AN UNKNOWN UNKNOWN MADE KNOWN KNOWN

Former Defense Secretary Donald Rumsfeld who authorized torture under the Bush administration, passed away today at age 88. *spit*

WELCOME TO LISA MONACO'S DOJ, E JEAN CARROLL LAWSUIT EDITION

Lots of observers are asking how Merrick Garland could make such a horrible decision as to sustain DOJ's defense of Trump against the lawsuit brought by E. Jean Carroll. They might be better served by — finally — considering what Lisa Monaco's background suggests she will do at DOJ.

ALEXANDER VINDMAN PROVES THAT WORKING WITHIN SYSTEM WORKS EVEN WHILE DEREK HARVEY WORKS TO

DESTROY IT

It’s hard to imagine two more polar opposites than Alexander Vindman and Derek Harvey. Vindman is a patriot committed to the security of the US and working within the system while Harvey is willing to sell out US security to whatever wingnut is willing to pay him and to bypass every safeguard built into the system.

KAVANAUGH CONFIRMATION STANDARDS OF NONSENSE

Okay, in case you have not already guessed, Marcy is away, mostly, for a couple of days. Even a prolific presence like her is entitled to that. So, you get me for today. Sorry!

Now, because I have been a little involved in trying to figure what is the “real standard of proof” for people in the shoes of, say, Susan Collins and Jeff Flake, I have been a tad predisposed this morning. But let us for now go back to Blasey Ford, Kavanaugh, Collins, Flake, Grassley and the “standard of proof”.

An executive branch nomination is NOT a criminal trial. Any talk about “presumed innocent” and “beyond a reasonable doubt” is asinine and

duplicitous. There is no set standard for a nomination consideration, much less one for the Supreme Court. Senators, especially those on the screening Senate Judiciary Committee, get to make their own individual assessments. In a perverse kind of way, it is like impeachment's "high crimes and misdemeanors", it is easy for people to argue, but the net result is that it is whatever strikes Congress as being applicable.

Frankly, I think the argument over what Susan Collins' standard was is kind of silly and diversionary. Collins stated on the record:

> "This is not a criminal trial, and I do not believe that claims such as these need to be proved beyond a reasonable doubt. Nevertheless, fairness would dictate that the claims at least should meet a threshold of more likely than not as our standard."

This is bullshit. As David Graham, again, pointed out:

> Citing the lack of corroboration of Ford's account as well as lacunas in Ford's own recollection, Collins said she did not believe the "more likely than not" standard had been met.
>
> Although she did not use the phrase, the standard that Collins offers appears to be the same as "the preponderance of the evidence," which is the burden of proof required in civil trials—as opposed to the beyond-a-reasonable-doubt standard in criminal cases. This is also the standard that many colleges now use in evaluating sexual-violence claims under Title IX. Obama-era guidance required schools to use a preponderance-of-evidence standard, though the Trump Education Department has granted schools greater leeway, instructing that "findings of fact and conclusions should

> be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard."

So, what is the relevant standard? As propounded earlier, there is no set one in these circumstances. It certainly is not "beyond a reasonable doubt" as is in criminal trials. Anybody using that language, including most of the geriatric white geezers in the SJC, is lying.

"Clear and convincing evidence"? Nope, there is no precedent for that either. Preponderance of the evidence/more likely than not? Again, there is scant authority to establish that as a relevant standard. Bottom line is Susan Collins manufactured her own "standard" and then cynically applied it, all without any legitimate basis. And, maybe, that is the kind of intellectual malleability these SJC determinations engender, but, if so, people like Collins, and the journalists that cover her charade, should acknowledge it.

So, what is the real "standard"? Again, there is none I can find. But if the course and scope of "background investigations" conducted by the FBI at the behalf of an Article II Executive Branch request is any indication, it is far different than being duplicitously portrayed by both the White House and Senate Judiciary Republicans.

Here is a specialist in clearance and background investigation issues, Brad Moss:

> Um, not totally true. It happens for high level national security operatives working for the NSC and related White House components. Those individuals have to hold TS/SCI access and often times can be subject to invasive polygraph screenings.
>
> Actual vetting, not that Kushner BS.

