

THE CONSTITUTIONAL ARGUMENT AGAINST THE PLATINUM COIN STUNT



They came for the 4th Amendment, but it was necessary for the war on drugs.

They came for the 5th Amendment, but due process had to be sacrificed for the war on terror. They came for the 6th Amendment, but confrontation had to succumb to classification and secrecy. They came for the War Powers Act because Libya was “required to be protected”. Now they are coming for one of the most fundamental of Constitutional checks and balances, the Congressional prerogative of the purse.

Who are “they”? They are, of course, the ubiquitous Article II Executive Branch. And they have a never ending thirst for usurping power, all in the name of efficacy. It is always necessary, it is always an emergency, there is always a reason, for them to take the power. They are the Daddy Branch, and it is always best to trust them. So they say.

Back when “they” were the Bush/Cheney regime, liberals, progressives, and Democrats in general, had a seriously dim view of accumulation and usurpation of power in a unitary Executive. When Dick Cheney, David Addington and John Yoo contorted existing law, gave it application never intended, and manufactured legal and governmental gimmickry to accomplish stunningly naked Executive power grabs, those on the left, especially the

blogosphere, screamed bloody murder. Well, that is precisely what is afoot here with the Mint the Coin! push.

Where is that principled set of voices on the left now? Things are different when it is your guy in office I guess. Because the active liberal/progressive left I see out there is currently screaming to "Mint the Coin!" doesn't seem to realize they are calling for the same type of sham rule of law that John Yoo engaged in.. This is most curious, because "Minting the Coin!" contemplates a naked power grab by the Executive Branch of historic proportions. It is a wholesale taking of the Congressional purse prerogative under the Constitution. But, hey, its an "emergency". Of course. It always is when the Article II Executive Branch comes to feed in the name of efficacy.

What is the value of Separation of Powers, and constriction of Constitutionally assigned powers to the branch to which they were assigned, and what is the value in insuring that an imperial Executive Branch does not usurp too many powers? Let James Madison, in Federalist No. 47 explain:

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge

cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.

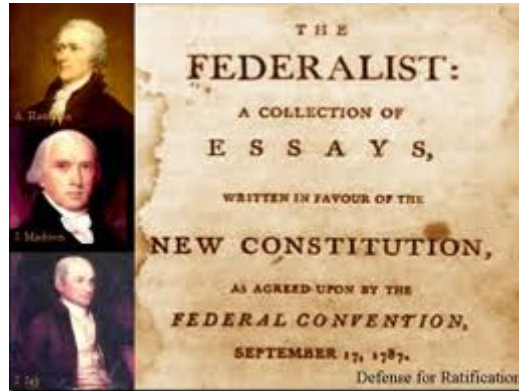
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The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department (Publius, Federalist 47).

What is the import of the Congressional "Power of the Purse"? As James Madison said in Federalist No. 58:

This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure (Publius, Federalist 58).

The mantra is always “oh it will be reined in later after the emergency is over” and/or “the courts will sort it



out later and fix it”. Not so in this case, the courts will not be settling this one; it is almost certainly the exact type of political issue historically and consistently refused to be entertained by federal courts under the Political Question Doctrine. Even if a federal court, presumably the District Court for the District of Columbia, would entertain the matter, do you really think the DC Circuit Court of Appeals, much less the Supreme Court led by Roberts and Scalia, would uphold this tomfoolery?

Also, as Hamilton noted in Federalist No. 78:

The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.

The only other avenue of corrective legal relief is the impeachment process pursuant to Article I, Sections 2-3. It is highly doubtful the House would issue a charge of impeachment (although, don't kid yourself, this is exactly the type of situation the impeachment power was designed for); but even if the House did, the Senate would never convict. So, the upshot is that if Obama is insane enough to pull the coin stunt, it will wind up as a historic and destructive gutting of power from the Article I Congress by the usurping Article II Executive Branch. And it

will stand because there was no truly available forum to litigate the merits on their own right. Is that a good precedent to set in the name of efficacy? No.

The temporary thrill that those on the left would receive from the stunt would leave indelible lasting harm on our root Constitutional government. And, yes, that still, even in this day and age, matters. But, what about Harvard Professor Lawrence Tribe having given his blessing to the "legality" of "Minting the Coin!"? There is, sadly for the coin aficionados, a difference between the legality of the physical "minting" of the trillion dollar platinum coin, and the legality and constitutionality of the plan to use it as a direct effective substitute for Congressionally authorized debt. Yes, it really is that simple.

Yesterday, I broached this subject with Professor Erwin Chemerinsky, and here is his response:

The Constitution says that Congress has the power to borrow money. The President cannot do this by unilaterally raising the debt ceiling or issuing a trillion dollar coin. The debt ceiling is set by statute and I think that there is not a plausible argument that it is unconstitutional.

