

DOJ'S CLEAR THREAT TO GO AFTER APPLE'S SOURCE CODE

Oops: My post URLs crossed. Here's where If Trump's Protestors Didn't Exist He Would Have to Invent Them is.

In a rather unfortunate section heading the government used in their brief responding to Apple last week, DOJ asserted "There Is No Due Process Right Not to Develop Source Code." The heading seemed designed to make Lavabit's point about such requests being involuntary servitude.

I'd like to elaborate on this post to look at what DOJ has to say about source code – because I think the filing was meant to be an explicit threat that DOJ can – and may well, even if Apple were to capitulate here – demand Apple's source code.

The government's filing mentions "source code" ~~nine~~ ten different times [see update]. The bulk of those mentions appear in DOJ's rebuttal to Apple's assertion of a First Amendment claim about having to write code that violates its own beliefs, as in these three passages (there is one more purportedly addressing First Amendment issues I discuss below).

Incidentally Requiring a Corporation to Add Functional Source Code to a Commercial Product Does Not Violate the First Amendment

Apple asserts that functional source code in a corporation's commercial product is core protected speech, such that asking it to modify that software on one device—to permit the execution of a lawful warrant—is compelled speech in violation of the First Amendment.

[snip]

There is reason to doubt that functional

programming is even entitled to traditional speech protections. See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 454 (2d Cir. 2001) (recognizing that source code's "functional capability is not speech within the meaning of the First Amendment").

[snip]

To the extent Apple's software includes expressive elements—such as variable names and comments—the Order permits Apple to express whatever it wants, so long as the software functions. Cf. *Karn v. United States Department of State*, 925 F. Supp. 1, 9-10 (D.D.C. 1996) (assuming, without deciding, that source code was speech because it had English comments interspersed).

Most people aside from EFF think Apple's First Amendment claim is the weakest part of its argument. I'm not so sure that, in the hands of the guy who argued *Citizens United* before SCOTUS, it will end up that weak. Nevertheless, DOJ focused closely on it, especially as compared to its treatment of Apple's Fifth Amendment argument, which is where that dumb heading came in. This is the entirety of DOJ's response to that part of Apple's argument.

There Is No Due Process Right Not to Develop Source Code

Apple lastly asserts that the Order violates its Fifth Amendment right to due process. Apple is currently availing itself of the considerable process our legal system provides, and it is ludicrous to describe the government's actions here as "arbitrary." (Opp. 34); see *County of Sacramento v. Lewis*, 523 U.S. 833, 846-49 (1998). If Apple is asking for a *Lochner*-style holding that businesses have a substantive due

process right against interference with its marketing strategy or against being asked to develop source code, that claim finds no support in any precedent, let alone “in the traditions and conscience of our people,” “the concept of ordered liberty,” or “this Nation’s history.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

Though admittedly, that’s about how much Apple included in its brief.

The Fifth Amendment’s Due Process Clause Prohibits The Government From Compelling Apple To Create The Request [sic] Code

In addition to violating the First Amendment, the government’s requested order, by conscripting a private party with an extraordinarily attenuated connection to the crime to do the government’s bidding in a way that is statutorily unauthorized, highly burdensome, and contrary to the party’s core principles, violates Apple’s substantive due process right to be free from “‘arbitrary deprivation of [its] liberty by government.’” *Costanich v. Dep’t of Soc. & Health Servs.*, 627 F.3d 1101, 1110 (9th Cir. 2010) (citation omitted); see also, e.g., *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (“We have emphasized time and again that ‘[t]he touchstone of due process is protection of the individual against arbitrary action of government,’ . . . [including] the exercise of power without any reasonable justification in the service of a legitimate governmental objective.” (citations omitted)); cf. *id.* at 850 (“Rules of due process are not . . . subject to mechanical application in unfamiliar territory.”).

In other words, both Apple and DOJ appear to

have a placeholder for discussions about takings (one that Lavabit argued from a Thirteenth Amendment perspective).

Those constitutional arguments, however, all seem to pertain the contested order requiring Apple to create source code that doesn't currently exist. Or do they?

As I noted in my earlier Lavabit post, the DOJ argument doesn't focus entirely on writing code that doesn't already exist. As part of its argument for necessity, DOJ pretends to take Apple at its word that the US government could not disable the features (as if that's what they would do if they had source code!) themselves.

Without Apple's assistance, the government cannot carry out the search of Farook's iPhone authorized by the search warrant. Apple has ensured that its assistance is necessary by requiring its electronic signature to run any program on the iPhone. Even if the Court ordered Apple to provide the government with Apple's cryptographic keys and source code, Apple itself has implied that the government could not disable the requisite features because it "would have insufficient knowledge of Apple's software and design protocols to be effective." (Neuenschwander Decl. ¶ 23.)

Note DOJ claims to source that claim to Apple Manager of User Privacy Erik Neuenschwander's declaration (which is included with their motion). But he wasn't addressing whether the government would be able to reverse-engineer Apple's source code *at all*. Instead, that language came from a passage where he explained why experienced engineers would have to be involved in writing the new source code.

New employees could not be hired to perform these tasks, as they would have insufficient knowledge of Apple's

software and design protocols to be effective in designing and coding the software without significant training.

So the discussion of what the government could do with if it had Apple's source code is just as off point as the passage invoking the Lavabit case (which involved an SSL key, but not source code). Here's that full passage:

The government has always been willing to work with Apple to attempt to reduce any burden of providing access to the evidence on Farook's iPhone. See *Mountain Bell*, 616 F.2d at 1124 (noting parties' collaboration to reduce perceived burdens). Before seeking the Order, the government requested voluntary technical assistance from Apple, and provided the details of its proposal. (Supp. Pluhar Decl. ¶ 12.) Apple refused to discuss the proposal's feasibility and instead directed the FBI to methods of access that the FBI had already tried without success. (Compare *Neuenschwander Decl.* ¶¶ 54-61, with Supp. Pluhar Decl. ¶ 12.) The government turned to the Court only as a last resort and sought relief on narrow grounds meant to reduce possible burdens on Apple. The Order allows Apple flexibility in how to assist the FBI. (Order ¶ 4.) The government remains willing to seek a modification of the Order, if Apple can propose a less burdensome or more agreeable way for the FBI to access Farook's iPhone.⁹

⁹ For the reasons discussed above, the FBI cannot itself modify the software on Farook's iPhone without access to the source code and Apple's private electronic signature. The government did not seek to compel Apple to turn those over because it believed such a request would be less palatable to Apple. If Apple would prefer that course, however,

that may provide an alternative that requires less labor by Apple programmers. See *In re Under Seal*, 749 F.3d 276, 281-83 (4th Cir. 2014) (affirming contempt sanctions imposed for failure to comply with order requiring the company to assist law enforcement with effecting a pen register on encrypted e-mail content which included producing private SSL encryption key).

