I WAS WRONG ABOUT THE CHEN AFFAIR

I am in the unenviable position of having to say I was wrong and am sorry. This is in relation to the issue of US diplomacy vis a vis China as relates to Chinese dissident Chen Guangcheng. In case anybody has forgotten, I wrote a rather harsh article toward the US government, by the State Department, conduct within 24 hours or so of it hitting the news wires:

> Hillary Clinton, and the State Department under President Obama, have been far from perfect, to be sure; but, overall, one of the stronger, if not strongest, departments in Obama's cabinet. But this is way ugly, and ought to, by all rights, leave a very permanent mark. It is a stain fairly earned in every sense of the word. Hard to imagine a more cravenly constructed pile of PR bullshit since the Jessica Lynch affair. Yet here it is in living steaming brownish color. All painted with Madame Secretary conveniently in Beijing, China. Awkward!

In a nutshell, I was extremely critical of the entire show, and especially the press manipulation component thereof.

I was wrong. I still have pretty strong issues with the opportunistic way in which the press was contacted by Chen on the way from the embassy to the hospital, which was completely aided and abetted by the US diplomatic officials with him, but this is, at this point, kind of a minor quibble it seems. And, heck, who knows, maybe it was even part of the plan.

Whatever, it seems to have worked out.

Here is today's lead from the Washington Post:

> Blind legal activist Chen Guangcheng,

> who had been at the center of a diplomatic row between the U.S. and Chinese governments, left Beijing on Saturday afternoon on a United Airlines flight bound for Newark and an uncertain life in the United States, after Chinese officials and American diplomats worked out of the public view to arrange for him and his family to travel out of the country.
>
> In the past two weeks, while waiting for movement on the Chinese side, senior staff in the State Department had been laying the groundwork for Chen's departure, including the logistics of his transportation, according to a senior administration official who was not authorized to give his name.

Listen, this is still very far from ideal in a number of respects, and it will be a long time, if ever, before we know all the facts and circumstances surrounding this mess. But fair is fair, my initial criticism, even if correct in some lesser elements, was dreadfully wrong overall.

Hat's off to Hillary Clinton, the State Department and the Obama Administration. It is far from perfect, but it is looking pretty good. I was wrong to be too critical, too soon.

UPDATE: The Washington Post has a pretty fleshed out tick tock on the gig. It actually does look like fairly decent work by State. Would love to see an honest version of the same on the flip side, from the Chinese perspective. That would be fascinating.

SON OF “DUMBEST FUCKING GUY ON THE PLANET” SHILLS FOR MORE WAR IN AFGHANISTAN AND ELSEWHERE

Old craven chickenhawks don’t die, they just breed chickenshit progeny. And so it is with Douglas Feith, famously, and arguably correctly at the time, labeled “the dumbest fucking guy on the planet” by no less than real military man General Tommy Franks. A dilettante son of a “Revisionist Zionist”, Doug Feith went to Harvard and Georgetown Law instead of war when his country actually was at war. Now, granted, I didn’t fight in Vietnam either, thankfully; however, unlike Doug Feith, I did not carve out a career of belligerently advocating for wars of aggression for the sons and daughters of my generation to kill and die in. Feith’s record on hawking the Iraq war, and other neo-con aggressive military action, is legend, and it is exactly what earned him his enduring moniker from Gen. Tommy Franks.

Which brings us to the chickenhawk’s chickenshit progeny. That would be David Feith, the “assistant editorial features editor” at the Wall Street Journal. Feith the younger took today to the pages of the Wall Street Journal to shill for once and future hawkish US warmaking and the proposition that “victory” can be had in Afghanistan if we just keep on killing and dying. David Feith’s vehicle for this attempt is surgemeister Gen. H.R. McMaster:

> The political and psychological dimensions of warfare have long fascinated the general, who first became famous in the Army when he led his vastly outnumbered tank regiment to

> victory at the Battle of 73 Easting in the first Gulf War. Six years later, he published “Dereliction of Duty,” based on his Ph.D. thesis indicting the Vietnam-era military leadership for failing to push back against a commander in chief, Lyndon Johnson, who was more interested in securing his Great Society domestic agenda than in doing what was necessary—militarily and politically—to prevail in Southeast Asia. For 15 years it’s been considered must-reading at the Pentagon.
>
> But Gen. McMaster really earned his renown applying the tenets of counterinsurgency strategy, or COIN, during the war in Iraq. As a colonel in 2005, he took responsibility for a place called Tal Afar. In that city of 200,000 people, the insurgents’ “savagery reached such a level that they stuffed the corpses of children with explosives and tossed them into the streets in order to kill grieving parents attempting to retrieve the bodies of their young,” wrote Tal Afar’s mayor in 2006. “This was the situation of our city until God prepared and delivered unto them the courageous soldiers of the 3d Armored Cavalry Regiment.”

What is most interesting about David Feith’s interview with the once and future hawk H.R. McMaster is that it seems to be Feith, not McMaster, that longs for the US to keep going for “the win” in Afghanistan and parlay into future war. McMaster talks in terms of the Afghanis curing their corrupt society, and of the US additions to the inherent problems in the Afghan culture:

> “We did exacerbate the problem with lack of transparency and accountability built into the large influx of international assistance that came into a government that lacked mature institutions.”

McMaster also talks of the desires and powers growing in the Afghan nation to right their own ship. In fact, if you separate McMaster out from Feith, you actually get some semi-intelligent perspective.

But not from Feith. Oh no. Instead, Feith tries to lead McMaster by the bit right back to more US warmaking:

> Near the end of our interview, we turn to the future of American warfare. U.S. troops are scheduled to end combat operations in Afghanistan in 2014, perhaps sooner. Focus is turning from the Middle East to East Asia, and to the air and sea power required in the Pacific.

McMaster refuses to bite on Feith's apple, in spite of Feith's determination to hold it out. Neo-con apples fall not far from the tree, and David Feith dropped particularly close to "the dumbest fucking guy on the planet".

KENTUCKY DERBY TRASH TALK: A RUN FOR THE ROSES & MISSING MARY

If it is the first Saturday in May, it is Kentucky Derby day. And so it is again today. We dabble with the ponies occasionally here at the Emptywheel blog, from previous Derby Trash Talks, to our coverage of the historic battles of super filly Zenyatta against the biggest and baddest boys of the horse racing world. Heck, we even have our own fearless roving reporter, Rosalind, monitoring the pending debut of Zenyatta's little sister, Eblouissante.

But, by far, it was our friend and colleague Mary who kept up our equine quotient here. Her tales from her farm, in the actual horse country of Kentucky, were a constant over the years. Whether it was the feeding and common chores to care for her horses, saving ones in trouble, to making sure they were ready for incoming storms, it was a slice of life we don't often stop to ponder in the fast paced politi-legal world we generally do here. Mary loved racing horses more than the actual racing really. For the big race days she would always say something to the effect of "oh, I'll probably just be working on the farm for that". Yet, later would say "well, I found a few minutes to see Rachel Alexandra run, wow what a race!"