I wish the President could do these things. I think increasing the debt ceiling here is essential and should not be an issue. But I do not think it can be done without Congress.

Yes. And that is the thing; even assuming *arguendo* the physical minting of the trillion dollar platinum coin is "legal" as suggested in this post by Markos (and for reasons left for another day, I maintain that is not nearly as clear as claimed), the contemplated *use of the coin* is not constitutional, and it is not appropriate. Therein lies the problem so many

seem to suddenly, now that it is our man in the White House, conveniently ignore. Again, though, it is always convenient and exigent when the power hungry, usurping, unitary Executive theory comes calling, isn't it?

So, there is the Constitutional case, or at least a healthy part of it. But what of the more pragmatic considerations? Do they militate in favor of President Obama being so brash



as to blow up the founding checks and balances, in the form of the Purse prerogative being designated to the Congress? No, they don't.

It is not every day I agree this much with something Ezra Klein said, but credit where due, I do today:

But there's nothing benign about the platinum coin. It is a breakdown in the American system of governance, a symbol that we have become a banana republic. And perhaps we have. But the platinum coin is not the first cousin of cleanly raising the debt ceiling. It is the first cousin of defaulting on our debts. As with true default, it proves to the financial markets that we can no longer be trusted to manage our economic affairs predictably and rationally. It's evidence that American politics has transitioned from dysfunctional to broken and that all manner of once-ludicrous outcomes have muscled their way into the realm of possibility. As with default, it will mean our borrowing costs rise and financial markets gradually lose trust in our system, though perhaps not with the disruptive

panic that default would bring.

....

The argument against minting the platinum coin is simply this: It makes it harder to solve the actual problem facing our country. That problem is not the debt ceiling, per se, though it manifests itself most dangerously through the debt ceiling. It's a Republican Party that has grown extreme enough to persuade itself that stratagems like threatening default are reasonable. It's that our two-party political system breaks down when one of the two parties comes unmoored. Minting the coin doesn't so much solve that problem as surrender to it.

While Mr. Klein does not address the Constitutional considerations and related arguments against the coin, and perhaps takes too easily some of the arguments for "legality", his depiction of the political and practical wasteland that would result from Minting the Coin! are spot on. And it is, as with the Constitutional considerations, not a very pretty picture painted.

Back in July of 2011, the last time the debt ceiling crisis reared its ugly head, the call was to "Use the 14th" and have the president simply issue more debt without the consent of Congress. I wrote then why "Using the 14th" was not a viable option. It is still not a viable option now. We also learned after that 2011 iteration of the debt ceiling crisis was resolved, that the White House had received guidance from the Office of Legal Counsel in the form of an OLC memo. Considering the strength of the Executive Branch's statements that it could not circumvent the Congress' control of the debt, it is almost certainly the case that the OLC guidance was that any such action was unconstitutional.

The premise, however, behind "Mint the Coin!" is no more constitutional than that of "Use the

14th". In fact they both, at root, rely on the same premise, namely the language in the first sentence of Section 4 of the 14th Amendment:

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.

But that sentence cannot be taken in isolation from the remainder of the Constitution, especially the primacy of the Article I Purse Power. No matter how much the gimmick crowd may wish it to be, it is not an ultimatum on the President to blow up the Constitutional system of checks and balances our government is based on. If one needed any further reminder of this fact, it is contained in Section 5 of the 14th Amendment, which states:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

So, not only does the 14th Amendment not provide the rationale for a gimmick solution to the debt ceiling crisis, if anything, it reinforces that it is Congress who controls the issue. Exactly as Professor Chemerinsky opined above.

I too join Professor Chemerinsky in wishing there was an easy path for President Obama to do these things and win the day. Such, however, is not how our Constitution is designed, nor does it so allow.

SICK OF THE ELECTION

JIZ VIRTUALLY SPEAKING TRASH TALK

If there were more days remaining, say maybe seven, perhaps there would be reason to throw some politics in here for discussion. But, no, there are, as I write this blarney, only four days left in our long national nightmare. So, enough of the yankee doodle dandies in their gold Rolls Royces, and car elevators, enough of the relentless ads and horserace discussion, let us instead talk football.

But this week it will not just be here, Marcy and I will also be appearing with Jay Ackroyd on Blog Talk Radio Sunday at **9pm EST [note corrected time]** and other times adjusted accordingly moving ever westward. To talk about the election? Nope, enough of that, we will be talking trash about football baybee! So come join us, here is a link to the audio feed on the net and if you are in Second Life, you can find us there as well. Even better, you too, my friends and friendettes can call in and yammer with us by dialing (646) 200-3440 during the show. Can't promise how many get through, because I am a rookie at this, but what the heck give it a try. Exciting!