Here is another, Kel McClanahan, of National Security Counselors:

> The White House can't order @FBI to just rummage through a random person's life. They can definitely AUTHORIZE FBI to rummage through a person's life who has agreed to be subjected to a background investigation.
>
> If this is true, it was McGahn & not Trump who was playing games…

Yes. Exactly. And, as a Senator who was one of the maybe 115 American citizens able to actually read the "FBI Investigation" work product, for Susan Collins and Jeff Flake to blithely sign off on the limited, restricted and choked off nonsense, is beyond craven. It is straight up duplicitous. And the New York Times article is kind compared to the chicanery that was clearly afoot from Don McGahn, a close friend and Federalist Society gang member for decades with Brett Kavanaugh.

In short, it is NOT about the relative "standard of proof" used by Susan Collins. She used "more likely than not" standard (effectively a preponderance of evidence standard). When she said that was the standard, she was lying. It never has been, and never will be. That was manufactured bullshit.

People have also argued that the standard should have been "reasonable accusation" or "credible accusation". And those are even lesser than than the preponderance/more likely than not" standard Collins artificially, self servingly and cynically utilized.

Is clearance on a Background Investigation warranted? Does anybody, including the high holy Brett Kavanaugh, have any god given right to have a clean BI and be elevated to the Supreme Court? Of course not (See Title 32 of the CFR), that is gibberish propounded by old white conservative and misogynistic demagogues, like Grassley, Hatch, Cornyn and Graham in the Senate

Judiciary Committee. And it is pure rubbish.

And, so too is the manufactured “standard” Susan Collins magically announced in her drama queen dog and pony show yesterday that seemed to narcissistically go on forever.

The bottom line is that whether under Collins’ manufactured and elevated standard, or even lesser ones such as reasonable or credible allegations, Brett Kavanaugh was not fit for passage and subsequent confirmation.

As Mark J. Stern detailed in Slate, Susan Collins’ manifesto announced with all the drama of a royal wedding, was in incredible bad faith. Her “standard” was nonsense and nowhere close to any applicable standard. It was a joke.

But, even more so, under ANY standard Susan Collins could have cited, her “finding” thereunder was garbage. Even in criminal sex cases, not just occasionally, but often, finders of fact (usually juries), decisions come down to weighing the relative credibility of an accuser versus the accused. And, given the relentless series of outright lies Brett Kavanaugh stated under oath, there is no way that a sentient human could see his testimony as more credible than the measured, and admitting as to gaps, honesty of Dr. Christine Blasey Ford. And, again, credibility of witnesses is what criminal trials, much less less than even civil litigation burdens, as here, are decided by every day.

This is because there are usually zero other witnesses to such kidnapping, molestation and attempted rape cases as Dr. Christine Blasey Ford credibly alleged, but also because time and reticence of victims is often a factor. And, yet, cases are filed and determinations made on just such “he said/she said” allegations every day. The implication by Susan Collins, Chuck Grassley, the other wrinkled old entitled white men like Hatch in the SJC, not to mention their cynically hired criminal prosecutor, Rachel Mitchell, are complete baloney.

Somebody go ask Rachel Mitchell, and the sad old men that hired her before they fired her, how many times she has operated off of an accuser's words. The answer will be a lie, because it happens all the time. And, yeah, that is enough to generate a full and meaningful "background investigation" despite the bullshit being proffered by the White House, Don McGahn and the SJC.

STEPHEN MILLER'S AND TRUMP'S GROSS RE-POLITICIZATION OF DOJ

There was some legitimate concern about inappropriate machination of the Department of Justice when Trump named and confirmed Jeff Sessions as his Attorney General. Typical discussion followed this by Isaac Arnsdorf at Politico:

> Donald Trump suggested on the campaign trail that he could use the Justice Department to fulfill his political agenda, taunting Hillary Clinton by threatening to throw her in jail over her email scandal.
>
> Now, Sen. Jeff Sessions, Trump's pick for attorney general, will have to decide whether to follow his predecessors by vowing to not let politics drive the DOJ's decision-

> making.

That was one, and a serious, level of concern. Today we find said concern not close to being deep enough as to how the Trump White House would try to run Justice as merely a lever of their extreme politics.