Mary's voice, sadly, left us just before last Christmas and, frankly, we are still reeling a little from the loss. Communities need glue, and she was part of ours. The first thing I thought when the Derby chatter started up this year was "Damn, I miss Mary". So, our Trash Talk and Derby coverage this week is dedicated to Mary. In honor, one of our longtime good friends of the blog has put together an amazing video, which is at the top of this post, and has a powerful ending. Give it a watch please. If you are new here and did not know Mary, here is the original memoriam we did.

So, there is a real live Derby today. It has not been one of the years with a big noisy media buildup. While we would probably know Andrew Cohen, the CBS News and The Atlantic legal analyst more for his work in the law, he is a completely devoted and involved soul in the world of horses and racing. Here is his breakdown for this year's race:

> On Saturday, the first Saturday in May, Churchill Downs in Louisville, Kentucky, will host the 138th running of the Kentucky Derby, the first leg of Thoroughbred racing's Triple Crown. It ought to be an excellent race. There is no dominant, obvious favorite this year

> and you can make reasonable arguments for any one of a handful of colts who will be running. As is often the case, you also don't have to look too hard to find a sentimental choice, if you are so inclined, because the field is full of them.
>
> For example, there is Union Rags, the pre-season favorite for the Derby until he ran poorly after a tough trip in the Florida Derby. Union Rags is trained by Barbaro's old trainer, Michael Matz, the mercurial horseman who seems like he could use some good karma for a change on the track. Then there is the fast colt Creative Cause, winner of the San Felipe Stakes, who represents his 71-year-old trainer Mike Harringon's first-ever Derby horse. And there is Bodemeister, trainer Bob Baffert's latest missive, named after Baffert's son, a colt who blew them away in the Arkansas Derby.
>
> Want more? There's Gemologist, one of trainer Todd Pletcher's best, a colt who won the Wood Memorial and who has never been beaten. There's Hansen, a striking white colt whose owner got into a tussle with race officials in Kentucky because he wanted the horse's tail painted blue for a race. It didn't happen—God forbid horse racing should have an edgy marketing ploy—and Hansen was beaten by another Derby horse, named Dullahan, trained by Dale Romans, son of Jerry Romans, who never won a Derby himself.

There is much, much more in Andrew's article though, it is well worth a read. The title is "The Kentucky Derby and the Slow Death of Horse Racing" and it is is an excellent work on the various ills of the endeavor once known as "the sport of kings".

I found a couple of historic takes on the

Kentucky Derby from years gone by that you might find interesting, if so inclined. The first is by William Faulkner and is from 1955. Faulkner is such a rich and brooding writer. The second is from the always raucous Hunter S. Thompson and paints the picture of just what a depraved and decadent ramble of a party Derby week is in Louisville. From a man who really knew decadent and depraved partying.

My mother was bred, born and raised in the bluegrass country of western Kentucky and went with her father, my grandfather, to the Derby nearly every year growing up. She also taught American Literature for a very long time; she, like Mary, would have loved these looks back through the eyes of American masters of the pen. They are long, but fascinating pieces.

There are a host of other sports going on as well. The NFL recently completed its entry draft, had more trouble down in the Big Easy and, sadly, lost Junior Seau. Not a very good week. Oh, and former marginal Pittsburgh running back Merril Hoge is making a blithering ignorant jackass of himself by ripping Kurt Warner, who made the perfectly reasonable comment that he might not want his children to play football at the level of the current college and pro ranks because of the potential for life altering brain injury. It appears to be Hoge, however, who has an angry screw loose in the head. Notably, Hoge himself almost died from the bullshit he is spewing.

The baseball world has lost Mariano Rivera, arguably the greatest relief pitcher ever, for at least the year to a freak knee injury while he was shagging flies in pre-game warmups. Thankfully, Mo promises to be back for a curtain call, a player of such quality should not leave the game like that. Pujols still can’t get a ball out of the yard in his new home in Anaheim and the Sawx are back on an even keel – for now.

The NBA playoffs are in full swing with last year’s champion, the Dallas Mavericks on the brink of extinction, the Bulls hanging by a

thread without star Derrick Rose and the San Antonio Spurs quietly plowing along. It is still completely impossible for me to find anything but total disdain for LeBron James and the Heat.

So, there is the rundown folks. A lot to chew on and talk trash about. Busy weeks lately, let's have some fun! And Jimi Hendrix in the special video, what more could you ask for. Let's get it on!

THE PADILLA V. YOO DECISION WILL NOT PUT CHONG'S CLAIM UP IN SMOKE

There has already been a lot of very good commentary across the internets and media on the notable decision in the 9th Circuit this week in the case of *Jose Padilla v. John Yoo*. Although many, if not most, commenters seem outraged, the decision is, sadly, both predictable and expected. I also think Marcy had about the right, and appropriately snarky, take on the decision embodied in her post title "Jay Bybee's Colleagues Say OLC Lawyers Couldn't Know that Torture Was Torture in 2001-2003". Yep, that is just about right.

As to the merits, Jonathan Hafetz, in a very tight post at Balkinization, hits every note I

would urge is appropriate, and does so better than I probably could hope to. Go read Jonathan. Above and beyond that, I think Steve Vladeck's analysis is spot on:

> In other words, (1) it wasn't clear from 2001-03 that CIDT "shocks the conscience"; (2) Padilla's mistreatment was not as severe as prior cases in which courts had recognized a torture claim; (3) it therefore wasn't clear whether Padilla's mistreatment was torture or CIDT; (4) it therefore wasn't clear that Padilla's mistreatment "shocks the conscience."
>
> Thus, the panel's approach is basically that the mistreatment here falls between conduct that prior courts (including the Ninth Circuit) had held to be torture and conduct that prior courts had held to be merely CIDT. Because Padilla's mistreatment was less severe than prior examples of torture, and more severe than prior examples of CIDT, it's just not "clear" on which side of the torture/CIDT line Padilla's mistreatment falls… Of course, the fact that A > B > C proves nothing about where B is. And under Hope v. Pelzer, the question in qualified immunity cases is not whether the plaintiff can prove that the defendant's conduct was at least as bad as something already acknowledged to be unlawful. As Justice Stevens explained, it isn't the case that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Instead, "in the light of pre-existing law[,] the unlawfulness must be apparent."
>
> Perhaps the panel would have reached the same result had they not skipped these steps. But to my mind, these are fairly significant omissions…

Wheeler, Hafetz and Vladeck are all correct about the infirmities in the 9th Circuit's version of *Padilla* (without even getting to the 4th Circuit's version of *Padilla*, contained in *Padilla/Lebron v. Rumsfeld*).

At this point, arguing over key governmental personnel accountability, or lack thereof, is pretty much a bit of Walter Mitty fantasy; I am much more interested in the way the various Bush/Cheney war on terror cases have cemented an already present trend in American jurisprudence to restrict, if not outright block, access of litigants to courts. Jon Hafetz thinks the rule of law caught a break when the 9th didn't reach the merits and weight of "special factors" preclusion of *Bivens* liability. And, sadly, that may be about right. There are two real issues that, while perhaps trending before the national security state set in after 911, jumped to warp speed after. Access preclusion and *Bivens* narrowing.