With that public service announcement out of the way, let's get down to business. First up is, of course, the student athletes. The game of the week finally does not have to do with the Blighted Irish. This week it is without question Alabama at LSU. Both teams have big and nasty defenses, but the Crimson Tide has a quietly cold blooded efficient offense, and I think, coupled with the defense, it will be too much for LSU. The other critical showdown is Oregon at USC. Can Matt Barkley and the Trojans get their mojo back and spoil the Ducks' season? Maybe, the game is in the Coliseum and the Men of Troy have a lot of weapons in the offensive skill positions. But their O-line is not up to usual par, nor is the defense. And, as I witnessed in person a couple of weeks ago, the

Quackers are big, fast and badass; I'm sticking with the boys with the billed beaks. Lastly, an honorable mention to Colin Klein and Kansas State, who host the always dangerous Oklahoma State.

On to the pros. The big cheese here is the Cardinals at Packers. Okay, not really, the Pack will light up and then crush the Cardinals in Lambeau and send the once promising season for Arizona further down the toilet. The game I am strangely hooked on is Miami at Indianapolis. The Fish are WAY better than anybody thought. Philbin can coach, Tannehill can throw, and Reggie Bush can be a featured back. Oh, and the defense is quietly awesome. Miami looks to be for real; but so too do the Colts and Andrew Luck. No clue which way this one will go, but maybe a slight edge to the Fish because of the D.

The third game on the slate for discussion is Pittsburgh at the Giants. Really, this is probably the best game of the week. Good/Bad Eli and Big Ben both came out of the 2004 draft, and both have a couple of Super Bowl wins. Both teams traditionally have punishing defenses. Fun fact: "This is the first time quarterbacks in opposite conferences with multiple championships are meeting in a regular-season game since Joe Montana's 49ers beat Jim Plunkett's Los Angeles Raiders in 1985." The game is in the Meadowlands where emotions will be running high from Sandy. Everything points to a win for the Gents, but the Stillers are starting to gel after a rough start to the season, and I think they may pull off an upset.

Hard to see Dallas having much for the Falcons in Atlanta. A better question is who in the world will win between the Saints and Eagles down in Nawlins on Monday Night? Both teams have been quite sucky to date. I don't think any team in history has given up more yards on defense through the first seven games than the Saints, and Drew Brees is getting uncharacteristically hammered behind a porous O-line. Mark Ingram has

been close to a bust at running back. It ain't pretty down in the Big Easy. Nor has it been for Mike Vick and the Iggles. His and Any Reid's jobs may truly be on the line. Both teams are desperate for a win, but I think Philly is a better team and will take the win.

Lastly, the Circus is up and running in Abu Dhabi this weekend. Sebastian Vettel had some problems with the brakes on his Red Bull in practice and spent most of the time in the garage. Qualifying is underway as I post – and it has just wound up. Lewis Hamilton was fast and took pole. Mark Webber will join him on the front row, with Vettel and Maldonado in the second row. Jenson starts from a disappointing P6 and Alonso is all the way back in P7 and Massa in P9. Two oddities may affect the final grid by tomorrow: Vettel stopped his car on the track as qualifying ended, and that is usually a penalty. Secondly, Ferrari was working beyond permissible hours last night in the garage, and that may yet cast Alonso and Massa. We shall see.

The Yas Marina Circuit is the most expensive track on the calendar, and it is indeed beautiful. It is also a pretty fine track for racing. Here is a nice video overview by CNN from when Yas Marina first opened in 2009. Should be an excellent race and it goes off at 8 am EST Sunday morning (think I have that right, it is the stupid daylight savings time change day).

So, that is it for this weekend. Music above is the original promo video of Elected by Alice from 1972 and it is pretty fun. Rip it up!

TRAVELING WHEELS

Hello one and all, and greetings from lovely downtown Providence, Rhode Island. Marcy and I

are both here for Netroots Nation; she has been in town since yesterday, and I just arrived this morning. We will both be here through Sunday afternoon.

So far Marcy and Jim have kept up regular posting, which is fortunate because I had a literal clusterfuck of problems rain on me yesterday which I was supposed to be providing content and getting ready to go. I have no idea what substantive posting we will do, so Jim may be piloting the ship. I'm a gonna guess he may want to be trash talking about Alabama, an SEC team, finally breaking through and winning the Women's College World Series in softball. Credit where due, they rolled the two other best teams in the brackets, Oklahoma and ASU.

More importantly, if any of you are at Netroots, or in the vicinity, we would love to say hi. Leave a note here, or just find us – we are wearing stinking badges!

We will be around, but if there is any hot breaking news, and we don't look to be around at the moment, put it up in comments and let fly with the analysis. In the meantime, since these Wheels are traveling, some traveling music for you from Bob Seger and the Silver Bullet Band.

ON CHRIS HAYES & AMERICA'S FALLEN HEROES

I will admit I was watching the F1 Grand Prix de Monaco this morning and not *Up With Chris Hayes* on MSNBC. It turns out I missed some controversy. I was referred to the matter by Doug Mataconis of Outside the Beltway. Mataconis argued that it seemed like the wrong tone for

Memorial Day.

