idea, articulated in a declaration made more than two centuries ago:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness.”

Today we continue a never-ending journey, to bridge the meaning of those words with the realities of our time. For history tells us that while these truths may be self-evident, they have never been self-executing; that while freedom is a gift from God, it must be secured by His people here on Earth. The patriots of 1776 did not fight to replace the tyranny of a king with the privileges of a few or the rule of a mob. They gave to us a Republic, a government of, and by, and for the people, entrusting each generation to keep safe our founding creed.

For more than two hundred years, we have.

Through blood drawn by lash and blood drawn by sword, we learned that no union founded on the principles of liberty and equality could survive half-slave and half-free. We made ourselves anew, and vowed to move forward together.

Together, we determined that a modern economy requires railroads and highways to speed travel and commerce; schools and colleges to train our workers.

Together, we discovered that a free market only thrives when there are rules to ensure competition and fair play.

Together, we resolved that a great nation must care for the vulnerable, and protect its people from life's worst hazards and misfortune.

Through it all, we have never relinquished our skepticism of central authority, nor have we succumbed to the fiction that all society's ills

can be cured through government alone. Our celebration of initiative and enterprise; our insistence on hard work and personal responsibility, are constants in our character.

But we have always understood that when times change, so must we; that fidelity to our founding principles requires new responses to new challenges; that preserving our individual freedoms ultimately requires collective action. For the American people can no more meet the demands of today's world by acting alone than American soldiers could have met the forces of fascism or communism with muskets and militias. No single person can train all the math and science teachers we'll need to equip our children for the future, or build the roads and networks and research labs that will bring new jobs and businesses to our shores. Now, more than ever, we must do these things together, as one nation, and one people.

This generation of Americans has been tested by crises that steeled our resolve and proved our resilience. A decade of war is now ending. An economic recovery has begun. America's possibilities are limitless, for we possess all the qualities that this world without boundaries demands: youth and drive; diversity and openness; an endless capacity for risk and a gift for reinvention. My fellow Americans, we are made for this moment, and we will seize it — so long as we seize it together.

For we, the people, understand that our country cannot succeed when a shrinking few do very well and a growing many barely make it. We believe that America's prosperity must rest upon the broad shoulders of a rising middle class. We know that America thrives when every person can find independence and pride in their work; when the wages of honest labor liberate families from the brink of hardship. We are true to our creed when a little girl born into the bleakest poverty knows that she has the same chance to succeed as anybody else, because she is an American, she is free, and she is equal, not

just in the eyes of God but also in our own.

We understand that outworn programs are inadequate to the needs of our time. We must harness new ideas and technology to remake our government, revamp our tax code, reform our schools, and empower our citizens with the skills they need to work harder, learn more, and reach higher. But while the means will change, our purpose endures: a nation that rewards the effort and determination of every single American. That is what this moment requires. That is what will give real meaning to our creed.

We, the people, still believe that every citizen deserves a basic measure of security and dignity. We must make the hard choices to reduce the cost of health care and the size of our deficit. But we reject the belief that America must choose between caring for the generation that built this country and investing in the generation that will build its future. For we remember the lessons of our past, when twilight years were spent in poverty, and parents of a child with a disability had nowhere to turn. We do not believe that in this country, freedom is reserved for the lucky, or happiness for the few. We recognize that no matter how responsibly we live our lives, any one of us, at any time, may face a job loss, or a sudden illness, or a home swept away in a terrible storm. The commitments we make to each other – through Medicare, and Medicaid, and Social Security – these things do not sap our initiative; they strengthen us. They do not make us a nation of takers; they free us to take the risks that make this country great.