The first area, access preclusion, is demonstrated perfectly by the insidious effects of the twin opinions in *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal*. Then House Judiciary Chairman Nadler said of the evil twin cases in a 2009 hearing:

> In the past the rule had been, as the Supreme Court stated in *Conley v. Gibson* 50 years ago, that the pleading rules exist to ''give the defendant fair notice of what the claim is and the grounds upon which it rests,'' assuming provable facts. Now the Court has required that prior to discovery, courts must somehow assess the plausibility of the claim.
>
> This rule will reward any defendant who succeeds in concealing evidence of wrongdoing, whether it is government officials who vio- late people's rights, polluters who poison the drinking water, employers who engage in blatant discrimination, or anyone else who

> violates the law. Often evidence of wrongdoing is in the hands of the defendants, of the wrongdoers, and the facts necessary to prove a valid claim can only be ascertained through discovery.
>
> The *Iqbal* decision will effectively slam shut the courthouse door on legitimate plaintiffs based on the judge's take on the plausibility of a claim rather than on the actual evidence, which has not been put into court yet, or even discovered yet. This is another wholly inventive new rule overturning 50 years of precedent designed to close the courthouse doors. This, combined with tightened standing rules and cramped readings of existing remedies, implement this conservative Court's apparent agenda to deny access to the courts to people victimized by corporate or government misconduct.
> ….
> Rights without remedies are no rights at all. There is an ancient maxim of the law that says there is no right without a remedy. Americans must have access to the courts to vindicate their rights, and the concerted attempt by this Supreme Court to narrow the ability of plaintiffs to go into courts to vindicate their rights is something that must be reversed.

But it is not just *Iqbal/Twombly* barring the courthouse doors for plaintiffs seeking redress against the federal government, it is the concurrent narrowing of accessibility of claim under *Bivens*, more properly known as *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. Against state level actors, there are claims available under 42 USC 1983, commonly known as Section 1983 litigation. But Section 1983 is only for claims against state actors under the color of law, and does not extend to

claims against the federal government.

Since the federal government is “the sovereign” and the sovereign has immunity, the federal government cannot, generally, be sued without its permission. This is why the decision by Judge Vaughn Walker in al-Haramain that there was a cause of action available under FISA was so important; if the decision was otherwise, there would have been no other available avenue open for the plaintiff therein to sue and obtain relief. Walker ruled Congress had, indeed, granted “the permission” of the federal sovereign to be sued.

But, what if the most fundamental and sacred Constitutional rights are violated in a heinous manner, and there is no specific provision like Judge Walker found under FISA? This is where the implied right to sue under *Bivens* comes to bear (for a variety of reasons, and some very much to do with the narrowing of the *Bivens* remedy, the al-Haramain plaintiffs would not have been able to proceed under *Bivens*). And is exactly why the disdain for, and narrowing of, *Bivens* over the years by the ever more conservative Supreme Court is so troubling – and it is exactly what you see in the various *Padilla* opinions.

In spite of the fact he disagrees somewhat on what should be done as a solution, the scope of the problem is summed up very well by Professor Steve Vladeck:

> …the consensus view has been that Iqbal is an unremarkable addition to a long line of Supreme Court decisions over the past quarter-century in which the Court has effectively limited Bivens to its facts—just another nail in a coffin long-since sealed.11 From that perspective, Iqbal is a small part of a much larger problem, the only real solution to which (other than a massive doctrinal shift) appears to be the creation of a statutory cause of action that would provide a rough equivalent to § 1983 relief13 for claims against

> federal officers.

Although Steve has different thoughts, I suggest that is precisely what is needed – Congress needs to specifically provide a designated avenue of access to courts so that plaintiffs, including ones in so called "national security" situations (think Jose Padilla, the AT&T/Hepting wiretapping plaintiffs and a host of others) can address their concerns and obtain redress for them. In short, accountability! It may be time to stop lamenting the failure of accountability for the wrongs occasioned by the Bush/Cheney regime and use them as leverage to an expanded path for court access and accountability in the future. The Roberts Court will never open this area up as was initially done by Justice Brennan during the Burger Court; the Roberts Court will only continue to narrow and eliminate access. In an election year, this is something that ought to be being specifically demanded of candidates for Congress, whether incumbent or otherwise.

All of which leads to the teaser I put in the post title, the hot off the presses case of Daniel Chong. From CBS News:

> The Drug Enforcement Administration issued an apology Wednesday to a California student who was picked up during a drug raid and left in a holding cell for four days without food, water or access to a toilet.
>
> DEA San Diego Acting Special Agent-In-Charge William R. Sherman said in a statement that he was troubled by the treatment of Daniel Chong and extended his "deepest apologies" to him.
>
> The agency is investigating how its agents forgot about Chong.
>
> Chong, 23, was never arrested, was not going to be charged with a crime and should have been released, said a law enforcement official who was briefed on the DEA case and spoke on the condition

> of anonymity.
>
> The engineering student at the University of California, San Diego, told U-T San Diego that he drank his own urine to survive and that he bit into his glasses to break them and tried to use a shard to scratch “Sorry Mom” into his arm.

There is some evidence Chong was also handcuffed for the five days he was abandoned in the crypt of a holding cell he was in. Pretty darn close to what the US did to detainees under the “enhanced interrogation techniques”, more commonly known to rational humans as torture. In fact, if the concrete floor of Chong’s crypt of a holding cell at the DEA facility had been frozen, he would have effectively been Gul Rahman of the Salt Pit frozen infamy. Or, you know, Jose Padilla.

The similarity to the detainee torture was clearly not lost on Daniel Chong’s attorney, Eugene Iredale, who, in the already filed Statutory Notice of Claim, makes reference to The Detainee Treatment Act of 2005, The Military Commissions Act of 2006, and the Conventions Against Torture.

That is going to leave a serious mark.

But could Daniel Chong be cheeched out of court access like Jose Padilla and so many others have been? Could the dreaded *Iqbal/Twombly* and *Bivens* narrowing block his action? No, probably not.

Mr. Chong Has pled under the Federal Tort Claims Act in 28 USC 2671 et. seq, as well as *Bivens*, and his claims appear to be square in the wheelhouse of the provisions. While, like Jose Padilla, Chong is a citizen, unlike Padilla, Chong’s status cannot be impaired by craven designation as an enemy combatant terrorist. Recall, the 9th Circuit framed Padilla in this manner:

> As we explain below, we reach this

> conclusion for two reasons. First, although during Yoo's tenure at OLC the constitutional rights of convicted prisoners and persons subject to ordinary criminal process were, in many respects, clearly established, it was not "beyond debate" at that time that Padilla – who was not a convicted prisoner or criminal defendant, but a suspected terrorist designated an enemy combatant and confined to military detention by order of the President – was entitled to the same constitutional protections as an ordinary convicted prisoner or accused criminal. Id. Second, although it has been clearly established for decades that torture of an American citizen violates the Constitution, and we assume without deciding that Padilla's alleged treatment rose to the level of torture, that such treatment was torture was not clearly established in 2001-03.