The key quote from the article Doug cited, which was from Mediate, quoted Hayes where he says he feels:

...uncomfortable, about the word because it seems to me that it is so rhetorically proximate to justifications for more war. Um, and, I don't want to obviously desecrate or disrespect memory of anyone that's fallen, and obviously there are individual circumstances in which there is genuine, tremendous heroism, you know, hail of gunfire, rescuing fellow soldiers, and things like that. But it seems to me that we marshal this word in a way that is problematic. But maybe I'm wrong about that.

Chris Hayes is a young and very smart talent in the progressive media, and his show has been a beyond rare breath of fresh air generally in what is the pitiful morass of cable news programming. Hayes quickly showed why by referring critics to the video at right, which does indeed present a much fuller and more nuanced take on the issue. As Jeremy Scahill noted, Hayes is being mauled for taking such a deeper and more nuanced look at the issue of praise for war. I agree wholeheartedly with Jeremy.

But, still, I have some, granted also nuanced, qualms.

Contrast Hayes tact with that of Olivier Knox of Yahoo News on Friday:

Memorial Day Weekend: My thoughts inevitably drift to visits to the Normandy Beaches. More moving each passing year. Merci.

...

When I was a kid, it was hard to appreciate the "full measure of devotion." Also my French grandparents

hadn't fully briefed me.

There is a palpable difference in tone between the initial takes of Knox and Hayes. While I originally instinctively gravitated toward the Knox take, the more I chew on it, I think Scahill has a point, and the more I think my knee jerk reaction to Hayes was a bit too reflexive and shallow. Here is why.

It is a generational thing to some extent, and the wider the age gap in people reacting to this, the generally wider the potential for adverse reaction. That, of course, is not totally the crux of the biscuit (as Frank Zappa would say), but I think it may be a large part of it.

Chris Hayes touched on a critical and under appreciated point: there is far too much cheerleading for war propagated through obligatory honor of the souls the powers that be send to fight the wars. It does cloud and mask the reality of what is transpiring on the greater moral and humanitarian stage, and does so very much to the detriment of society and the relevant discussion. That is just a fact in my book.

By the same token, the older voices among us, even those of us who grew up with the mess that was Vietnam, still grew up in the halo years of WW II, with the remnants of WW I that preceded it. When I think of Memorial Day, it is under a mental framework cast in those terms, that was still the framework conveyed in the 60's and, even if lesser, still in the 70's and 80's. Vietnam was the aberration, not the norm, for a very long time when considering war and "war heroes".

And that was me, a kid who mercifully avoided the draft and never served. I think the feelings could, and may well be, even stronger among those who did serve or, like Olivier Knox, who have land and families free today because of the last devotion expended on the beaches of

Normandy or Okinawa.

To an older generation, and the differently situated, Memorial Day exists to honor true heroes. American soldiers who died so that you, me, Chris Hayes and everyone else may all have the discussions we do. The fact they gave what they did allows that. And, yes, they ARE heroes.

It is indeed a complex dynamic. Could Chris Hayes have exercised a bit more rhetorical discretion; no question. And he would be wise to not paint it quite as much as he does so primarily in terms of Afghanistan and, presumably, if not mentioned, Iraq (leaving aside Yemen and our other, um, areas of interest/conflict); there is a much larger and older framework, as Hayes himself cogently noted in his lead in.

But move beyond the patina of insensitivity, and Chris Hayes was quite right. We need desperately to unhinge the valor of our troops from the moral squalor of our leaders. Memorial Day may be a touchy time to hear that, but it needs to be said.

[Notice of Erratum: I would like to make quite clear that I do not think Chris Hayes and Olivier Knox are at any odds here; not at all. I simply found their initial takes demonstrative of the greater depth of the issue and discussion here, and illustrative of the point. Thanks to my friend Olivier for pointing that out]

THE FALSE REPORT OF BANNED BOOKS IN TUCSON: THE TEMPEST

IN THE ARIZONA TEAPOT

Last
Friday
afternoon,
author
Jeff
Biggers
published
an article
at Salon
entitled



Who's Afraid of "The Tempest"? The cognitive lede, and framing for the article as a whole, is contained in the first sentence:

As part of the state-mandated termination of its ethnic studies program, the Tucson Unified School District released an initial list of books to be banned from its schools today.

Biggers goes on to report and discuss on a litany of books and textbooks – even Shakespeare's *The Tempest* – that were removed from Tucson Unified School District (TUSD) classrooms:

Other banned books include "Pedagogy of the Oppressed" by famed Brazilian educator Paulo Freire and "Occupied America: A History of Chicanos" by Rodolfo Acuña, two books often singled out by Arizona state superintendent of public instruction John Huppenthal, who campaigned in 2010 on the promise to "stop la raza(sic).