We, the people, still believe that our obligations as Americans are not just to ourselves, but to all posterity. We will respond to the threat of climate change, knowing that the failure to do so would betray our children and future generations. Some may still deny the overwhelming judgment of science, but none can avoid the devastating impact of raging fires,

and crippling drought, and more powerful storms. The path towards sustainable energy sources will be long and sometimes difficult. But America cannot resist this transition; we must lead it. We cannot cede to other nations the technology that will power new jobs and new industries – we must claim its promise. That is how we will maintain our economic vitality and our national treasure – our forests and waterways; our croplands and snowcapped peaks. That is how we will preserve our planet, commanded to our care by God. That's what will lend meaning to the creed our fathers once declared.

We, the people, still believe that enduring security and lasting peace do not require perpetual war. Our brave men and women in uniform, tempered by the flames of battle, are unmatched in skill and courage. Our citizens, seared by the memory of those we have lost, know too well the price that is paid for liberty. The knowledge of their sacrifice will keep us forever vigilant against those who would do us harm. But we are also heirs to those who won the peace and not just the war, who turned sworn enemies into the surest of friends, and we must carry those lessons into this time as well.

We will defend our people and uphold our values through strength of arms and rule of law. We will show the courage to try and resolve our differences with other nations peacefully – not because we are naïve about the dangers we face, but because engagement can more durably lift suspicion and fear. America will remain the anchor of strong alliances in every corner of the globe; and we will renew those institutions that extend our capacity to manage crisis abroad, for no one has a greater stake in a peaceful world than its most powerful nation. We will support democracy from Asia to Africa; from the Americas to the Middle East, because our interests and our conscience compel us to act on behalf of those who long for freedom. And we must be a source of hope to the poor, the sick, the marginalized, the victims of prejudice – not out of mere charity, but because peace in our

time requires the constant advance of those principles that our common creed describes: tolerance and opportunity; human dignity and justice.

We, the people, declare today that the most evident of truths – that all of us are created equal – is the star that guides us still; just as it guided our forebears through Seneca Falls, and Selma, and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great Mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on Earth.

It is now our generation's task to carry on what those pioneers began. For our journey is not complete until our wives, our mothers, and daughters can earn a living equal to their efforts. 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. Our journey is not complete until no citizen is forced to wait for hours to exercise the right to vote. Our journey is not complete until we find a better way to welcome the striving, hopeful immigrants who still see America as a land of opportunity; until bright young students and engineers are enlisted in our workforce rather than expelled from our country. Our journey is not complete until all our children, from the streets of Detroit to the hills of Appalachia to the quiet lanes of Newtown, know that they are cared for, and cherished, and always safe from harm.

That is our generation's task – to make these words, these rights, these values – of Life, and Liberty, and the Pursuit of Happiness – real for every American. Being true to our founding documents does not require us to agree on every contour of life; it does not mean we will all define liberty in exactly the same way, or follow the same precise path to happiness.

Progress does not compel us to settle centuries-long debates about the role of government for all time – but it does require us to act in our time.

For now decisions are upon us, and we cannot afford delay. We cannot mistake absolutism for principle, or substitute spectacle for politics, or treat name-calling as reasoned debate. We must act, knowing that our work will be imperfect. We must act, knowing that today's victories will be only partial, and that it will be up to those who stand here in four years, and forty years, and four hundred years hence to advance the timeless spirit once conferred to us in a spare Philadelphia hall.

My fellow Americans, the oath I have sworn before you today, like the one recited by others who serve in this Capitol, was an oath to God and country, not party or faction – and we must faithfully execute that pledge during the duration of our service. But the words I spoke today are not so different from the oath that is taken each time a soldier signs up for duty, or an immigrant realizes her dream. My oath is not so different from the pledge we all make to the flag that waves above and that fills our hearts with pride.

They are the words of citizens, and they represent our greatest hope.

You and I, as citizens, have the power to set this country's course.

You and I, as citizens, have the obligation to shape the debates of our time – not only with the votes we cast, but with the voices we lift in defense of our most ancient values and enduring ideals.

Let each of us now embrace, with solemn duty and awesome joy, what is our lasting birthright. With common effort and common purpose, with passion and dedication, let us answer the call of history, and carry into an uncertain future that precious light of freedom.

Thank you, God Bless you, and may He forever
bless these United States of America.