Effectively, having invented a discussion about whether the government would be able to use Apple's source code out of thin air, DOJ returns to that possibility here, implying that that would be the least burdensome way of getting what it wanted and then reminding that it has succeeded in the past in demanding that a provider expose all of its users to government snooping, even at the cost of shutting down the business, even after Ladar Levison (after some complaining) had offered to provide decrypted information himself.

Significantly, the government obtained a warrant for Lavabit's keys as a way of avoiding the question of whether the "technical assistance" language in the Pen/Trap statute extended to sharing keys, but Levison was ultimately held in contempt for all the orders served on him, including the Pen/Trap order and its language about technical assistance. The Fourth Circuit avoided ruling on whether that assistance language in Pen/Trap orders extended to encryption keys by finding that Levison had not raised it prior to appeal and that the District Court had not clearly erred, which effectively delayed consideration of the same kinds of issues at issue (though under a different set of laws) in the Apple encryption cases.

In making his statement against turning over the encryption keys to the Government, Levison offered only a one-sentence remark: "I have only ever objected to turning over the SSL keys

because that would compromise all of the secure communications in and out of my network, including my own administrative traffic.” (J.A. 42.) This statement – which we recite here verbatim – constituted the sum total of the only objection that Lavabit ever raised to the turnover of the keys under the Pen/Trap Order. We cannot refashion this vague statement of personal preference into anything remotely close to the argument that Lavabit now raises on appeal: a statutory-text-based challenge to the district court’s fundamental authority under the Pen/Trap Statute. Levison’s statement to the district court simply reflected his personal angst over complying with the Pen/Trap Order, not his present appellate argument that questions whether the district court possessed the authority to act at all.

[snip]

The Government, however, never stopped contending that the Pen/Trap Order, in and of itself, also required Lavabit to turn over the encryption keys. For example, the Government specifically invoked the Pen/Trap Order in its written response to Lavabit’s motion to quash by noting that “four separate legal obligations” required Lavabit to provide its encryption keys, including the Pen/Trap Order and the June 28 Order.

[snip]

In view of Lavabit’s waiver of its appellate arguments by failing to raise them in the district court, and its failure to raise the issue of fundamental or plain error review, there is no cognizable basis upon which to challenge the Pen/Trap Order. The district court did not err, then, in

finding Lavabit and Levison in contempt once they admittedly violated that order.

In other words, the Lavabit reference, like the invention of an Apple discussion about what the government could do with its source code (any such discussion would have been interesting in and of itself, because I'd bet Apple would be more confident FBI couldn't do much with its source code than that NSA couldn't), was off point. But in introducing both references, DOJ laid the groundwork for a demand for source code to be the *fallback, least burdensome* position.

And, as I noted, in the Lavabit case, the government justified demanding a key based on the presumption that Edward Snowden would have a more complicated password than Syed Rizwan Farook's 4-digit numerical passcode. That is, in that case, the government tied a more intrusive demand to the difficulty of accessing a target's communications, not to the law itself, which suggests they'd be happy to do so in the future if they were faced with an Apple phone with a passcode too complex to brute force in 26 minutes, as FBI claims it could do here.

All of which brings me to one more citation of source code in DOJ's extended First Amendment discussion: a reference to a civil case where Apple was able to obtain the source code of a competitor.

This form of "compelled speech" runs throughout both the criminal and civil justice systems, from grand jury and trial subpoenas to interrogatories and depositions. See, e.g., Apple Inc.'s Motion to Compel in Apple Inc. v. Samsung Electronics, Docket No. 467 in Case No. 11-cv-1846-LHK, at 11 (N.D. Cal. Dec. 8, 2011) (Apple's seeking court order compelling Samsung to produce source code to facilitate its compelled deposition of witnesses about that source code).

Note, this is not a case about Apple (or Samsung, in this case) being compelled to write new code at all. Rather, it is a case about handing over the source code a company already had. In another off point passage, then, DOJ pointed to a time when Apple itself successfully argued the provision of source code could be compelled, even in a civil case.

Through a variety of means, DOJ went well out of its way to introduce the specter of a demand for Apple's source code into its response. They are clearly suggesting that if Apple refuses to write code that doesn't exist, the government will happily take code that does.

Loretta Lynch claimed, under oath last week, that the government doesn't want a back door into Apple products. That's not what her lawyers have suggested in this brief. Not at all.

Update: Here's how Apple treated this in its Reply:

The government also implicitly threatens that if Apple does not acquiesce, the government will seek to compel Apple to turn over its source code and private electronic signature. Opp. 22 n.9. The catastrophic security implications of that threat only highlight the government's fundamental misunderstanding or reckless disregard of the technology at issue and the security risks implicated by its suggestion.

Also, in writing this post, I realized there's one more reference to source code in the government's Response, one that admits Apple's source code is "the keys to the kingdom."

For example, Apple currently protects (1) the source code to iOS and other core Apple software and (2) Apple's electronic signature, which as described above allows software to be run on Apple hardware. (Hanna Decl. Ex. DD at 62-64

(code and signature are “the most confidential trade secrets [Apple] has”).) *Those* –which the government has *not* requested—are the keys to the kingdom. If Apple can guard them, it can guard this.

HOW HILLARY HELPED BANKS FORECLOSE ON 5 MILLION FAMILIES

Let me be clear at the outset: *I think what follows is a bullshit argument.* But I think it is less unfair of an argument than Hillary’s claim that, by voting to withhold the second tranche of TARP funding on January 15, 2009, Bernie Sanders voted against the auto bailout.

As you’ll recall, in October 2008, the Bush Administration threw some vaguely laid out plans on some cocktail napkins over the wall to Congress and got it to release \$700 billion dollars to bail out the banks. Between the time the new Congress got sworn in but before Obama became President, Republicans in the Senate wrote a bill to withhold the second tranche, or \$350 billion, of those funds. In the days before the vote, Larry Summers threw two more cocktail napkins of promises to Congress. Bernie was one of seven Democrats who voted not to release the funds based on a series of what were effectively ideas on cocktail napkins.

One of the things on those cocktail napkins, though, was a promise from the Obama Administration that actual human persons facing a crisis, rather than just banks, would get some of the second tranche of money.

The Obama Administration will commit substantial resources of \$50-100B to a

sweeping effort to address the foreclosure crisis. We will implement smart, aggressive policies to reduce the number of preventable foreclosures by helping to reduce mortgage payments for economically stressed but responsible homeowners, while also reforming our bankruptcy laws and strengthening existing housing initiatives like Hope for Homeowners. Banks receiving support under the Emergency Economic Stabilization Act will be required to implement mortgage foreclosure mitigation programs.