It is a rather stunning, and alarming, report fashioned by Mr. Biggers and, little wonder, it swept like fire across the progressive internet, and social media like Twitter and Facebook over the King Holiday weekend. Biggers' Salon article served as the basis for reportage of the banning of books, including Shakespeare's *The Tempest*,

in a plethora of media sources from such internet venues as AlterNet, to mainstream media like The Tucson Citizen, New York Daily News, and The Wall Street Journal.

There is only one problem with this story. It is categorically and materially false. No books have been banned in Tucson by the TUSD, much less Shakespeare's classic, *The Tempest*.

Sensing that Biggers' story did not sound correct, nor comport with my understanding of the law in this subject area here in Arizona, I was able to make contact with officials at TUSD over the Martin Luther King extended holiday weekend and spoke with an official on Monday, even though the school system was officially closed. It is an understatement to say they were dismayed and concerned; it is "disingenuous to say 'banned'" said Cara Rene, Communications Director for the TUSD.

Indeed, upon returning to their offices Tuesday, the TUSD put out, through Ms. Rene, an official News Release stating:

Tucson Unified School District has not banned any books as has been widely and incorrectly reported.

Seven books that were used as supporting materials for curriculum in Mexican American Studies classes have been moved to the district storage facility because the classes have been suspended as per the ruling by Arizona Superintendent for Public Instruction John Huppenthal. Superintendent Huppenthal upheld an Office of Administration Hearings' ruling that the classes were in violation of state law ARS 15-112.

The books are:

Critical Race Theory by Richard Delgado
500 Years of Chicano History in Pictures edited by Elizabeth Martinez
Message to AZTLAN by Rodolfo Corky Gonzales
Chicano! The History of the Mexican

Civil Rights Movement by Arturo Rosales
Occupied America: A History of Chicanos
by Rodolfo Acuna
Pedagogy of the Oppressed by Paulo
Freire
Rethinking Columbus: The Next 500 Years
by Bill Bigelow

NONE of the above books have been banned by TUSD. Each book has been boxed and stored as part of the process of suspending the classes. The books listed above were cited in the ruling that found the classes out of compliance with state law.

Every one of the books listed above is still available to students through several school libraries. Many of the schools where Mexican American Studies classes were taught have the books available in their libraries. Also, all students throughout the district may reserve the books through the library system.

Other books have also been falsely reported as being banned by TUSD. It has been incorrectly reported that William Shakespeare's "The Tempest" is not allowed for instruction. Teachers may continue to use materials in their classrooms as appropriate for the course curriculum. "The Tempest" and other books approved for curriculum are still viable options for instructors.

Oh, my, that is fundamentally and materially different than what Mr. Biggers both stated, and inferred, isn't it? It was excessive and inflammatory hyperbole, and that is not a good thing as it paints the TUSD, and the Arizona school and educational system in a false, and prejudicially negative, light. I know many teachers and administrators in the Phoenix area, and they were outraged. "Banning of books" is an extremely negative concept both emotionally and

legally; it is an extremely serious allegation, and *not* one to be made lightly or inaccurately.

There are a LOT of very good people in the State of Arizona, and the bad that is going on here (and there IS plenty of bad too) should be painted large and loud for what it is, but not in brush strokes so big and hyperbolic as to give a false picture of the story and state. I dislike the existence and effect of HB 2281, the law that has created this controversy over ethnic studies, every bit as much as Mr. Biggers honestly seems to; but do not want that to be used as a whipping post to make Arizona an ogre in ways it truly does not deserve. And that was the effect of his January 13, 2012 article in Salon.

You would probably think this particular story, and my report on it, ends here for now. It does not and, for once, that is a very positive thing. Over the King Holiday weekend, in addition to contacting the TUSD, I also contacted Salon regarding my concerns. They were, under the circumstances, both cordial and professional. Early this afternoon a notice of correction was placed at the bottom of the original story, and a new report by Jeff Biggers, far more accurately portraying the facts on the ground in Tucson, was published by Salon. Salon, and its editors, are to be commended and applauded for their willingness to listen and act responsibly.

Which brings us to the bigger picture. Demagoguery and hyperbole are something that all of us do who write on emotional hot button issues; which are about the only kind of issues we do here at Emptywheel. I have noticed the same phenomenon in the progressive blogosphere and media acutely prevalent on torture, Bradley Manning, Occupy Wall Street and, just recently, the NDAA. Emotion and illustration are good; facts and truth are better.

DOJ DOESN'T THINK BLOGGERS ARE MEDIA EITHER-AND IT MAY USE NSLS TO GET MEDIA CALL RECORDS

A number of bloggers are pointing, with concern, to an Oregon case in which a blogger got hit with a \$2.5 million defamation judgement.