SHORTER ROGER AILES: I'M NOT A KINGMAKER, I'M A CHAIRMAN-MAKER

Presumably as part of David Petraeus' effort to rehabilitate his image, Bob Woodward obtained a tape of a discussion in which Fox News' "Analyst" Kathleen McFarland passes on Roger Ailes' April 2011 advice to Petraeus: if Obama doesn't name him Chairman of the Joint Chiefs, Ailes instructed, he should quit and run for President.

When you listen to the tape, it seems clear Petraeus is getting the promises Ailes and Rupert Murdoch previously made to him on a tape he presumably knew was running. Note the way he leads the discussion in this passage.

Petraeus: He is. Tell him if I ever
ran *[laughs]* but I won't . . .

Q: Okay, I know. I know.

Petraeus: But if I ever ran, I'd take
him up on his offer.

Q: Okay. All right.

Petraeus: He said he would quit Fox.

Q: I know. Look, he's not the only one.

Petraeus: And bankroll it.

Q: Bankroll it? *[Laughs]*

Petraeus: Or maybe I'm confusing that
with Rupert. No. *[Laughter]*

Q: I know Roger, he's done okay,
but . . . no, I think the one who's

bankrolling it is the big boss.

Petraeus: That might be it.

Q: Okay. The big boss is bankrolling it. Roger's going to run it. And the rest of us are going to be your in-house.

Mind you, I'm not sure what Petraeus thought he was accomplishing by getting this on tape. It is not news, after all, that Republican hacks like Ailes wanted Petraeus to run. Nor is it news that Fox is a partisan organization that would drop everything to back the right candidate. And a tape record that Murdoch promised to bankroll the unsullied Petraeus for President does not legally bind Murdoch to do the same for a now-shamed former General.

So while the tape and transcript are fun on a lot of levels, all they really does is confirm what we've long known about Ailes, Murdoch, and the publicity hound Petraeus.

Moreover, I'm far more troubled by the way McFarland discussed what she called gossip she has picked up from some former chiefs, purportedly repeating the White House's fears, about Petraeus.

Q: Okay. But they think if you're chairman, they can't overrule you. They can't go against whatever your advice is going to be, militarily. Plus, they have a Colin Powell problem. Where Colin Powell, very successful chairman, is everybody's sort of rallying point to run for an office where there's nobody that they think is – that the group can . . .

Petraeus: But of course he didn't run.

Q: But he could have.

Petraeus: And he wouldn't have. No.

Q: He could have. Politically, he could have. So they look at you and they

think, how can we keep him quiet? We don't want him out on the loose to potentially run in '12, and we sure don't want him in '16. We'll put him at the CIA, where he can speak publicly twice a year before an open session of Congress. No backgrounders to the press, no Sunday talk shows, no speeches, no nothing. Now, I'm throwing that out as gossip.

Mind you, McFarland attributes these beliefs to the White House via presumably retired officers, not Ailes. But it comes just after she has delivered Ailes' instructions: take JCS or run for President.

Q: That's not the question at this point. He says that if you're offered chairman, take it. If you're offered anything else, don't take it, resign in six months and run for president. Okay?

So in addition to a purported media outlet (albeit one that solicited advice on its coverage) recruiting Petraeus to run for President, said media outlet first said that if Petraeus could get into a position where the White House "can't overrule" him, he should stay in government.

Just minutes after relaying advice that he should stay if he were JCS Chair, McFarland stated that the value of having him at Chair is that the Commander-in-Chief could not overrule him.

For Fox, it seems, having their guy in charge is more important than maintaining civilian rule over the military.

When Woodward contacted Ailes about the conversation, Ailes downplayed McFarland's actions, her position at Fox, and his own role.

In a telephone interview Monday, the wily and sharp-tongued Ailes said he did

indeed ask McFarland to make the pitch to Petraeus. "It was more of a joke, a wiseass way I have," he said. "I thought the Republican field [in the primaries] needed to be shaken up and Petraeus might be a good candidate."