Those concerns are simply not going to apply to Daniel Chong. It is hard to see how he will not either get an acceptable settlement, or his day in court. And, while punitive damages are not available under a straight Federal Tort Claims Act claim under 28 USC 2674, they are available under a *Bivens* Claim (see: *Carlson v. Green*, 446 U.S. 14 (1980)). In short, Mr. Chong has a heck of a claim and some decent legal leverage. For once.

For the foregoing reasons, Daniel Chong may have the most important and compelling tort case against the United States government in recent memory. He cannot be glibly chiseled out of court access like the terrorist torture plaintiffs but, yet, he otherwise stands in nearly identical damage shoes, both factually and in terms of his legal damage pleading. The government and DOJ cannot avoid this one, and it is going to set a stark contrast to exactly what they have been cravenly avoiding with

“terrorist” and “national security” detainees.

THE BIN LADEN DOCUMENT DUMP

As MadDog noted, there is a big Bin Laden document dump today. Here is what appears to be the main 205 page pdf file released so far this morning. The first seven pages give a decent overview, lead off by this introduction paragraph:

> This document provides a general description of the 17 declassified documents captured in the Abbottabad raid and released to the Combating Terrorism Center (CTC). For additional context please see the documents themselves and/or the CTC’s report “Letters from Abbottabad: Bin Ladin Sidelined?” released in conjunction with this summary.

The “Letters from Abbottabad: Bin Ladin Sidelined?” is here.

I have not yet had a chance to look at these, so please feel free to dissect them and discuss them, with your analysis, in comments. Also, if more documents are released that I do not have up, drop a link into comments so that I see it and can add it into the main post.

Here is a very nice report and overview of the dump by our friend Spencer Ackerman at Wired.

Also, not necessarily exactly based on these same documents, Gareth Porter has a nice longform piece over at Jason’s joint, Truthout. The title is *Finding Bin Laden: The Truth Behind the Official Story*, and it makes a somewhat interesting juxtaposition to all the hype that

has been being pitched by the Administration the last few days.

Happy Hunting!

CHEN GUANGCHENG: THE HOLLOW CORE OF A PRESS MANIPULATION PRESIDENCY

I live in the Pacific time zone, a full three hours behind the news makers and breakers on the east coast. I woke up early yesterday, by my time, and found an apparent great story occupying my Twitter stream: Chinese dissident and activist Chen Guangcheng had not only, through the miracle that is United States benevolence, been sheltered in the US Embassy (as had been theorized) from his daring blind man's escape from house arrest, but had been represented in a breathtakingly humanitarian deal with the oppressive Chinese government that resulted in his proper medical care, reunion with his family and a safe and fulfilling life from here on out.

The proverbial "and everybody lived happily ever after".

By the time I got my second eye open, and

focused, I realized what I was reading something more akin to a Highlights Magazine “What’s Wrong With This Picture?” puzzle.

And so it was. What a difference a day makes. The initial report I read this morning at the source Washington Post article appears to be pushed aside from their website, supplanted by a more honest report.

The first report at the WaPo depicted an incoming call to the reporter from US Ambassador to China, Gary Locke:

> What I was not prepared for was when Locke said, “I’m here with Chen Guangcheng. Do you speak Chinese? Hold on.”
>
> And then passed the phone over.
>
> “Hello, this is Chen Guangcheng,” came a matter-of-fact, almost cheerful voice.
>
> I introduced myself in halting Chinese, using my Chinese name and the Chinese name for The Washington Post. I asked how Chen was, and where. I asked him to speak slowly, to make sure I could understand.
>
> “Washington Post?” Chen repeated, his voice sounding generally happy. Chen said he was fine and was in the car headed to the hospital, Chaoyang Hospital. He repeated the name slowly, three times.
>
> And that was it. Chen handed the phone back to the ambassador, who said they were stuck in traffic, but promised a full briefing later.
>
> Following the old “two source” rule for journalists, I definitely had my story. Chen was indeed under U.S. diplomatic protection, as we and other news outlets had been reporting. He was now leaving the embassy on his way to the hospital. In a vehicle with the American

> ambassador. The first word would go out soon after that, in a blast to our overnight editors, and via my Twitter account.
>
> I learned later that I was just one in a succession of calls U.S. diplomats made from the van at Chen's request – they also spoke to Chen's lawyer and to Secretary of State Hillary Rodham Clinton, recently arrived in Beijing for an important two-day summit.

That was the "happily ever after" story which was too good to be true.

It was indeed too good to be true. A mere twelve hours later, and even the Washington Post reports a far different tale:

> The blind legal activist Chen Guangcheng left the refuge of the U.S. Embassy in Beijing for a hospital on Wednesday, but he was quickly cordoned off by Chinese police and reportedly seized by misgivings about his decision, as an apparent diplomatic triumph risked dissolving into a potentially damaging episode in U.S.-China relations.
>
> After four days of secret negotiations, U.S. diplomats on Wednesday initially touted then later scrambled to defend their role in forging an agreement that they said contained extraordinary Chinese promises to allow Chen – a self-taught lawyer known for criticizing Chinese policies on abortion – to move his family to Beijing, where he would begin a new life as a university student.
>
> Chinese officials, by contrast, broke their official silence on Chen by firing a broadside complaining about U.S. interference in China's internal affairs. The Foreign Ministry demanded an apology, which State Department

> officials declined to give.
> ….
> But activists' fears over Chen's fate mounted, and they expressed increasing alarm — fueled by a series of Twitter updates — that what seemed like a human rights victory was spiraling quickly into a worst-case scenario.
>
> Chen was no longer under U.S. protection, they noted, and it was not clear whether he had left on his own free will or under coercion. While U.S. officials said they had been promised access to Chen in the hospital, Britain's Channel 4 news quoted a conversation with him in which he seemed confused and upset that no American diplomats were around.
>
> "Nobody from the [U.S.] embassy is here. I don't understand why. They promised to be here," Channel 4 quoted Chen as saying.
>
> Bob Fu, president of the advocacy group ChinaAid, said he was concerned that "the U.S. government has abandoned Chen" and that the Chinese government is "using his family as a hostage."

Quite a difference, no? And that, quite frankly, appears to be the sanitized version from the Washington Post, who has a dozen eggs on their face. But nowhere near the eggage the Obama Administration, and State Department, has on their collective face.

Hillary Clinton, and the State Department under President Obama, have been far from perfect, to be sure; but, overall, one of the stronger, if not strongest, departments in Obama's cabinet. But this is way ugly, and ought to, by all rights, leave a very permanent mark. It is a stain fairly earned in every sense of the word. Hard to imagine a more cravenly constructed pile of PR bullshit since the Jessica Lynch affair.

Yet here it is in living steaming brownish color. All painted with Madame Secretary conveniently in Beijing, China. Awkward!

Such are the vagaries of policy by press manipulation though. The ass biting incidents such as the aforementioned Jessica Lynch, the dishonor of the man that was Pat Tillman, to the broken promises of Barack Obama on warrantless wiretapping and war crime accountability, to the false hope of Cairo, to the greasy and uncomfortable election politicization of the SEAL's takedown of Osama bin Laden a year ago, to Chen Guangcheng.