But, via the New York Daily News, comes a little noticed, and truly frightening report of just how renegade and ridiculous the "fine tuned machine" the Trump White House is determined to be in politicizing the DOJ. In an article captioned "Stephen Miller called Brooklyn U.S. Attorney at home and told him how to defend travel ban in court", comes the stunning news that:

> In the chaotic hours after President Trump signed on a Friday afternoon the sloppily written executive order meant to fulfill his Muslim ban campaign promise, Stephen Miller called the home of Robert Capers to dictate to the U.S. Attorney for the Eastern District how he should defend that order at a Saturday emergency federal court hearing.
>
> That's according to a federal law enforcement official with knowledge of the call, which happened as Department of Justice attorneys cancelled plans, found babysitters and rushed back to their Brooklyn office to try and find out what exactly it was they were defending and who was being affected by it – how many people were already being held in America, how many were being barred from arriving here and the exact status of each person.

The full article at the NYDN is mandatory reading, but let that sink in for a second. 31 year old Stephen Miller, a wet behind the ears extreme right wing ideologue with white nationalist leanings and NO, repeat NO legal

training, much less law degree, called up a United States Attorney – at home! – to "dictate" how the DOJ would operate in an emergency litigation situation in an United States District Court.

Stunning is too weak of a response. Shocking is insufficient. It is actually hard to know what the proper words for this are.

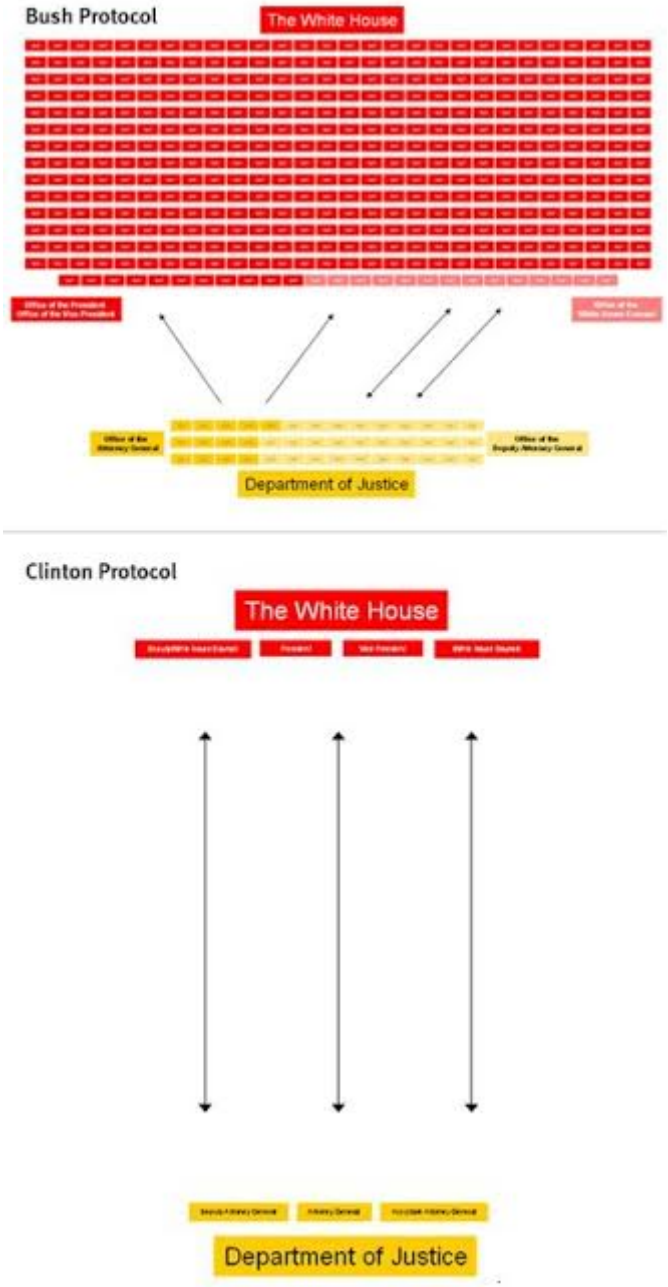
I asked Matthew A. Miller, former OPA head under the Obama DOJ for a thought on the implications of Stephen Miller's hubris in this instance. His reply was:

> The last time a White House started dictating demands to U.S. attorneys, the sitting Attorney General had to resign in disgrace. This raises yet another in a series of questions about whether the Sessions Justice Department will be independent from the Trump White House.

Exactly. I would have said "unprecedented" above along with "stunning" and "shocking", but for what occurred during a period of the Bush/Cheney regime when the interaction and control of the DOJ from the White House was extreme. And, ultimately, blown up as beyond unacceptable and appropriate by more reasoned minds and authorities. And, I might add, substantially due to the Fourth Estate of the press, that Trump blithely and ignorantly describes as "enemies of the American people".