Ailes added, "It sounds like she thought she was on a secret mission in the Reagan administration. . . . She was way out of line. . . . It's someone's fantasy to make me a kingmaker. It's not my job." He said that McFarland was not an employee of Fox but a contributor paid less than \$75,000 a year.

He wasn't a kingmaker, Ailes said. Though it seems he was happy to play Chairman-Maker.

ROMNEY'S WHITE WHALE: OLD MAN'S IT AND THE ELECTION THAT GOT AWAY



"Both jaws, like enormous shears, bit the craft completely in swain."

[Illustration from Moby

ArsTechnica did a comparison between Mitt Romney's and Barack Obama's campaigns' information technology expenditures. They note a few key attributes that differentiate the Romney campaign's use of IT:

- Outsource anything that's not a key competency, and spend as little as possible on it;
- Reward "friends" with outsourcing contracts;
- Spend on ad hoc items and pre-built SaaS* (buy from "friends" where possible).

Sure looks like the typical modus operandi of vulture capitalists that don't invest but hit-and-run on the high seas, looking to harpoon anything of value in order to flay its carcass for cash. This says something both familiar and abhorrent about Mitt Romney and his supporters with regard to democracy.

But there are several other points that ArsTechnica missed in their assessment.

Generational shift – The difference in funds allocated and the way in which the IT monies were spent revealed a compelling truth: old guy Romney doesn't value information technology the way younger guy Obama does. It's a generational shift, from old school campaigns which still rely heavily on direct mail and broadcast media, to digital campaigns run by Gen-X and Millennials who are digital natives.

Based on past performance by vendors and team members alike, Obama's team also trusts the technology team it assembled to do work quickly, effectively, on the fly. They trusted

technology.

In contrast, Romney's camp went with bigger brand name vendors like Best Buy (via service subsidiary) and Salesforce (for customer relationship management SaaS app). In mega-corporate they trust, apparently.

IT effectiveness opaque to outsiders – What exactly was the Romney team's ORCA application? ArsTechnica notes the lack of disclosure, but doesn't really ask a key question: *what were all of ORCA's deliverables?* It sure wasn't a GOTV application based on what the public could see. It looked more like a GMSV (giant money-sucking vortex) and nobody from Team Romney wants to talk, while rejecting any claims that ORCA was a fail whale. We'll likely never know what the problems were with ORCA and what positive/negative impact it had on the campaign unless insiders leak about the application.

"Friends" made less visible IT contributions – Although some Obama supporters provided their own IT firepower to boost support through their own independent effort, the Romney camp received far more IT help in tandem through super PACs. The pro-Romney/anti-Obama digital campaign purchased by these super PAC "friends" was far larger than the Romney campaign's IT component.

And of course, IT spending by these groups can be a black hole since donors' identities need not be disclosed. How does the public know with absolute certainty what was donated if full disclosure isn't required? Under current campaign finance laws we can't be absolutely certain if donors provided cash, or a donation-in-kind, or both; there's an inadequate amount of information reported providing a solid audit trail to assure the public that donations of any kind have been fully revealed. Ditto for privately-held corporations like those owned by the Koch brothers whose financial records are confidential; what was their contribution to these super PACs?

Yet firms with the biggest IT spending in the

world are required to be more transparent, due to their status as publicly-held entities. Funny how we expect our search engines and booksellers to be more upfront with their digital technology expenditures than a campaign that sought control of our federal government.

** SaaS = Software as a Service – buy-as-you-use hosted applications, versus packaged applications or developed/customized to order hosted applications.*

BROADWELL'S DENVER APPEARANCE: DID SHE COVER PETRAEUS' BAD BRIEFS?

[youtube]<http://www.youtube.com/watch?v=W35dwmdGtig>[/youtube]

Update: Sadly, it appears that the University of Denver has become cowardly and withdrawn the video, but I'm leaving the embed language in the post just to show the folly of their action.