Oregon law provides special legal protections against defamation lawsuits to journalists associated with traditional media outlets. Such publications are immune from defamation suits unless the defamed individual first requests a retraction. Journalists at recognized media outlets are also protected from revealing confidential sources. Cox argued that she was eligible for protection under both provisions and asked the judge to set aside the verdict.

But Judge Marco Hernandez disagreed. "Although defendant is a self-proclaimed 'investigative blogger' and defines herself as 'media,' the record fails to show that she is affiliated with any newspaper, magazine, periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system," the judge wrote. "Thus, she is not entitled to the protections of the [Oregon journalist shield] law."

That result was apparently dictated by the text of the Oregon shield statute, which singles out those specific media technologies for legal protection.

But as Kashmir Hill notes, even aside from the outdated terms of Oregon's law, the woman in question had set up a series of websites pretty much designed to hurt the reputation (and especially the Google searches) of the firm in question, and then sent an email asking for \$2,500 a month for "reputation management" services to undo her work.

The Oregon case, in other words, is more complicated than it has been portrayed.

DOJ Doesn't Consider Many Bloggers News Media

But while we're talking about whether bloggers are protected under media guidelines, we probably ought to be looking at DOJ's recently changed Domestic Investigation and Operations Guide, which also don't consider bloggers to be protected as media (I wrote about these changes here, but the guidelines themselves have been released, in heavily redacted form). Unlike Oregon, DIOG does include online news in its definition of media (PDF 157).

"News media" includes persons and organizations that gather, report or publish news, whether through traditional means (e.g., newspapers, radio, magazines, news service) or the on-line or wireless equivalent. A "member of the media" is a person who gathers, reports, or publishes news through the news media.

But then it goes on to exclude bloggers from those included in the term "news media."

The definition does not, however, include a person or entity who posts information or opinion on the Internet in blogs, chat rooms or social networking sites, such as YouTube, Facebook, or MySpace, unless that person or entity falls within the definition of a member of the media or a news organization under the other provisions within this section (e.g., a national

news reporter who posts on his/her personal blog).

Then it goes onto lay out what I will call the “WikiLeaks exception.”

As the term is used in the DIOG, “news media” is not intended to include persons and entities that simply make information available. Instead, it is intended to apply to a person or entity that gathers information of potential interest to a segment of the general public, uses editorial skills to turn raw materials into a distinct work, and distributes that work to an audience, as a journalism professional.

The definition does warn that if there is any doubt, the person should be treated as media. Nevertheless, the definition seems to exclude a whole bunch of people (including, probably, me), who are engaged in journalism.

DOJ Has Made It Easier To Investigate Journalists’ Contacts

Though to some degree, it doesn’t matter, because the new DIOG treats the media so poorly in any case. It considers investigations sensitive (and therefore requiring special approvals) only if the member of the news media (or religious or political organization, or academic institution) is the **subject** of the investigation, not if they are a witness, as media almost always will be in leak investigations.

Just as troubling, the new DIOG seems to make it a lot easier to get news media contact records in national security investigations. A heavily-redacted section (PDF 166) suggests that in investigations with a national security nexus (so international terrorism or espionage, as many leak cases have been treated) DOJ need not comply with existing restrictions requiring Attorney General approval before getting the

phone records of a journalist. The reason? Because NSLs aren't subpoenas, and that restriction only applies to subpoenas.

Department of Justice policy with regard to the issuances of subpoenas for telephone toll records of members of the news media is found at 28 C.F.R. § 50.10. **The regulation concerns only grand jury subpoenas, not National Security Letters (NSLs) or administrative subpoenas.** (The regulation requires Attorney General approval prior to the issuance of a grand jury subpoena for telephone toll records of a member of the news media, and when such a subpoena is issued, notice must be given to the news media either before or soon after such records are obtained.) The following approval requirements and specific procedures apply for the issuance of an NSL for telephone toll records of members of the news media or news organizations. [my emphasis]

So DOJ can use NSLs—with no court oversight—to get journalists' call (and email) records rather than actually getting a subpoena.

The section includes four different approval requirement scenarios for issuing such NSLs, almost all of which are redacted. Though one only partly redacted passage makes it clear there are some circumstances where the approval process is the same as for anyone else DOJ wants to get an NSL on:

If the NSL is seeking telephone toll records of an individual who is a member of the news media or news organization [2 lines redacted] there are no additional approval requirements other than those set out in DIOG Section 18.6.6.1.3 [half line redacted]

And the section on NSL use (see PDF 100) makes it clear that a long list of people can approve such NSLs:

- Deputy Director
- Executive Assistant Director
- Associate EAD for the National Security Branch
- Assistant Directors and all DADs for CT/CD/Cyber
- General Counsel
- Deputy General Counsel for the National Security Law Branch
- Assistant Directors in Charge in NY, Washington Field Office, and LA
- All Special Agents in Charge

In other words, while DOJ does seem to offer members of the news media—which is itself a somewhat limited group—some protection from subpoena, it also seems to include loopholes for precisely the kinds of cases, like leaks, where source protection is so important.