Of course, it was just a cocktail napkin, and by voting to release the funds without tying them to actual legislation requiring the Administration actually use the funds in a such a way as to help homeowners, Hillary – and all the other Democrats who voted to give their new President funds without real limits on how they could spend it – gave away any leverage they had to actually force the Administration to implement such a plan.

Last year David Dayen described how the Administration not only never spent \$50 billion – they only ever spent \$12.8 billion – but the number of people helped was far lower than promised, and most people “helped” actually weren’t helped at all.

On January 15, 2009, Obama’s chief economic policy adviser, Larry Summers, wrote to convince Congress to release the second tranche of TARP funds, promising that the incoming administration would “commit \$50-\$100 billion to a sweeping effort to address the foreclosure crisis ... while also reforming our bankruptcy laws.” But the February 2009 stimulus package, another opportunity to legislate mortgage relief, did not include the bankruptcy remedy either; at the time, the new administration wanted a strong

bipartisan vote for a fiscal rescue, and decided to neglect potentially divisive issues. Having squandered the must-pass bills to which it could have been attached, a cramdown amendment to a housing bill failed in April 2009, receiving only 45 Senate votes.

Senate Majority Whip Dick Durbin, who had offered the amendment, condemned Congress, declaring that the banks “frankly own the place.” In fact, the administration had actively lobbied Congress against the best chances for cramdown’s passage, and was not particularly supportive when it came up for a vote, worrying about the impacts on bank balance sheets. Former Treasury Secretary Timothy Geithner admitted in his recent book, “I didn’t think cramdown was a particularly wise or effective strategy.” In other words, to get the bailout money, the economic team effectively lied to Congress when it promised to support cramdown.

[snip]

According to a recent Government Accountability Office report, 64 percent of all applications for loan modifications were denied. Employees at Bank of America’s mortgage servicing unit offered perhaps the most damning revelations into servicer conduct. In a class-action lawsuit, these employees testified that they were told to lie to homeowners, deliberately misplace their documents, and deny loan modifications without explaining why. For their efforts, managers rewarded them with bonuses—in the form of Target gift cards—for pushing borrowers into foreclosure.

Because of all this, HAMP never came close to the 3–4 million modifications President Obama promised at its

inception. As of August 2014, 1.4 million borrowers have obtained permanent loan modifications, but about 400,000 of them have already re-defaulted, a rate of about 30 percent. The oldest HAMP modifications have re-default rates as high as 46 percent.

Effectively, because Congress didn't force the Administration to adopt cramdown (which would have resulted in real modifications which would have meant more people kept their homes and didn't lose their wealth), Treasury could instead use the promise to "foam the runways" to help the banks string out losses and therefore avoid accountability for their recklessness.

This was a direct result of voting to give the Executive continued free rein on what to do with massive amounts of bailout money. So was bailing out the car industry, but the vote in January was primarily about whether to continue letting the Executive spend billions without clear guidelines.

So Hillary, according to her own logic, voted to help banks foreclose on 5 million people, which resulted in a tragic loss of wealth for American families.

Again, I think this is a bullshit argument. I assume Hillary intended to get real foreclosure relief (indeed, one domestic policy on which she was better than Obama in 2008 did just that). Though for someone who claims to know how to "get things done," she showed no awareness of how to do that here. Nevertheless, it is the kind of bullshit argument she is making.

And having gone there – having permitted herself to engage in this kind of bullshit argument – she makes such arguments fair game for Donald Trump to make about her in June.

Ultimately, I think this vote was about whether the Executive should be able to operate without real limits. Bernie voted against that, Hillary voted for it (which makes it similar, in many

ways, to the Iraq War vote in 2003, and had equally foreseeably bad results). Hillary will never make such votes for freeing the Executive of meaningful restraints again. But it's pretty clear she's a fan of letting the Executive operate without them.

That, to me, is the meaningful, non-bullshit, takeaway from that vote.

THURSDAY MORNING: THINGS ARE GONNA' CHANGE

After Tuesday's primaries and last night's Democratic candidates' debate, surely something will change in messaging and outreach.

And surely something will change on the other side of the aisle given the continued rampage of 'Someone With Tiny Hands.'

Calls to mind an animated movie popular with my kids a few years ago.

Moving on...

Volkswagen and the Terrible, Horrible, No Good, Very Bad Week

- USDOJ subpoenaed VW under recent banking law (CNBC) – This is the first such application of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) since it was signed into law in 1989 in response to the savings and loan scandal. The law was used to

target bank fraud in subprime mortgages after the 2008 financial crisis. (Caveat: that link at CNBC autoplays video. Bad practice, CNBC very bad.)

- VW's US CEO Michael Horn departs with marked haste (Bloomberg) – Huh. Interesting timing, that. A subpoena and an exit inside 48 hours? The phrases “mutual agreement” and “leave to pursue other opportunities” are very telling. IMO, Volkswagen Group's response to the scandal has been lackluster to obstructionist, and Horn might not want to be the automaker's sin eater here in the U.S.
- Not looking good in Germany for VW, either, as prosecutors expand their investigation (Business Insider) – 17 employees now under scrutiny, up from six.
- VW's South Korean offices raided (Reuters) – Wondered when South Korea would catch up after all the recent happy-happy about clean diesel passenger vehicle sales.

I feel like I'm telling a child Santa Claus is a

lie and the Easter Bunny doesn't exist, but it's important to this scandal to grasp this point: *There is no clean diesel technology. There is no clean diesel technology coming any time soon.* Invoke a little Marcus Aurelius here and look at this situation and its essential nature, by asking why VW cheated and lied and did so for so long.

Because there is no clean diesel technology.

And the clock is tick-tick-ticking – the court case in California gave VW 30 days to come up with a technical solution. Mark your calendar for March 24, people.

A – Apple, B – Bollocks, C – Cannot...

- Tech dude says FBI can crack the San Bernardino shooter's iPhone 5C, but I think he's really reaching. Can't get past A-for-Acid etching processor, or A-for-Apple signing FBI-written firmware. Options cited are extremes, and ridiculous considering the FBI screwed up the iPhone's handling, and there's likely little useful on the device that can't be traced using available metadata.
- Another dude suggests Apple should compromise on encryption, because France! Where are these tech dude bros coming from? Didn't they get the message from the Bush years about "cheese-eating surrender

monkeys“?

- Apple's head of service worries about FBI forcing Apple to turn on iPhone cameras.

Panopticonic POV

- Defense Department used surveillance drones over U.S. for a decade (USA Today) – All legit, though, nothing to see here, move along. Disregard the incomplete list of flights, just trust.
- What will happen when your neighbors can buy a StingRay on the cheap to listen in on your cellphone calls? (Bloomberg) – Worse thought: what if they've already built one?
- If you're a commercial trucker, chances are anybody can track you (Naked Security) – Read this, especially the pointers at the bottom of the article. (Personal tip from me: If you're a female trucker, use a gender neutral name or initials in the workplace. Insist your employer respects this practice.)