There has been precious little return on the false hype from the Obama Administration; instead, a wave of disappointment. And the press is, without saying, all too willing to serve as the tool of the string pullers in power, regardless of which political faction it may be at any given time. It is who they are, it is what they do. As Glenn Greenwald said recently of the willing press:

> They aren't nearly so substantive as to be driven by any sort of belief or ideology or anything like that. Their religion is the worship of political power and authority (or, as Jay Rosen says, their religion is the Church of the Savvy). Royal court courtiers have long competed with one another to curry favor with the King and his minions in exchange for official favor, and this is just that dynamic. Political power is what can give them their treats – their "exclusive" interviews and getting tapped on their grateful heads to get secret documents and invited to White House functions and being allowed into the sacred Situation Room – so it's what they revere and serve.

That is exactly the bogus and counterfeit relationship between Presidency and press that led to the unquestioning, and ultimately

embarrassing, breathless buy in by the Washington Post on the spoon fed horse manure from the Obama Administration's Chinese Ambassador, Gary Locke, on Chen Guangcheng.

It is all a media manipulation now, and the media do not care who, or which side, are doing the manipulating. Presidency by press release. It doesn't matter if it is real or fabricated, it is all good if it sells. The distressing thing is that it does, indeed, sell.

WHY JOSE RODRIQUEZ SHOULD BE IN PRISON, NOT ON A BOOK TOUR

As Marcy noted, Adam Goldman and Matt Apuzzo of the AP have gotten their hands on an early copy of Jose Rodriquez's new ~~screed~~ book, "Hard Measures". The one substantive point of interest in their report involves the destruction of the infamous "torture tapes". What they relate Rodriquez saying in his book is not earth shattering nor particularly new in light of all the reporting of the subject over the years, but it is still pretty pretty arrogant and ugly to the rule of law:

> The tapes, filmed in a secret CIA prison in Thailand, showed the waterboarding of terrorists Abu Zubaydah and Abd al-

> Nashiri.
>
> Especially after the Abu Ghraib prison abuse scandal, Rodriguez writes, if the CIA's videos were to leak out, officers worldwide would be in danger.
>
> "I wasn't going to sit around another three years waiting for people to get up the courage," to do what CIA lawyers said he had the authority to do himself, Rodriguez writes. He describes sending the order in November 2005 as "just getting rid of some ugly visuals."

As you may recall, specially assigned DOJ prosecutor John Durham let the statute of limitations run out on prosecuting Jose Rodriquez, and others directly involved, including four Bush/Cheney White House attorneys (David Addington, Alberto Gonzales, John Bellinger and Harriet Miers) involved in the torture tapes destruction, as well as two CIA junior attorneys, on or about November 9, 2010. There was really never any doubt about what Rodriquez's motivation was in light of the fact he destroyed the tapes of Abu Zubaydah and al-Nashiri within a week of Dana Priest's blockbuster article in the Washington Post on the US "black site" secret prisons.

But, just as there was no doubt, then or now, as to the motivation of Rodriquez and/or the others, there was similarly never any doubt about the legitimate basis for criminal prosecution. The basic government excuse was they could not find any proceeding in which the torture tapes were material to so as to be required to have been preserved. For one thing, Judge Alvin Hellerstein determined the tapes were indeed material to the ACLU FOIA suit and within the purview of their evidentiary hold (even though he refused to hold CIA officials in contempt under the dubious theory they may not have had notice).

More important, however, was the immutable and

unmistakable fact that the torture tapes were of specific individuals, al-Qaeda members Abu Zubaydah and Abd al-Rahim al-Nashiri, who, at the time of destruction of the tapes, were in detention awaiting trial, whether it be in an Article III court or a military commission. With al-Nashiri there was the added fact that he was a named co-conspirator (though unindicted) in the open indictment of his Cole bombing mates al-Badawi and al-Quso. It was, and is, patently duplicitous to claim there were no possible cases the tapes had pertinent evidentiary value to. And the DOJ knew it. Because I told them in a letter prior to the expiration of the statute of limitations:

> Secondly, I would like to point out that should you be thinking about relying on some rhetoric that Mr. Durham simply cannot find any crimes to prosecute and/or that there were no proceedings obstructed, it is intellectually and legally impossible to not consider the tapes to be evidence, and as they almost certainly exhibit torture to some degree and to some part they would almost certainly be exculpatory evidence, in the cases of Abu Zubaydah and al-Nashiri themselves. The United States government continues to detain these individuals and they have charges that will putatively be brought against them in some forum (civil or tribunal), Habeas rights and/or indefinite detention review processes that will occur in the future.
>
> In short, there exist not just the potential, but the necessity, of future proceedings, and agents of, or on behalf of, the United States government have destroyed material, and almost certainly exculpatory, evidence. Crimes have been committed. At a bare root minimum, it is crystal clear Jose Rodriquez has clear criminal liability; there are, without question, others culpable too.

In short, the tapes were material evidence in multiple ways, in multiple forums, and the crime of obstruction of justice by destruction of evidence is patently obvious. If you have any questions about the willingness of the DOJ to charge obstruction of justice for evidence destruction, look no further than yesterday's charging affidavit for destruction of text messages in the BP Gulf Oil Spill case. The DOJ knows how to charge the kind of crimes Jose Rodriquez and the others committed when they want to. Thing is, the DOJ of Barack Obama and Eric Holder did NOT want to charge any crime, even patently obvious obstruction, that impinged on the Bush/Cheney illegal torture program.

Marcy made a very salient point in that "the problem with the torture tapes is not what they showed, but what they didn't show". That may well be true, but it does not detract from the fact the tapes were directly material evidence to Abu Zubaydah and al-Nashiri, in fact it only confirms the malicious intent the government had with respect to covering up their torture – the blank spots and erasures are powerful evidence. In and of themselves, the blank spots, erasures and inoperability of some of the tapes, in conjunction with the corresponding torture session logs, demonstrate malicious intent to cover up torture.3 And let's not mince words, whatever was still on the tapes was so powerful that it shocked the conscience of CIA Inspector General John Helgerson and displayed, at a minimum, waterboarding. So, there was critical evidence of many varieties possessed in and on the tapes Jose Rodriquez et. al wantonly destroyed.

So, why is Jose Rodriquez out running free, pimping his book and slamming President Obama, instead of in a federal prison? Well, it most certainly is not because he could not have been charged and convicted, it is because the Administration of Barack Obama refused to do so. Jose Rodriquez is one wired in spooky guy, and the CIA, well there is no telling what they might do to protect themselves. Maybe Dianne

Feinstein and the Senate Intel Committee could investigate what levers Rodriquez and the Company pushed to obtain this result before the reach they looming completion of their "investigation" of the Bush/Cheney interrogation program.