The Oregon case is important because it reminds us how little protection is accorded those of us working on line. But it's probably not the biggest threat to bloggers, or even other online media professionals.

CIA'S "VENGEFUL LIBRARIANS" V. DIFI: OPEN SOURCE GRUDGE

MATCH

The AP's story on the CIA's social media monitoring project is an important article, if unsurprising.

At the agency's Open Source Center, a team known affectionately as the "vengeful librarians" also pores over Facebook, newspapers, TV news channels, local radio stations, Internet chat rooms – anything overseas that anyone can access and contribute to openly.

From Arabic to Mandarin Chinese, from an angry tweet to a thoughtful blog, the analysts gather the information, often in native tongue. They cross-reference it with the local newspaper or a clandestinely intercepted phone conversation.

But I'm struck by one thing. The Center's head, Doug Naquin, seems to directly contradict DiFi's assertions, made in February, when she complained that the CIA had ignored open-source intelligence on Arab Spring protests. Here's DiFi:

Feinstein set a skeptical tone at the opening of the hearing, saying Obama and other policymakers deserved timely intelligence on major world events. Referring to Egypt, she said, "I have doubts whether the intelligence community lived up to its obligations in this area."

After the hearing, Feinstein said she was particularly concerned that the CIA and other agencies had ignored open-source intelligence on the protests, a reference to posts on Facebook and other publicly accessible Web sites used by organizers of the protests against the Mubarak government.

Speaking more broadly about intelligence on turmoil in the Middle East, Feinstein said, “I’ve looked at some intelligence in this area.” She described it as “lacking . . . on collection.”

And here’s Naquin, claiming they did too predict Egypt’s uprising.

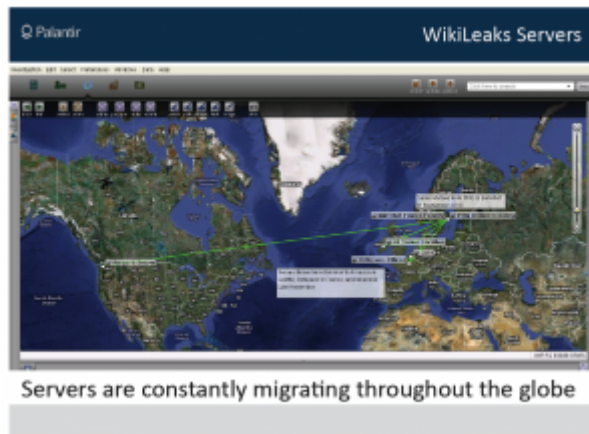
Yes, they saw the uprising in Egypt coming; they just didn’t know exactly when revolution might hit, said the center’s director, Doug Naquin.

The center already had “predicted that social media in places like Egypt could be a game-changer and a threat to the regime,” he said in a recent interview with The Associated Press at the center.

Given what I found in this post—that our government spent time counting Mohammed el Baradei’s FaceBook followers while dismissing the April 6 movement people who ended up leading the uprising—I actually think DiFi may be right. Indeed, the AP article focuses on other moments—Thai riots in spring 2010 and the aftermath of the bin Laden killing—to demonstrate the value of the center.

I’m really glad CIA boasted of their analysis of the Toobz. But I’m not entirely convinced they’re any good at what they’re doing.

WAR GAMING WIKILEAKS-AND THE FIRST AMENDMENT



At least according to this short piece, the US and Europe are

holding a war game today to “simulat[e] how they would in future stop a Wikileaks-type hack.”

I find this to be a really troublesome development. After all, the way to stop a “Wikileaks-type hack” is for DOD, by itself, to implement some very basic security measures on their networks. You know? Like preventing soldiers from inserting writable disks with a Lady Gaga label into SIPRNET-linked computers?

Granted, they have resisted such basic security measures for years, even in the face of two viruses and the WikiLeaks leak. But they don’t need the EU’s help to implement very basic security fixes.

Where they **would** need help from Europe, though, is in choking off a media outlet by denying it both funding and server space—something they tried to do with WikiLeaks, with only partial success. While they did succeed in choking off funding, they failed to prevent the publication of WikiLeaks generally.

Indeed, when DOJ was recommending Bank of America work with a private spying company to combat WikiLeaks, the plan was to go after WikiLeaks’ server in Sweden.

Need to get to the Swedish document submission server. Need to create doubt about their security and increase awareness that interaction with WikiLeaks will expose you.

Not only does this suggest DOD is still looking

elsewhere to solve the problem created by their own abysmal network security.

But it also means the US and Europe are plotting out ways to shut down free speech in the future.

IS DEMOCRACY THE PROBLEM, OR MONEY-CORRUPTED GOVERNANCE?