That's enough damage for one day. Things have got to change.

BERNIE WINS MI — WAIT WHUT?

Apparently my state gave Bernie Sanders the most unexpected of wins last night, winning a close race that only one poll even got close (but still predicted a narrow Hillary win). Most polls predicted she'd win it by 20%.

I'm going to spend the day looking at the results. But here's what I understand to have happened:

- Hillary won African-Americans, but not by as much as she had in the south. That's probably consistent with MA's results, the exit poll for which didn't break down people of color, but as far as I know no one did the granular analysis of the MA results to figure that out.
- MI's Muslims voted for the elderly Polish Jew, by wide margins. That's not a huge population, but it is big enough to have accounted for much of the differential between Hillary and Bernie. Keith Ellison, one of Sanders' few Congressional backers, has close ties to the Muslim community here in MI and did some events for

him in the last week.

- Independents turned out in big numbers, and they voted for Sanders by big margins. MI has a completely open voting process, which means independents – who might normally be considered less likely primary voters – can (and apparently did) turn out in big numbers. I suspect, though haven't yet confirmed it, that support for Bernie outside of SE MI was much higher in terms of numbers; usually when people analyze Democratic contests in this state they just blow off the areas outside of SE MI, because the latter is such a population center of Democratic voters. That may be what pollsters missed. Update: Adding, the Democratic party in my part of the state is pretty dysfunctional, even though there's a population that should be turning increasingly Democratic. This is where Bernie picked up the numbers to offset Hillary's SE MI numbers. That suggests he basically created a Democratic infrastructure that doesn't exist (as Chris Savage

pointed out, Bernie set up offices here and in other cities so had more field organizers throughout the state, save Detroit, than Hillary).

- Students voted, and not just in Ann Arbor. Because of the way they suppress student turnout, University of Michigan is the school at which it is hardest for college students to vote (because they're more likely to be out of state and/or from all over the state, which means if there's a registration problem they'll have harder time going "home" to vote). Bernie did events at EMU, MSU, GVSU, and only then U of M, and while those students are more likely to be dispersed than UM students, they appear to have turned out. Bernie continued to win young people by enormous margins.
- Hillary underperformed in the rich suburbs. Hillary only won Oakland County, which is the second largest county and is the kind of affluent county Hillary has done really well in this year, by about 4.6%. I

thought she'd win by 5 to 7%. I'm not sure why that is – again, it's always possible cross-over voting is affecting the Democratic side. But had she gotten the numbers in Oakland I would have expected she likely would have won the state. The same is true of Detroit, but turnout in Detroit is less reliable than in Oakland.

There was a lot of talk last night about Hillary's cynical auto bailout attack misfiring. Apparently, some top UAW people got quite pissed about it and were communicating about it among themselves.

It may be that Michiganders realized that was a dishonest attack, but I think it just as likely they responded to Sanders' comments about Hillary's trade record (curiously, he never even hammered on KORUS, where her involvement is much more direct than some of the other trade agreements she has supported, and which has had a clear impact on MI jobs). I've been predicting for some time that Hillary's record on trade would hurt her in the state. Exit polls showed that those who think trade agreements have cost MI jobs voted in fairly big numbers for Bernie.

Update: One more point. I'm hearing a lot of talk about Hillary voters crossing over to vote for Kasich or Rubio to slow Trump's momentum. I doubt that explains Hillary's loss. First, any talk of that is anecdotal: there was no big discussion about how to strategize a cross-over vote. Second, the Kasich and Rubio numbers just don't show any big swing, except perhaps in Washtenaw (Ann Arbor), but the Democratic results are about what we'd expect there. Third, the only people I heard talk about this were

Sanders voters, so to the extent it did happen, it likely happened, in small numbers, among *both* Bernie and Hillary voters. Finally, while crossover voting is quite common here, it's less common among party insiders than more independent voters (in part, because what ballot you pull does get recorded, so it shows in the voting rolls), so you'd think fewer of Hillary's supporters would even consider it.

Update 2: I know that exit polls showed 7% of Dems crossed over compared to 3% of Republicans. I actually suspect those numbers are *lower* than what happened in other states and mostly stems from Democrats voting for Trump. Indeed, it's possible that those who wanted to vote for a populist in MI felt like Bernie was a viable choice here (which would be consistent with where he got his biggest margins) as compared to places in the south where Trump was a more attractive populist to vote for.

WEDNESDAY MORNING: IN THE MORNING AFTER

Suffering from a 'morning after' here – not from the primary race results, but a bug I picked up from a banking website, of all places. (Not a national bank, a small in-state bank I will call very soon about their problem.) Until I get this bug hunted down and removed, I'm on low output.

There's plenty to read anyhow, with Ed Walker's latest post on totalitarianism, and a preliminary Michigan primary analysis from Marcy.

Use this as an open thread. I'll update here once my entire anti-bug arsenal has been deployed.

TUESDAY MORNING: SOME KIND OF FREAK

Today's the intersection of my Gwen Stefani jag and International Women's Day 2016. Need some more estrogen-powered music to celebrate IWD? Try this list – note and compare Lesley Gore's You Don't Own Me and Nancy Sinatra's These Boots Are Made for Walking against more recent tunes like No Doubt's Just A Girl.

Let's roll...

Volkswagen shocked, SHOCKED! the EPA went public on the diesel emissions standards cheat But by the time the EPA made public statements regarding VW, the German automaker had already known about the International Council on Clean Transportation's research results for a year and had yet to reveal to shareholders the risk of prosecution and penalties. VW's leadership hoped for a mild and quiet slap on the hands and enough time for a technical solution before the EPA's disclosure:

“In the past, even in the case of so-called ‘defeat device’ infringements, a settlement was reached with other carmakers involving a manageable fine without the breach being made public,” VW argued. “And in this case, the employees of Volkswagen of America had the impression on the basis of constructive talks with the EPA that the diesel issue would not be made public unilaterally but that negotiations would continue.”

Hope somebody is looking at insider trading for any sign that VW executives were unloading stock in the period between September 2014 when ICCT's results were published, and when the EPA went public in 2015. Wonder what penalties there are

under German/EU laws for this?

USDOJ appealed last week's ruling in Brooklyn iPhone 5S case

At the heart of this appeal is Apple's past cooperative actions when federal law enforcement asked for assistance in unlocking iPhones.

Apple, however, said past acquiescence is not consent. USDOJ has now asked for review of Judge Orenstein's ruling.

Apple co-founder Steve Wozniak appeared on Conan, sided unsurprisingly with Apple. Woz admitted to having tried his hand at writing viruses for Mac, but the entire premise terrified him, compelling him to destroy his efforts. Video of his appearance included at [this link](#).