[UPDATE] And Dana Priest has just weighed in this morning with her take on Rodriquez and his book. The entire article at the Washington Post is worth a read, but the pertinent part for this post is:

> In late April 2004, another event forced his hand, he writes. Photos of the abuse of prisoners by Army soldiers at the Abu Ghraib prison in Iraq ignited the Arab world and risked being confused with the CIA's program, which was run very differently.
>
> "We knew that if the photos of CIA officers conducting authorized EIT [enhanced interrogation techniques] ever got out, the difference between a legal, authorized, necessary, and safe program and the mindless actions of some MPs [military police] would be buried by the impact of the images.
>
> "The propaganda damage to the image of America would be immense. But the main concern then, and always, was for the safety of my officers."
>
> Readers may disagree with much of what Rodriguez writes and with the importance of some of the facts he omits from his book, but the above sentence speaks volumes about why this book is important. In this case, a loyal civil servant — and the decision-makers above him who blessed these programs — were not thinking about the larger, longer-lasting damage to the core values of the United States that disclosure of these secrets might cause. They were thinking about the near term. About efficiency.

> About the safety of friends and colleagues. In their minds, they were thinking, too, about the safety of the country.
>
> And after some back-and-forth with agency lawyers for what seemed to him the umpteenth time, he writes, Rodriguez scrutinized a cable to the field drafted by his chief of staff, ordering that the tapes be shredded in an industrial-strength machine. The tapes had already been reviewed, and copious written notes on their content had been taken.
>
> “I was not depriving anyone of information about what was done or what was said,” he writes. “I was just getting rid of some ugly visuals that could put the lives of my people at risk.
>
> “I took a deep breath of weary satisfaction and hit Send.”

Priest is exactly right about “the larger, longer-lasting damage to the core values of the United States”. One of those values is fairness and the rule of law. Those values demand that the rights of the accused rate just as much or more moment than the self serving cover you rear desires of the accusers and abusers.

(Graphic by the one and only Darkblack)

BAHRAIN DRAIN: OPPRESSIVE US CLIENT STATE SUCKS THE LIFE

OUT OF FORMULA ONE

[UPDATE] Qualifying went off without much hitch this morning, at least inside the circuit. Outside the circuit, the body of a protester was found, dead after a night of clashes with government authorities and police. Inside the confines of the circuit, Sebastian Vettel regained qualifying form and took his first pole of the season, followed by Lewis Hamilton, Mark Webber and Jenson Button. Schumacher didn't even manage to get out of Q1. Unlike the desolate practice yesterday, there were at least some fans observable in the main grandstand for qualifying today. But the scene was still as bleak and lifeless as I have ever seen for a F1 Grand Prix. It remains an embarrassment for FIA and the teams (FOTA) to be in Bahrain. And, as I pointed out yesterday, the lie that FIA and Bernie Ecclestone comfort themselves with – that they are being non-political by going and not giving in to international political concerns – is absurd and outrageous. The oppressive Sunni minority and the ruling Khalifa clan are using the mere presence of F1 in Sakhir to paint the picture that everything is okay with the Shia majority in Bahrain. It is not, and F1 looks like a tool. – bmaz 10:30 am EST Sat Apr. 21

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

The scene is surreal in how vacant and empty it is. There are no people, no crowds, no passenger cars in the surrounding lots, no motorhomes in the infield. There is no party. There is no circus. There are no people. F1 is not lovingly

referred to by longtime aficionados as “the circus” for nothing, *it is the circus*. F1 brings the press, the families, the hangers on, the beautiful women, the beautiful people – and the press that follow them. It is a traveling roadshow party of epic proportions, and always has been.

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

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

> “The truth of the matter is we put the calendar together and the teams race on the calendar,” he said. “We were trying to help Bahrain, who have been very helpful to Formula One, and hoping they could get themselves sorted out.
>
> “I don’t know whether there is peace or not. I have no idea. The FIA sent somebody out to check and they said it was all OK. I think the teams had different information and they have the right to say they don’t want to change the calendar.”

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

I know people whose life it is to follow F1 and document it, it is their profession. It was their father’s profession before them. It is their life. They are not in Bahrain. Presumably,

as effectively permanent attachments to the sport, they could have gotten in; they just refused to go. Just having the option is more than most journalists can say. From the AFP:

> Bahrain has denied visas to foreign journalists and photographers, including from AFP, to cover this Sunday's controversial Grand Prix race.
>
> An AFP photographer, accredited by the sport's governing body, the FIA (Federation Internationale de l'Automobile), was informed by Bahrain's information affairs authority that there has been a "delay to your visa application, so it might not be processed."
>
> Associated Press said two of its Dubai-based journalists were prevented from covering the Grant Prix because they could not receive entry visas, despite being accredited by the FIA.
>
> Meanwhile, cameramen already in Bahrain were required to keep fluorescent orange stickers on their cameras so that they would be easily recognisable to ensure they do not cover any off-track events, such as ongoing protests.

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

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

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

> For the monarchy — and for Formula One — there are also overriding economic concerns. The Grand Prix is the

> kingdom’s biggest sports event, drawing a worldwide television audience of roughly 100 million in nearly 200 countries, bringing in half a billion dollars in revenue and attracting thousands of visitors. When the race was canceled last year, Bahrain still had to pay Formula One a $40 million “hosting fee.”

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

> The tiny island nation of Bahrain plays a big role in America’s Middle East strategy. In fact, more than 6,000 U.S. military personnel and contractors are located just five miles from where government security forces violently put down demonstrations this week.
>
> Bahrain is also home to the U.S. Fifth Fleet, a major logistics hub for the U.S. Navy ships. The island is located halfway down the Persian Gulf, just off the coast of Saudi Arabia, and is something of a rest stop for U.S. Navy ships cruising the waters of the Gulf.
>
> “It has facilities that can provide support to our ships, including, you know, fuel, water provisions, resupply,” retired Rear Adm. Steve Pietropaoli says.
>
> Those facilities have been resupplying warships for nearly a half-century, ever since Great Britain’s fleet left the island. Bahrain provided major basing facilities and support for the armada of U.S. Navy ships sent for the first Persian Gulf War in 1990 and the Iraq War in 2003.
>
> “Bahrain is an outstanding partner,” Pietropaoli says. “It has been the enduring logistical support for the

> United States Navy operating in the Persian Gulf for 50 years."

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

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

This is a load of baloney from Bernie. The mere fact that F1 is in Bahrain now, as a false front for the oppressive Bahrain government and Khalifa ruling family, is, itself, politicization of the worst kind.

WILLIAM WELCH LEAVING DOJ; MAIN JUSTICE CIRCLES THE ETHICAL WAGONS

Apparently the thrill is finally gone, or at least soon to be gone. Carrie Johnson at NPR has just reported:

> A federal prosecutor who led the elite public integrity unit when the case

> against the late Alaska Sen. Ted Stevens collapsed has told associates he will leave the Justice Department.
> ….
> A spokeswoman for the Justice Department and a representative for Welch had no comment on his departure, which one source said he characterized as a "retirement."
>
> Welch had been scheduled to lead a controversial prosecution later this year of former CIA official Jeffrey Sterling, who is accused of leaking secrets to New York Times reporter James Risen. That case has drawn widespread media attention because it could set important precedent on the issue of whether reporters enjoy some sort of legal privilege that could help them protect their sources.