Update 2: And now it's back, but at a new URL. Embed should be restored (for the video, not Broadwell...)

There was a lot of discussion last night of the YouTube you see here, which shows Paula Broadwell in an October 26 appearance at the University of Denver. One of the better analyses of the appearance, along with a transcription of Broadwell's comments on the Behghazi incident, was written by Blake Hounshell of Foreign Policy.

I will leave it to others to discuss whether Broadwell disclosed classified information with her reference to the CIA holding two militia

members or if she might have been confused on that point as Marcy suggests. I want to concentrate on two other points that jumped out to me regarding the appearance and what Broadwell said.

First, the appearance is at the University of Denver's Josef Korbel School of International Studies. As the school points out, it is named after Madeleine Albright's father and has a history of producing prominent graduates in international relations. However, this school also came to my attention early last year when I was researching Raymond Davis. I found that Davis had a history of previous addresses where he had lived in close proximity to university programs such as the Josef Korbel school. In fact, I found that one of Davis' "business" operations even had a corporate officer who appeared to be a student at Josef Korbel. The information I found led me to believe that whatever his duties overseas, it seemed likely that Davis' duties while in the US may have been to recruit for the CIA and that graduate programs like this one were seen as prime recruiting grounds.

The second point I want to hit is how Broadwell described Petraeus' response after the Behnghazi attack. From Hounshell's transcript (around 35 minutes into the video, as Hounshell points out):

The challenging thing for General Petraeus is that in his new position, he's not allowed to communicate with the press. So he's known all of this – they had correspondence with the CIA station chief in, in Libya. Within 24 hours they kind of knew what was happening.

But if you remember at the time – the Muslim video, the Mohamed video that came out, the demonstrations that were going on in Cairo – there were demonstrations in 22 other countries around the world. Tens of thousands of people. And our government was very

concerned that this was going to become a nightmare for us.

So you can understand if you put yourself in his shoes or Secretary Clinton's shoes or the president's shoes that we thought it was tied somehow to the demonstrations in Cairo. And it's true that we have signal intelligence that shows the, um, the militia members in Libya were watching the demonstration in Cairo and it did sort of galvanize their effort. Um, so we'll find out the facts soon enough.

As a former intel officer it's frustrating to me because it reveals our sources and methods. I don't think the public necessarily needs to know all of that. It is a tragedy that we lost an ambassador and two other government officials. Um, and something – there was a failure in the system because there was additional security requested. But it's frustrating to see the sort of political aspect of what's going on with this whole investigation.

I think it is appropriate and a good thing that Broadwell reminds the audience that there had been demonstrations (and she didn't even point out that some were violent) in over twenty countries that day and that those demonstrations did indeed seem to be in response to the anti-Mohammed video. However, the rest of what Broadwell said I think is misleading at best and is aimed at trying to deflect from the evidence that Petraeus gamed the way he briefed Congress and the White House on the incident.

Recall that I brought up back on October 19 that there was evidence that for nearly a week afterward, Petraeus continued to brief Congress and the White House that the attack was in response to the video when it has been established (as Broadwell reminds us) within 24 hours that the attack was planned and not a

spontaneous video protest. So while Broadwell is right in saying that Petraeus couldn't share this information with the public, what she omits from her remarks is that Petraeus is obligated to share what he knows with Congress and the White House and that for a week after the attack, he was misleading both in what well may have been a political ploy aimed at providing an edge for Mitt Romney in the final stages of the election. That Broadwell would end this section of her remarks by lamenting the "politics" of the situation is pure hypocrisy.

Finally, the timeline for this appearance deserves some consideration. This recent article from the New York Times says that Broadwell was first interviewed by the FBI "the week of October 21". The appearance is on October 26, so it is very likely she had already talked to the FBI (or at least knew that they wanted to talk to her) before this appearance. The same article says Petraeus was interviewed "the following week" although this post from Marcy presents evidence he may have been interviewed in the October 25-26 range.