France to punish phonemakers for encryption, while UK's GCHQ says it should get around encryption

A narrow body of water, a different language, and a recent terrorist attack make for very different reactions to encrypted communications. France's Parliament voted yesterday to punish phonemakers which do not cooperate with law enforcement on unencrypting data; the bill is not yet law, subject to further parliamentary process. Meanwhile, Britain's spy chief said he hopes methods can be developed to get around encryption without building backdoors.

Drive-by quickies

- North Korea hacked smartphones of South Korean officials, reports SK's spy agency (Phys.org) – not much of a surprise, right?
- Mossad agents stuck with a hefty towing tab after getting stuck in German mud (euronews) – *~mumbling about opsec~*

- F-35 bomber's latest problem: radar that must be rebooted (The Guardian) – still has to be tested for cyber security, too.
- US looking at rotating long-range bombers through Australia's Northern Territory (ABCNews24)
- Malaysia Air flight MH370 went missing two years ago today, and still no sign of the plane, passengers, cargo (The Sun Daily) – the investigation remains open at this time.

And it's Presidential Primary Day in Michigan, Mississippi, Idaho, Hawaii. I may avoid social media for most of the day for this reason. Hasta pasta!

THE RETURN OF THE REAGAN DEMOCRATS

Donald Trump held a rally in Warren, MI today, a blue-collar, largely white suburb of Detroit in Macomb County. The county, as a whole, is famous for what Democratic pollster Stan Greenberg dubbed the "Reagan Democrats" after lifelong white working class Democrats started flipping to the GOP in 1980, as he described in this study done on polling about Obama in 2008.

In 1960, Macomb was the most Democratic suburban county in the country as John F. Kennedy won handily there, garnering 63 percent of the vote. Four years

later, Lyndon Johnson increased the Democratic vote share even further, winning 75 percent of Macomb voters. But over the next 20 years, these voters turned on the Democrats, culminating with Ronald Reagan taking 66 percent of the vote in 1984.

Even before the election, Greenberg found Obama did worse with Macomb's voters than he did elsewhere. Greenberg even found some racial basis for that, though not as much as he had earlier. But Greenberg judged early on that Obama did so much better elsewhere in the state – primarily, with the young, but also by generating enthusiasm among African American voters – that it wouldn't matter.

Obama is running 7 points ahead in our statewide poll conducted at the same time. Obama obviously will be able to count on immense enthusiasm and turnout among African Americans, but there is more going on than that – including Obama's over-performance in the growing suburban parts of the state, including Oakland County, where he is running a net 5 points above party identification and 9 points ahead of John McCain. Among young voters under 30 years, Obama defeats McCain 58 to 36 percent but Obama's success with younger voters is even broader.

He leads McCain among all voters under 40 years by 48 to 41 percent across Michigan and matches that margin in Macomb. Clearly, the rules of the game are a little different this year.

Sure enough, Obama did over-perform in the suburbs. So much so that after the election, Greenberg said so long to his Macomb Reagan Democrats, embracing, instead, the racially diverse (or at least tolerant) suburbanites who could replace them in the Democratic coalition.

Oakland County has formed part of the Republican heartland in Michigan and the country. From 1972 to 1988, Democratic presidential candidates in their best years lost the county by 20 points. From Bill Clinton to John Kerry, however, Democrats began to settle for a draw. Over the past two decades, Oakland County began to change, as an influx of teachers, lawyers and high-tech professionals began to outnumber the county's business owners and managers. Macomb has been slow to welcome racial diversity, but almost a quarter of Oakland's residents are members of various racial minorities.

These changes have produced a more tolerant and culturally liberal population, uncomfortable with today's Republican Party. When we conducted our poll of 600 voters in Oakland County on election night, they were a lot more open than voters in Macomb to gay marriage and affirmative action. We asked those who voted for Mr. Obama why they made that choice. At the top of the list was his promise to withdraw troops from Iraq, followed by his support for tax cuts for the middle class and affordable health care for all, and the idea that he will bring people together, end the old politics and get things done.

On Tuesday, Oakland County voters gave Mr. Obama a 57 percent to 42 percent victory over John McCain – those 15 points translated into an astonishing 96,000-vote margin. That helped form one of the most important new national changes in the electorate: Mr. Obama built up striking dominance in the country's growing, more diverse and well-educated suburbs.

So, good riddance, my Macomb barometer.

But in elections since, Democrats have been doing worse and worse among whites and, in the interim years, losing elections as a result. By 2014, Greenberg was not so sanguine about Democrats' losing those white voters anymore.

For example, a lot of blue-collar work today takes place in small groups rather than in factory settings, and most construction workers are self-employed contractors. Moreover, if by blue-collar jobs we mean jobs that involve routine and repetitive tasks, require limited skills, are closely supervised, and offer no autonomy during working hours, then it turns out that half of all white male workers and 40 percent of white working women are blue collar. Far from working on factory floors, more and more workers are employed in service-sector jobs like health care, leisure and hospitality, and, particularly, professional and business services.

If Democrats cannot figure out how to appeal to today's working-class voters, then they don't deserve to lead. Nearly all of the people in these jobs have not seen a raise in years. The majority of them, who now work in the service sector—maids and housekeepers, waitresses and hostesses, cooks and dishwashers, counter attendants and ticket takers, janitors and hairdressers and child care workers—earn, on average, about \$400 a week.

At that point, the GOP wasn't even doing all that well with these voters. But they are now, with Donald Trump, returning today to the site of Reagan's victory with the support of a bunch of working people arguably voting against their economic interest. Trump is speaking the language – significantly, of building infrastructure, and not just his damned wall – that would appeal to this group in a way the GOP had foresworn. And in Macomb, as elsewhere,

Trump's voters are his voters, largely detached from either party and thus far unimpressed with the dirt the GOP threw last night and reportedly will start throwing in abundance in the near future. Trump seems to recognize he has a limited window of time to win out before the shit gets really deep, and he stands a very good chance of doing just that.

And there is a real reason to be concerned that it will lead to victory for the GOP in November.

Thus far, we're seeing Democratic turnout down, significantly, and GOP turnout up even more. That comes, in large part, because white voters – thus far we've had voting in the South, so these consist of what this analysis calls old-style Dixiecrats as well as Trump cross-overs – are turning to Donald Trump. Worse, we're not seeing the kind of turnout among people of color, not even African Americans, that Democrats have been presuming would build a permanent firewall against GOP victories.