This is interesting, actually fascinating news. As Carrie notes the Sterling matter is hanging in the lurch. In fact, it is waiting on an interlocutory appeal decision from the 4th Circuit over claims that the DOJ, once again led by Welch, played fast and loose with critical evidence disclosure. I do not, however, think that the impetus behind this somewhat surprising announcement. The 4th case appears to have completed briefing with the government's filing of a redacted reply about six weeks ago; however, I don't think a decision is likely coming that fast and federal appellate courts are not that leaky. Although, to be fair, District and Circuit courts do, occasionally in media intensive cases, give the parties a heads up a decision is coming.

More likely, this is more fallout from the Ted Stevens case and the Schuelke report. In fairness to Welch, he was not one of the hardest hit DOJ attorneys in Schuelke's report, but he was blistered by Schuelke at Schuelke's testimony in front of the Senate Judiciary Committee in late March:

> Schuelke said tight deadlines before the lawmaker's October 2008 trial and a series of missteps within the Justice Department's public integrity unit where leaders William Welch and Brenda Morris "abdicated supervisory responsibility" contributed to the evidence sharing lapses. The failings prompted new Attorney General Eric Holder to abandon the case in 2009; Stevens died a year later in a plane crash after he had lost his Senate seat.

The odds are fairly good that the DOJ is putting the finishing touches on its long awaited OPR report on the Stevens fiasco and, after Schuelke, needs a sacrificial lamb. And Welch is a prime candidate to be sacrificed. But that would beg the question of what will they do about Brenda Morris, whose conduct in Stevens was much more egregious and central, as a supervisor, that even that of Welch. And it should not be forgotten that Brenda Morris was also smack dab in the middle of another catastrophic black eye for the DOJ, the Alabama bingo cases. So, there are some real questions for DOJ there.

As to William Welch though, with both the OPR report nearing completion, and the prospect of a House Judiciary inquiry looming later this week, it would seem that Welch's newfound desire for "retirement" has a bit of a forced edge to it.

One last thing should be kept in mind: the legislation proposed by Lisa Murkowski and having key bi-partisan backing after Stevens and the Schuelke Report, to reform federal evidence disclosure rules for the DOJ. The DOJ is literally, and cravenly, apoplectic about the proposed reform and has promised they have "learned their lesson" and that everybody should just "trust us".

DOJ had been fighting disclosure reform hard for quite a long time; but there will never be better momentum than is present now, and they

know it. Any seasoned criminal defense attorney will confirm that the far more open and reciprocal discovery rules found at the state level in several more enlightened jurisdictions (I can vouch for this in Arizona, which is one of them) work far better than the archaic disclosure rules extant in federal court. It would be a huge benefit to fairness in the criminal justice process, and it IS an attainable goal. And that, too, may be why we are seeing the sacrifice of William Welch.

ZIMMERMAN: ANATOMY OF A DEFICIENT PROBABLE CAUSE AFFIDAVIT

Now that the dust has settled from the decision in the Zimmerman/Martin case not to proceed by grand jury by the Florida Special Prosecutor Angela Corey, and the decision to file a single count of second degree murder, I want to address a couple of critical topics in the case. First is the fact that there are serious questions as to the sufficiency of the probable cause affidavit that currently constitutes not just the core, but pretty much the entire basis for the state's case.That will be the subject of the instant post. Second, will be a discussion of the mechanics of Florida's procedure for implementing its "Stand Your Ground" law and a discussion of other pending procedural aspects of the case, and that will be covered in a followup post.

A probable cause affidavit is exactly what it sounds like, a sworn affidavit delineating probable cause in a criminal case – whether it be to search a place, arrest a person or charge a crime. Whatever the particular purpose, the affidavit must delineate the factual basis to support the specific legal action sought to be pursued by the state. And the general principle common to all such affidavits, whether for search, arrest or charging, is that it must "stand on its own" based on "what is within its four corners". In lay terms, that means there must not only be sufficient information to cover all requisite elements necessary for the action, all such support must be actually in the affidavit – not in some extraneous place or with some extraneous source.

The Zimmerman affidavit is, at least by my analysis, wholly deficient for its purpose intended, i.e. to support the criminal charge under Florida law of second degree murder against Zimmerman.

We will start with a look at what useful, and useable, information is actually contained in the affidavit. Here is a complete copy of the full three page affidavit filed by the State of Florida in the Zimmerman case. Other that captions, signatures and certifications, all pertinent information is contained in twelve text paragraphs on the first two pages. Let's look at them:

Paragraphs 1-3: The first three paragraphs give the names of the two investigators that are serving as the affiants for the affidavit and gives their background experience that qualifies them to do so. The investigators, O'Steen and Gilbreath both appear to be very experienced and appropriate for the task. No problems here.

Paragraph 4: The fourth paragraph details the types of material, evidence and sources the affiants relies on. Pretty standard stuff, again no problems here. (Interesting that the state appears to have a lot of "sworn statements" – even from cops, which is kind of unusual at this

stage. Cops rarely give sworn evidence if they don't have to, and prosecutors rarely want to lock them in this early. There may have been an internal affairs type of investigation that explains this, we shall see).

Paragraph 5: The fifth paragraph is the first factually substantive material. It details that Martin was living in the gated community at the time of the event, was returning from the store (with the infamous Skittles) and was unarmed and not engaged in any criminal activity. Then, however, the affidavit blurts out a critical, but completely unexplained and unsupported claim, namely that Zimmerman was "profiling" Martin. It does NOT allege that any such "profiling" had a racial animus or was, in any sense, illegal or improper. This is important because, while it is a rhetorically charged term, profiling is completely legal, whether for police or average citizens, so long as it not based on an improper invidious animus like race, religion, sex, etc. So, with NO allegation of improper animus here, and there is not, the profiling alleged is completely and unequivocally legal. Further, there is absolutely no specific attribution as to where this allegation came from – did Zimmerman admit it, if not what was the basis for the conclusion by the affiants? We have NO idea whatsoever, it is just a raw conclusory statement of absolutely no value whatsoever in its naked state. In short, there is nothing in Paragraph 5 that does anything to actually provide probable cause for the crime charged.

Paragraph Six: Paragraph six is much like paragraph five, except it details the intro to Zimmerman, where paragraph five did so for Martin. Zimmerman also lived in the gated community. It relates Zimmerman was "driving his vehicle" (we have no idea from where or to here) and "assumed Martin was a criminal". Well that sounds bad right? Well, not really. First off, again, there is absolutely NO way of knowing where this information came from – did it come from Zimmerman? Was it culled from the 911 tape?

Did a psychic conjure it up? We don't know. Remember, it is seminal affidavit law that a;; pertinent facts must be supported and attributed "within the four corners of the document". There is also a statement the 911 dispatcher told Zimmerman an officer was "on the way". Again, there is absolutely nothing in Paragraph 6 that does anything to actually provide probable cause for the crime charged.

Paragraph 7: Paragraph seven is yet more of the same. It describes that Zimmerman believed there had been unsolved break-ins in the neighborhood, and "fucking punks" and "assholes" "always get away". Credit where due, we finally have a specific attribution point for the statements by the affiants, it is specifically stated to be from the recorded 911 call. See, the state and affiants are capable of proper attribution when they want to. Small victory. The problem is, there is *still* NO improper or illegal activity described. None. So far, Zimmerman is judgmental and concerned about his neighborhood, but there is not one scintilla of illegal conduct.