In other words, it's almost a certainty that the FBI had interviewed Broadwell before she made this appearance in Denver. It appears that she had decided that her disclosure to the FBI that she had had an adulterous affair with the Director of the CIA was not going to interrupt her stated goal of one day becoming the National Security Adviser. While we can't fault her ambition, this behavior certainly seems to call her judgment into serious question.

CHICAGO STYLE TRASH TALK

Well, now that the little Le'Affaire du Patraeus thing is over (just kidding, Pete Hoekstra

promises more to come!), we can now get back to the important stuff: Trash Talk. This edition is served up Chicago Style because no city has had a better week. The reelection effort for hometown guy Obama, run out of Chicago by Axelrod and Plouffe came up roses and Obama gave his acceptance speech there.

But, even bigger and badder are Da Bears. Man, they are on a roll that is not getting enough attention in the football universe. The Bears are 7-1 on the year and just demolished the Titans last week. Urlacher is solid as usual and Charles Tillman is the second coming of Revis Island in their D-backfield. Who knows, he may schiz out at any time, but Jay Cutler and the offense are really clicking. Matt Forte and Brandon Marshall are a big part of that. Together, it is a team that is just flat out scary right now.

Which is a good thing, because the other current league powerhouse, the Houston Texans are coming for a Sunday Night throwdown. This is far and away the game of the week, and it will tell us a lot about both teams as they start the second half of the regular schedule.

Some other random thoughts: Don't look now, but with Thursday's win over the hapless Jags, the Colts and Andrew Luck are 6-3. The Vikes and Kittehs game should be interesting; similar records, but moving in opposite directions as teams. The Lions are starting to settle in and the Vikes are unraveling slightly as of late after a surprising start. Cowboys at Iggles is another interesting game between two desperate teams, both of which should be better than they are.

In the land of "student athletes", the one I most want to see is the total destruction of Alabama by Texas A&M and the amazing super frosh "Johnny Football", Johnny Manziel. If you have not heard of this kid yet, you need to. He is flat out ripping it up in the big bad SEC.

plays and amassed 693 yards, gaining 361 on the ground and 332 through the air, in last Saturday's 38-13 win over then-No. 15 Mississippi State. It was the fifth time this season Texas A&M racked up at least 600 yards.

Manziel completed 30 of 36 passes for 311 yards and ran for 129 yards and two touchdowns for the Aggies, who improved to 5-0 on the road. The freshman has now totaled 31 touchdowns and is averaging 383.2 yards of total offense, better than 47 FBS teams.

There is no stopping the Tide unless the Aggies do it today. Either way, it will be exciting to see how Johnny Football holds up to that smothering defense.

The clear game of the week for some particular denizens of this blog is the Fighting Journalists dropping in on the Wolverweenies. Man, the Bo Merlots have been vacillating between competent and horrid this year, and they looked so promising at the start of the year. The Journalists, on the other hand are a solid 7-2 and have the makings of one of their better seasons in a long time. Pat Fitzgerald is really a quality coach, you just have to wonder how long before he moves on to a bigger job. Other games of note are Oregon State at The Tree in Palo Alto, ASU at USC,

No Formula One this week, the next appearance of the Circus is at the brand new Circuit of the Americas in Austin Texas for the renewal of the US Grand Prix. However, there is huge news in the NBA: The Lakers up and fired coach Mike Brown after a painful 1-4 start to the season and an offense that was burying LA's best players, Kobe and Steve Nash. Really, Brown had to go, so it was good to get it over with. Most prominent names bandied about as replacements are Phil Jackson (would be unlikely, but Jeannie Buss is his longtime love interest) and Mike D'Antoni who really knows how to use Nash from

their collaboration in Phoenix. If Jackson won't do it, I would love to see D'Antoni. Brian Shaw is also in play, but he is an assistant under contract elsewhere right now.

That is the rundown. Music by, who else, Chicago. It is easy to forget just how smoking good early Chicago really was. REALLY good. For my money, Terry Kath was, and remains, one of the most underrated world class guitar players ever. Check him out on Make Me Smile. The second selection, South California Purples is kind of a more obscure song, that I have always liked, off the band's debut album when they were still Chicago Transit Authority.