So it's absolutely imperative that we find some way to do three things:

- *Bring back some form of the Obama effect on African American turnout, so it does not fall (as it did in South Carolina).*
- *Give younger voters the motivation to actually turn out and vote.*
- *Effectively fight the Trump effect, and stem the anti-establishment exodus of working class whites to the GOP, and to Trump.*

If we can't find a way to do that, then

in the outer South:

- *North Carolina will not be remotely competitive.*
- *Virginia won't lean Dem, and could be a true tossup or even lean R.*
- *Florida won't really be a tossup, but will probably lean reasonably R as in 2004 (unless gains among Hispanics are fully strong enough to offset the Trump effect in North Florida and the drift of older retirees to the GOP).*

That's enough by itself to return the electoral college map to something more similar to what we had in 2000 and 2004. And if the Trump effect is strong in places like Ohio, Pennsylvania, and Michigan, then we could have a real fight on our hands, without any clear reason to think we have the upper hand.

In other words, with Trump on the GOP ballot and Obama off the Dem ballot, the Obama coalition could come tumbling down and crash into pieces. That "blue wall" we liked to think made America safe from another George W. Bush? Gone. History.

But even in MA, Trump drew those working class whites in YUGE numbers.

Bernie probably had a shot at winning among white and black and brown working people. Partly

because the Democrats launched Republican attacks on sound policy, partly because Bernie didn't listen to people of color enough, and partly because Trump had an easier sell to the white working class, he won't pull it off.

Which will leave Hillary and Oakland's voters (or, in parallel fashion, huge wins in the most affluent Military Industrial Complex suburbs of VA).

Democrats risk losing this election, once again to Reagan's Democrats. If Trump wins, it may also be a realignment election, where Democrats become the party of those suburbs while Trump feeds the fears of those working towns. As Greenberg said, Democrats don't deserve to win if they're not offering solutions for those working class service workers, of all classes.

And thus far, Democrats haven't convinced sufficient numbers they do.

THE ORIGINS OF TOTALITARIANISM: INTERLUDE DEFINING ELITES

Previous posts in this series:

The Origins of Totalitarianism Part 1:
Introduction.

The Origins of Totalitarianism Part 2:
Antisemitism

The Origins of Totalitarianism: Interlude on the
Tea Party

The Origins of Totalitarianism Part 3:
Superfluous Capital and Superfluous People

The Origins of Totalitarianism: Interlude on The

Commons

Capitalism Versus The Social Commons (published at Naked Capitalism; discusses privatization using Rosa Luxemburg theory)

The Origins of Totalitarianism Part 4: Humanity under Totalitarianism

The Origins of Totalitarianism: Interlude on Right-Wing Authoritarianism

The Origins of Totalitarianism Part 5: Artistic and Intellectual Elites and the Rise of Fascism

In Part 5 I discussed Hannah Arendt's view of the role of the elites in the rise of fascism. She defines the term elites as the artists, composers and intellectuals in Germany and Austria in the late 19th and early 20th Centuries. We use the term "elites" more broadly today. Depending on the context, it might mean some or all of the following:

1) a few very rich people. This group is described by Robert Reich as

...the major corporations, their top executives, and Washington lobbyists and trade associations; the biggest Wall Street banks, their top officers, traders, hedge-fund and private-equity managers, and their lackeys in Washington; the billionaires who invest directly in politics; and the political leaders of both parties, their political operatives, and fundraisers.

2) the people whose views are most respected in some scientific field or some academic area;

3) pundits, writers, media people, and the talking heads and experts who appear in their outlets. The experts themselves fall into two categories. One group comes from academia, and generally are actual experts. The other comes from think tanks, national issue-oriented organizations and other holding pens where they try to influence policy and wait for an

opportunity to move into government.

4) top government people, including those in the legislature and their top staffers, top administration officials and of course, the President. This group also includes members of the deep state, the permanent group of military and security officials and bureaucrats who stay on election to election.

Taking these groups together, we have a working definition of the Establishment, and by separating them along the lines of their political party identifications, we have the Republican and Democratic Establishments.

You'll note there is no mention in my list of artists or composers, and no mention of "intellectuals". We have a complicated relationship with any kind of intellectualism, as Richard Hofstadter explains in *Anti-Intellectualism in American Life*, a book I read in college, reread later, and kept, I thought, until I went to look for it. Nicholas Lemann discussed it in an article in the *Columbia Journalism Review*, from which the following is taken.

It helps in understanding Hofstadter to know what [Hofstadter] takes intellectualism to mean. Here is a passage that comes as close as any in the book to a definition:

It accepts conflict as a central and enduring reality and understands human society as a form of equipoise based upon the continuing process of compromise. It shuns ultimate showdowns and looks upon the ideal of total partisan victory as unattainable, as merely another variety of threat to the kind of balance with which it is familiar. It is sensitive to nuances and sees things in degrees. It is essentially

relativist and skeptical, but at the same time circumspect and humane.

I'm not sure how well that definition works with Arendt's general description, but there certainly was a group of intellectuals in the late 19th and early 20th Century, and I think there would be general agreement on its members. Today, we don't actually have many intellectuals in that sense. Instead, we have experts, people wired into the economic and social structure who are thought to have special expertise in some area of study. Judge Richard Posner of the Seventh Circuit wrote a book about this issue, *Public Intellectuals: A Study in Decline*. This is from a review in the Economist:

He starts off by ruling out what most of us would take as archetypal intellectuals: scientists who explain science to lay people (eg, Steven Weinberg), philosophers with an influential vision of society (eg, John Rawls or Robert Nozick) and literary intellectuals of high Bohemia (eg, Susan Sontag). No, his public intellectuals are really pundits: people who opine about issues of the day on television or in newspaper columns. On the theory that if it's real it must be countable, he ranks what he calls the top 100 on the basis of scholarly citations, media mentions and web hits.

Here's Posner's expanded list of over 600 public intellectuals. Arendt made the list, and it's fun to see the people who are quoted or sought on the internet 15 years ago; for example, David Brooks and David Broder are there, next to each other. Posner says the problem is that the then current crop of pundits (who are a subset of that list) is really bad at opining. As you would expect from the founder of the Law and Economics movement, he explains this with

simplistic ideas about supply and demand. He says there are too many commentators, and that they are not held accountable for their errors, which is obviously true.

There have been a number of studies of the ability of experts to predict the future. In this review in the New Yorker Louis Menand (also on the list, and deservedly) discusses *Expert Political Judgment: How Good Is It? How Can We Know?* by Philip Tetlock, a Berkeley psychologist and researcher. It turns out experts aren't good at predicting the future either in their own fields or in other areas.

Posner is quite right that those who spout what Paul Krugman (on the list) calls zombie ideas are never held accountable for being totally wrong. Instead, their views are considered highly valuable by policy makers. This, of course, shows how badly Posner has missed the real problem. Pundits and experts who shriek about deficits and inflation in today's economy are prized by those who serve the interests of the rich, and who provide their PR.