I've been pondering this NYT story—which is presented as news yet which in fact is analysis attempting to provide a general explanation for protests in democracies—since it came out. Its general explanation for why so many people are protesting is that people—primarily youth—have grown disillusioned with voting.

Hundreds of thousands of disillusioned Indians cheer a rural activist on a hunger strike. Israel reels before the largest street demonstrations in its history. Enraged young people in Spain and Greece take over public squares across their countries.

Their complaints range from corruption to lack of affordable housing and joblessness, common grievances the world over. But from South Asia to the heartland of Europe and now even to Wall Street, these protesters share something else: wariness, even contempt, toward traditional politicians and the democratic political process they preside over.

They are taking to the streets, in part, because they have little faith in the ballot box.

Note, the title of the article (which presumably

the authors didn't write) refers to a "scorn for vote," but even this last sentence focuses on the ballot box, rather than the system the ballot box supports. The article doesn't offer any polling to show this generation (or even just protest participants) are objecting to voting, per se, nor does it question why the record number of youth who came out to vote in the US in 2008 are now among those occupying Wall Street. Rather, it offers these quotes from a protest participants.

"Our parents are grateful because they're voting," said Marta Solanas, 27, referring to older Spaniards' decades spent under the Franco dictatorship. "We're the first generation to say that voting is worthless."

[snip]

"We elect the people's representatives so they can solve our problems," said Sarita Singh, 25, among the thousands who gathered each day at Ramlila Maidan, where monsoon rains turned the grounds to mud but protesters waved Indian flags and sang patriotic songs.

"But that is not actually happening. Corruption is ruling our country."

[snip]

Mr. Levi, born on Degania, Israel's first kibbutz, said the protests were not acts of anger but of reclamation, of a society hijacked by a class known in Hebrew as "hon veshilton," meaning a nexus of money and politics. The rise of market forces produced a sense of public disengagement, he said, a feeling that the job of a citizen was limited to occasional trips to the polling places to vote.

"The political system has abandoned its citizens," Mr. Levi said. "We have lost a sense of responsibility for one another."

All three of these speakers are talking about

something more than democracy. They're talking about democracy that has been delegitimized by its insulation from voters; two specify that corruption is the culprit.

In other words, the article claims to report something about protestors' attitude towards democracy, while mostly downplaying the role that money has had in the failed governance that results from that democracy, though the protests focus on the latter.

The authors fail to distinguish between democracy and capitalism in other ways, too. In one case, for example, they use a quote talking about capitalism to support a claim they make about voting.

Frustrated voters are not agitating for a dictator to take over. But they say they do not know where to turn at a time when political choices of the cold war era seem hollow. "Even when **capitalism** fell into its worst crisis since the 1920s there was no viable alternative vision," said the British left-wing author Owen Jones. [my emphasis]

And while they say, "the protest movements in democracies are not altogether unlike those that have rocked authoritarian governments this year," they only examine the technological similarities, the reliance on social media in both. They don't bother to consider the commonality between Tunisians demanding jobs, Israelis demanding affordable housing, Europeans fighting austerity or (in the case of London's riots) for some kind of future. And while they link to news on Occupy Wall Street, they don't even mention Wisconsin, perhaps because the involvement of unions and middle class teachers would spoil their desired narrative, which claims protestors are also bypassing unions.

A globalized economy has presented similar problems leading to similar protests in democracies and authoritarian regimes alike, but the NYT's reporters want to claim this is about democracy and not economics.

All of which builds to their judgment, one terribly sourced paragraph spinning these protests as a profoundly undemocratic movement.

While the Spanish and Israeli demonstrations were peaceful, **critics have raised concerns over the urge to bypass representative institutions.** In India, Mr. Hazare's crusade to "fast unto death" unless Parliament enacted his anticorruption law struck some supporters as self-sacrifice. **Many opponents viewed his tactics as undemocratic blackmail.** [my emphasis]

"Critics have raised," "many opponents viewed." None of them named or quoted in the article, but all critically deployed to interpret the evidence the reporters set forth as being primarily about democracy and not about so-called capitalism (otherwise known as elite looting).

For the record, I do believe there's commonality among these protests. Not just the ones the authors puzzle through in Israel, India, and Europe, but also those in Madison, Wall Street, Egypt, and Tunisia. I do believe it's worth reflecting on this commonality. But I find it telling that an article published in the most elite news institution and complaining that, "protesters have created their own political space online that is chilly, sometimes openly hostile, toward traditional institutions of the elite," interprets the commonality here as a rejection of democracy, not a rejection of elite looting.

**NETROOTS NATION:
MARCY WHEELER**

INTRODUCES GUEST OF HONOR RUSSELL FEINGOLD

Please join me, Firedoglake, Netroots Nation,
and the progressive enterprise as Marcy Wheeler
welcomes one of us: Senator Russell Feingold.