Hoop it up folks.

SCOTUS PREPARES TO DECIDE 2016 ELECTION

One of the unsung heros of this election is Thomas Perez, head of DOJ's Civil Rights Division. By aggressively challenging states trying to disenfranchise people of color, he prevented states from tipping the scale for Republicans.

Apparently, the Republicans on the Court read the news on Wednesday, because they've just accepted a challenge to the Voting Rights Act.

Lyle Denniston writes:

Acting three days after the nation's minority voters showed that they have increased and still growing power in U.S. elections, the Supreme Court agreed on Friday to rule on a challenge to Congress's power to protect those groups' rights at the polls. The Court said it would hear claims that Congress went beyond its authority when it

extended for another 25 years the nation's most important civil rights law, the Voting Rights Act, originally passed in 1965 and renewed four times since then.

Specially at issue is the constitutionality of the law's Section 5, the most important provision, under which nine states and parts of seven others with a past history of racial bias in voting must get official clearance in Washington before they may put into effect any change in election laws or procedures, no matter how small. The Court came close to striking down that section three years ago, but instead sent Congress clear signals that it should update the law so that it reflects more recent conditions, especially in the South. Congress did nothing in reaction.

[snip]

In agreeing to rule on the Voting Rights Act, the Court limited its review to a question which it composed itself: "Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution." The Tenth Amendment protects the powers of states by limiting Congress's powers. Article IV guarantees each state a "republican form of government," meaning it is protected in its right of self-government. The question specified by the Court differed from that posed by Shelby County's lawyers only by adding a reference to the Fourteenth Amendment. The case to be decided

in *Shelby County v. Holder* (12-96).

It appears the Court is going out of its way to take this case, with very obvious timing.

I guess John Roberts wants to make his decision in ObamaCare up to the GOP? I guess the Republicans on the Court didn't think their intervention with Citizens United gave the corporatists enough of a boost this year?

THE 2ND RICHEST COUNTY IN THE COUNTRY "CAN'T" FIND ENOUGH QUALIFIED POLL WORKERS

The Organization for Security and Cooperation in Europe has completed its preliminary report about how pathetic our elections are (though it is not as critical as that). I'll have more to say about the report, but I got hung up on this passage:

In line with the decentralized nature of the US political system, general elections are administered at the state level and there is no federal election management body with oversight responsibilities. Administrative authority is vested in the respective state secretary or state election board. However, the greater part of election administration is typically delegated to county or lower-level election officials, resulting in a wide variety of electoral practices across the country. While some election officials are appointed, others are elected, which

raises possible conflicts of interest. Women and minorities are well represented at all levels of election administration. Overall, the election administration performed their duties in a professional and transparent manner and enjoyed the trust of the majority of stakeholders.

While training of polling staff was extensive, a number of counties experienced problems identifying a sufficient number of experienced poll workers. In some counties, this led to a reduced number of polling stations or less poll workers. ⁷

⁷ For example, in Jackson county in Kansas, Leon and Duval counties in Florida, and Fairfax county in Virginia.

Fairfax, VA claims it could not find enough qualified poll workers.

Fairfax county is, of course, the second richest county in the country, with one of the highest levels of education. Out of this county, our government finds people capable of the most amazing feats of analysis, engineering, and leadership to run our war machine. But it can't find enough people to run its poll machines?

Though maybe this is the reason why: with over 57% of the vote, Obama beat Mitt by almost 87,000 votes just in same-day voting in the county, even in spite of long lines in Fairfax. Obama beat Mitt statewide by less than that: 81,707.

Or perhaps this is the reason why: the Vice Chair of Fairfax's Board of Elections is Hans von Spakovsky, the architect of GOP efforts to suppress the vote.

And so it is that one of the most affluent, best educated counties on earth claims to be unable to find people capable of running polling machines.