Until the last few years, the elites have generally agreed on policies on most issues. You can see a good example in the way the New York Times discusses the refusal of the Republicans to govern, as in this astonishing piece by Jennifer Steinhauer. The destruction of institutional norms that once made government work under our ancient Constitution is now perfectly normal for our elites. For another, and more dangerous example, there is nearly universal agreement among the elites that prosecuting bank executives for their crimes that crashed the economy would not be possible. In fact, the elites generally agree that none of them can be held accountable for any of their actions, regardless of the damage done. We can no more punish Rick Snyder for poisoning Flint families than we could punish anyone for Iran-Contra or the top executives of American Water for failing to notice that the water they had privatized and sold to the people of Charleston

WV was sickening. It mustn't be done.

That kind of consensus indicates that the large bulk of our public intellectuals are completely indifferent to and unaware of the level of anger at the corruption that affects every aspect of our public lives. Zephyr Teachout explains corruption succinctly: the use of public office for private gain. Our elites refuse to accept this definition. There is no better proof that we need new elites.

Note: this post was updated by expanding paragraph 1) above.

THE PLAY ON THE SCALIA REPLACEMENT: REMEMBER THE LAME DUCK

Within minutes after the public announcement of Antonin Scalia's death, Senator Mike Lee's flack Conn Carroll started predicting Obama would have zero chance of successfully naming a successor. After Carroll, one after another actual Senator followed that sentiment, including Chuck Grassley and Mitch McConnell, both of whom would have the ability to stall any Obama nominee. From that point, the GOP was pretty much committed, they said, to preventing any Obama nominee from being confirmed.

That led to a bunch of bad comparisons – between judges like Robert Bork who was rejected and Miguel Estrada who never got a vote – and simply going a year without acting on a President's nominee. Even the comparison with Anthony Kennedy (who was nominated in November after two other nominees, including Bork, failed) is inapt, as he was nominated earlier than any Obama pick would be (though in a sense that

fetishizes the year that would pass without a nominee).

I, like bmaz, believe Obama will pick someone fairly centrist, probably someone who has been recently confirmed by big margins. I agree the most likely nominee will be Sri Srinivasan, who in 2013 was confirmed to the DC Circuit with a 97-0 vote – though I'm also mindful of the wisdom (given the GOP unanimity about obstructing this nominee) of picking someone who drive Democratic turnout – an African-American woman, for example. Though I highly doubt Obama will nominate Loretta Lynch, as some have suggested, not least because the fight over releasing data on HSBC's continued money laundering will draw more attention as it moves toward appeal, which might focus attention on her role in administering the wrist slap in the face of egregious drug cartel and terrorist supporting money laundering.

After some reflection, some conservatives have suggested that the GOP would have been better served if they had simply not managed to pass Obama's nominee, rather than making such a big stink about it.

I think that ignores how much both parties look forward to using this nominee to drive turnout – and regardless of who the respective nominees are, the GOP have a much bigger challenge in getting enough voters to turn out to elect a GOP president in November, so I'm sure they're quite happy to have an issue that (they presumably hope) might flip some conservative Latino votes – though one likely outcome of an extended 8-member court is that the Fifth Circuit's ruling staying Obama's immigration orders will be upheld after a 4-4 tie on the court, which might have the opposite effect.

Furthermore, I think it ignores one other factor. Srinivasan has been predicted to be Obama's most likely SCOTUS appointment for almost 3 years (few people consider how such predictions might have influenced Ruth Bader Ginsburg's decision not to retire). The

Republicans probably presume he's the most likely candidate as well.

The presumption Srinivasan – or someone similar – would be the nominee easily justifies the GOP's immediate promise they won't confirm a nominee. That's because they need to explain why someone they just overwhelmingly confirmed, someone who faced more opposition from the left than the right, suddenly became unacceptable.

More importantly, I presume the GOP wants to keep open the possibility of confirming Srinivasan or whatever centrist Obama appoints during the lame duck. Here's why:

Barring any replay of Bush v. Gore, both sides will know on November 9 who would get to pick Scalia's replacement if Obama's pick failed. Both sides will also know the makeup of the Senate. Because of the demographic issues I mentioned earlier, the likely Democratic nominee, Hillary Clinton, is most likely to win. That's not to say I think she's necessarily the strongest candidate – even ignoring the potential the email scandal will taint close advisors like Huma Abedin or Jake Sullivan, I think it likely the economy will be crashing by November in a way that would favor Trump if he were the GOP nominee facing Hillary. But I think electoral demographics suggest the GOP will have a harder time winning this year, particularly after a year of Trump branding the GOP with bigotry.

Plus (ignoring my suspicion the economy will be crashing by November), we're likely to have a more Democratic Senate after November. Harry Reid is the only retiring Democrat where the replacement race is currently perceived to be toss-up, whereas Marco Rubio, Mark Kirk, Kelly Ayotte, and Ron Johnson are all deemed to be likely toss-ups, if not Dem-favorable. It's still most likely the GOP will have a slight majority, but a smaller one, in the Senate, one where people like Susan Collins could make more of a difference. But it is likely to be more Democratic.

If Hillary wins (the most likely outcome) and Democrats win the Senate (unlikely, but feasible), then the Republicans will have good reason to want to confirm an Obama nominee perceived to be centrist. Whereas Srinivasan looks far worse than Scalia to the Republicans, he would all of a sudden look far preferable to a Hillary choice with the time to wait out the Senate. The GOP would have time between November 9 and the Christmas break to confirm whatever Obama nominee has been languishing.

In other words, I think the GOP have provided a way to stall someone (like Srinivasan) they have recently confirmed, while leaving the possibility of confirming that person if November makes it likely the next nominee will be more liberal.

One more thing: Commentary on this process has presumed that McConnell and Grassley (and Obama) learned of Scalia's death when we all did. I would hope that Obama, at least, got word well before that, particularly given the involvement of at least the US Marshals and according to some reports the FBI. But I also wouldn't leave out the possibility that one of the 39 other still unidentified guests at the ranch this weekend gave the Republican leadership a heads up as soon as a hearse showed up. So it's possible that what looked like quick knee-jerk response on the part of Republican leadership was instead more considered, along the lines I've just laid out.

BIASED PLURALISM AND THE DEFENSE OF "REALITY" IN THE

DEMOCRATIC PRIMARY

Last week, I pointed to a problem

with Jonathan Chait's defense of Hillary Clinton's "pluralistic" approach to governance, noting that in an era of weak labor organization, such an approach leaves out the views of the great majority of working people, precisely the kinds of people Bernie Sanders is attracting.

I didn't think of it at the time, but since got reminded of an important paper by Martin Gilens and Benjamin Page, released in 2014. It used a dataset matching polling data to policy outcomes to test four theories for how our political system works: Majoritarian Democracy (meaning policies adopted reflect what most people want), Dominance by Economic Elites (meaning the rich get what they want), Majoritarian Pluralism (meaning interest groups, including those that represent the non-wealthy, get what they want), and Biased Pluralism (meaning interest groups that represent the views of the economic elite get what they want).