Paragraph 8: The eighth paragraph starts out with a description of a call Martin was on supposedly at the time he was being observed and followed by Zimmerman. But, again, there is not squat for specificity or particularity, the linchpins of a proper affidavit. We are not old who the person on the phone with Martin is, what the exact time of the call, and length of call, was, and we are not told how that information is known. Was that person interviewed by cops? Did she give a sworn statement? Did these investigators talk to her themselves, or was it some other officer and, if so, who? Hearsay, and even double or triple hearsay is acceptable in an affidavit, but the path and facts establishing it must be delineated. Here it is not. Then paragraph 8 goes off the edge, veering into some of the most unattributed and nakedly conclusory statements imaginable. It alleges Martin tried to run home, Zimmerman got out of vehicle and pursued, that Zimmerman thought Martin might commit an immediate crime before

cops could arrive and that the 911 dispatcher told Zimmerman to wait for the cops but Zimmerman disregarded the advice. Other than maybe being able to assume the dispatcher advice is on the tape, we have no idea who, what, when, where or how the affiants know their wholly conclusory statements. It is simply unsupported tripe. Oh, and there is STILL no evidence of any criminal activity whatsoever. None.

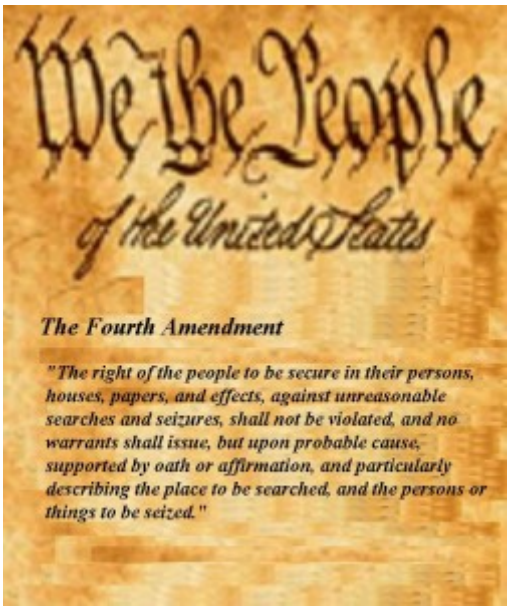
Paragraph 9: Paragraph nine starts the actual meat of the subject confrontation. Let's look at it sentence by sentence. "Zimmerman confronted Martin and a struggle ensued." Okay, how do the affiants know this, did it come from Zimmerman's statement? Some other unidentified witness? Was there surveillance video? we have no idea. Just another completely unsupported and unattributed statement lobbed out. Even if it were to be taken at face value, it at best relates that Zimmerman confronted Martin, it DOES NOT indicate who started the "struggle". It is an absolutely critical fact, and there is no indication whatsoever given. If Zimmerman is to be charged with acting with a "depraved mind" it is hard to see how that could be if Martin started the actual physical, as opposed to verbal, "struggle". But we do not know who did so, because the affiants did not include that. It is pretty clear there is no eyewitness or other direct evidence on this fact, because the next sentence reads "During this time period witnesses heard numerous call for help and some of these were recorded in 911 calls to police." This is not only not attributed to specific witnesses (whether named or otherwise separately identified), nor is there any indication of how the affiants know it, it is completely harmless information. There is NO way to discern WHO was crying for help or whether both individuals were. The last sentence reads "Trayvon Martin's mother has reviewed the 911 calls and identified the voice calling for help as Trayvon Martin's voice." Which 911 calls? just the one that Zimmerman made? Or was there others? Did the cops eliminate Zimmerman's voice as making any pleas for help through voice print analysis?

That is one of the first things that should have been done; seems telling there is no such evidence. Surely the cops recorded Zimmerman. Irrespective, even assuming Martin's mother is correct in her identification, that shows NOTHING as to who initiated the physical portion of the "struggle" or who was doing what to whom in it. In short, somewhat shockingly, there is STILL not one iota of criminal activity, of any kind, on the part of George Zimmerman stated in this affidavit.

Paragraph 10: "Zimmerman shot Martin in the chest." Zimmerman fully admitted it, and admitted it was his gun and turned it over. Well, that at least establishes a homicide has occurred, as a homicide is defined as the killing of one human by another human. There is, however, STILL nothing establishing how or why this homicide was criminal. Seriously there is nothing in the affidavit to establish criminality, much less a "depraved mind" on the part of Zimmerman.

Paragraphs 11-12: The final two paragraphs of the core affidavit add nothing in the way of criminality. Paragraph eleven establishes Martin died of a gunshot wound and paragraph twelve relates that the cops have other evidence and want a charge of Second Degree Murder. Nothing in these last two paragraphs bolsters criminality whatsoever.

And that, folks, is it. It is completely lacking in requisite and necessary attribution for the extremely few and, really, innocuous facts it does present, and



the rest
comprises nothing but unsupported and wholly conclusory statements meant to infer criminal activity, but which do not even do a competent job of that.

In short, it is shit. To be honest, this affidavit, within its “four corners” arguably does not even meet the necessary burden of probable cause for Manslaughter under Florida section 782.07, much less the “depraved mind” necessary under Florida’s Second Degree Murder charge under section 782.04(2) as charged in the information. George Zimmerman may have committed a crime, but it is not demonstrated in this affidavit, and certainly is not as to the crime charged, Second Degree Murder. Charles Blow can praise this thing until the cows come home in the august pages of the New York Times, but it is still a pile of junk.

But the above discussion is all about what is in the affidavit, let’s talk about what is *not* in the affidavit as well. The affidavit goes out of its way to spin innocuous and perfectly legal activity into some nebulous vignette of implied criminality, yet self servingly there is not a single fleeting reference to Zimmerman’s claim of having acted in self defense. To be sure, in charging a case, a prosecutor is going to frame the facts to support her charge. But that does not mean she can blithely ignore patently exculpatory facts known to her and germane to the interests of justice. Angela Corey’s affidavit is thusly not just deficient, but dishonest in a very slimy, even if not unethical way. It is patently offensive in that regard.

The case is also patently overcharged. As stated above, I think it is more than arguable that the probable cause affidavit does not even support manslaughter, but it is not remotely close to supporting second degree murder. This is an embarrassment not only for Angela Corey, but the magistrate who signed off on this bunk. It makes the criminal justice system look horrible.

None of this is to say I think George Zimmerman

is innocent of any crime for the incident that led to Trayvon Martin’s death, nor is it to say that the state may not possess sufficient evidence to convict Zimmerman of some crime at a trial. In fact, I am highly disturbed by Zimmerman’s behavior and Martin’s death. All I am saying is, is that while there may be probable cause to charge Zimmerman, it has in no way, shape or form demonstrated by the State of Florida’s official legal statement that is supposed to be the foundation for charging Zimmerman. Zimmerman should not be charged, nor sitting in a county detention, based on this document; yet there he is.

There are other developments in the procedural case, involving the trial judge, upcoming bail determination hearing and assertion of the official Stand Your Ground affirmative defense. I will come back in the next day or two to address those items.