Ultimately, the paper showed that our system provides what interest groups want, not what the majority want. Importantly, it also noted that the interest groups that have influence don't actually represent the preferences of the average citizen (which is defined to be policies supported by a median income voter).

Table 1
Theoretical predictions concerning the independent influence of sets of actors upon policy outcomes

Theory (ideal type)	Sets of Actors				
	Average Citizens	Economic Elites	All Interest Groups	Mass Interest Groups	Business Interest Groups
Majoritarian Electoral Democracy	Y	n	n	n	n
Dominance by Economic Elites	y	Y	y	n	y
Majoritarian Pluralism	y	n	Y	Y	Y
Biased Pluralism	n	n	y	y	Y

n = little or no independent influence
y = some independent influence
Y = substantial independent influence

But net interest-group stands are not substantially correlated with the preferences of average citizens. Taking all interest groups together, the index of net interest-group alignment correlates only a non-significant .04 with average citizens' preferences!

It explains this, in part, because there are so many more interest groups (which include corporations) representing the interests of the economic elite that ultimately they'll guide policy even when including those interest groups representing the interests of the non-elite.

As a result, majoritarian views – what most Americans want – have almost no influence on policy.

The estimated impact of average citizens' preferences drops precipitously, to a non-significant, near-zero level. Clearly the median citizen or "median voter" at the heart of theories of Majoritarian Electoral Democracy does not do well when put up against economic elites and organized interest groups. The chief predictions of pure theories of Majoritarian Electoral Democracy can be decisively rejected. Not only do ordinary citizens not have uniquely substantial power over policy decisions; they have little or no independent influence on policy at all.

When the majority gets what they want, it is because the elite interest groups favor the same policy, not because anyone is responding to the interests of the average voter.

Finally, the paper further shows that that is even more true when the majority wants change.

A final point: Even in a bivariate, descriptive sense, our evidence indicates that the responsiveness of the U.S. political system when the general public wants government action is severely limited. Because of the impediments to majority rule that were deliberately built into the U.S. political system—federalism, separation of powers, bicameralism—together with further impediments due to anti-majoritarian congressional rules and

procedures, the system has a substantial status quo bias. Thus when popular majorities favor the status quo, opposing a given policy change, they are likely to get their way; but when a majority—even a very large majority—of the public favors change, it is not likely to get what it wants.

So it's one thing if the majority wants things to remain the same, when they might get what they want, but another thing if they'd like to change the status quo, when they almost never will.

I raise all this because it provides an important reminder for this year's bizarre presidential election. At least on the Democratic side, the findings totally reinforce both candidates. Bernie Sanders is absolutely right that the system is rigged, that the government's policies don't reflect the interests of average Americans. But Hillary Clinton is right, too, that the way to get things done in DC – or at least the way that things have gotten done in DC – is to negotiate compromises within the existing interest group structure (which includes a nearly impotent labor movement and overly powerful corporations). She's even probably right that in the current system you need to co-opt a certain number of economic elite interest groups (that is, largely, corporate groups) to be able to acquire the critical mass of support from interest groups to get a policy adopted. You've got to make enough Goldman Sachs speeches to get them to the table, Hillary might excuse her boondoggle speeches.

But that also has certain implications for the policy debate going on. One problem Hillary is having is in needing to champion – to legitimize – the compromises made within that system: notably, Dodd-Frank and Obama's insurance reform. She's doing that by suggesting, with the help of wonk-boys like Chait, that the compromises made in those

legislative processes were all that were possible at the time. As I hope to lay out, not only the record – but specific actions by those who remain a part of the Hillary entourage – disprove that claim, at least in theory: 2009 was the rare year when that might not have been true. In addition, Hillary's choice to function within the existing pluralist system also all presumes that the existing set of interest groups, with the nearly impotent labor movement and overly powerful corporations, are a fixed set.

Which brings us back to Bernie's call for a revolution, which we might think of as providing average people some means of being an interest group again. Whatever else it is, it could become (unlike the Dean organization that became the 50 state strategy and Obama for America that became a messaging organization within a neutered DNC) a resilient interest group. In many ways, it is a more institutionalized and better funded reincarnation of some recent protest groups, with a very strong overlap with Occupy Wall Street, and as such might have staying power, regardless of what happens with the primary.

But that brings us back to the other problem Hillary (as well as the institutional candidates on the Republican side) is having: voters aren't dummies.

While you can defend the claim that Obama's insurance reform was all that was possible, that doesn't mean – even with the many benefits it has brought about – that it was a sound compromise, much less policy that served the interest of the majority or the country as a whole. Similarly, while you can claim (even more dubiously) that foaming the runway to give the banks a soft landing was necessary, real Americans know we all would be better off with Lloyd Blankfein in prison. That is, you can claim that interest group policies are all we can get, but at that same time that means that interest group policies don't self-evidently

serve the interests of Americans. Hillary can't admit that, but that's the truth confirmed in Gilens and Page. It's also the reason why the wonk-boys are working so hard to claim that these policies serve the good of most people, to try to refute the obvious ways they don't.

Hillary may well win (the primary, at least) based on truthfully claiming she represents the continuation of Obama's policies, as Greg Sargent argued yesterday.

Beyond this, the big picture here is that Sanders has gotten as far as he has by offering up a serious, if partial, indictment of the Obama years. He is arguing that Obama era reforms – Dodd-Frank, Obamacare, his climate agenda – ended up being woefully inadequate to the scale of our challenges, because he failed to sufficiently rally the grassroots against the power of the oligarchy and because the Democratic establishment still remains in thrall to oligarchic money. Clinton full-throatedly defends Obama's accomplishments as very much worth preserving, rejects the Sanders-promulgated notion that Obama could have gotten a whole lot more than he did, and vows to build on those achievements.

The bigger, more diverse, more moderate electorates in the contests to come might be more receptive to Clinton's arguments along these lines. And one thing to watch will be whether Sanders tries to find a way to temper the criticism of the Obama years that is laced through the story he is telling.

I'd temper that and note that Bernie is probably closer to the real foreign policy successes of Obama's post-Hillary term, including opening relations with Iran and Cuba and demanding that the Saudis actually start fighting ISIL. But on the Obama policies that are most obviously the

result of letting interest groups, from the impotent labor movement to the overly powerful corporations, direct policy, Hillary is the inheritor of a historically fairly popular legacy. That's true, and it may well be enough, barring any unforeseen economic reversals, though economic reversals are actually looking pretty likely, in which case that legacy may be of far less value.

The problem with being in that very advantageous position is that, especially this year, voters are all too aware that those policies didn't necessarily serve their needs. And that, it seems, explains the disjuncture between Hillary's claim (true or not) to best be able to negotiate the interest groups of DC and the fact that that hasn't been enough to convince voters.