Yes, it is really that important of a moment now with Stephen Miller (note: NO relation to Matthew A. Miller) and the extreme hubris and lack of institutional awareness, competence or control, and obvious disdain for any, by the Trump Administration.

Back in 2007 Senator Sheldon Whitehouse created, and displayed at a Senate hearing, a stunning graphic displaying the shocking difference between communication between the Clinton White House and DOJ, and the ridiculous political input that the Bush Cheney White House had to DOJ.



With the grossly inappropriate statements of President Donald Trump as to how “he” will direct prosecutions of political enemies and other criminal and military defendants, leakers and others, to the literally insane conduct of Stephen Miller here, it is time to remember Senator Whitehouse’s chart.

It is also time to wonder if Sheldon Whitehouse

and other members of the Senate Judiciary Committee have the cojones to take the fight for the Constitution and integrity of the justice system once again to a renegade White House. And the Trump White House has quickly made the Bush/Cheney White house look better in the rear view mirror, as truly craven as they were.

And, yes, the situation is exactly that dire if you recall the same Stephen Miller, being sent out and directed to all the Sunday political shows to declare and mandate that:

> "…our opponents, the media and the whole world will soon see as we begin to take further actions, that the powers of the president to protect our country are very substantial and will not be questioned."

This is straight up an Article II Branch declaration of pure tyranny by Stephen Miller and Trump. This is a serious problem, and this is an Administration making good on its promise and determination in that regard.

9/11: A STORY OF ATTACKS, HORROR, VICTIMS, HEROES AND JINGOISTIC SHAME

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, 2001 is now 15 years in the mirror of life. Like the two Kennedy assassinations, the Moonshot and a few other events in life, it is one of those “yeah I remember where I was when…” moments. Personally, being on west coast time, I was just waking up thinking all I had was a normal morning court calendar. When my wife, who gets up far earlier than I, shouted at me to rub out the cobwebs and watch the TV because something was seriously wrong in New York City. She was right. It was a hell of a day, one of unspeakable tragedy and indescribable heroism. It was truly all there in one compact day, unlike any other, save maybe December 7, 1941.

2,996 people lost their lives, and their families and history were forever altered in the course of hours on an otherwise clear and beautiful day in Manhattan. Most were simply innocent victims, but many were the epitome of heroes who charged into a hellscape to try to salvage any life they could. There were other heroes that altered their lives in response, and either died or were forever changed as a result. One was a friend of mine from South Tempe, Pat Tillman.

No one can speak for Pat Tillman, and, save for his family, those who claim to only prove they never met the man. All I can say is, I wish he were here today. The one thing that is certain is he would not give the prepackaged trite partisan reaches you are likely to hear today. It would be unfiltered truth. Which the US did not get from its leaders after September 11, 2001, and is still missing today.

Instead of rallying and solidifying the oneness of the American citizenry that was extant immediately after September 11, 2001, the Bush/Cheney Administration and GOP told us to go shopping and that we needed to invade Iraq, who had nothing whatsoever to do with 9/11. It was a fools, if not devil's, errand and a move that threw away an opportunity for greatness from the country and exploited it in favor of war crimes and raw political power expansion and consolidation.

Instead of gelling the United States to make ourselves better as the "Greatest Generation" did sixty years before, America was wholesale sold a bill of goods by a determined group of unreformed and craven Neo-Con war criminals left over from the Vietnam era, and we were led down the path to a war of aggression that was an unmitigated disaster we have not only not recovered from today, but are still compounding.

The 2000's will prove to be a decade of American shame when history is written decades from now. Not from the attacks, but from our craven response thereto. So, pardon me if I join Colin Kaepernick and choose not to join, every Sunday, just because the Madison Avenue revenue generating NFL of Roger Goodell cravenly exploits it, the jingoistic bullshit of rote dedication to a racist National Anthem. Also, too, shame on opportunistic and Constitutionally ignorant whiny police unions who scold free speech and threaten to abandon their jobs in the face of it.

But that is all over now surely. Taking the United States

, nee the world, to a forever war on the wings of a craven lie is universally recognized, condemned and scorned, right?

No. The Neo-Cons are unrepentant and still trying to advance themselves on the lie that their once and forever war justifies more than their prosecution and conviction in The Hague. Here is a belligerent and unrepentant Dick Cheney passing the torch of evil to his spawn Liz Cheney in the august pages of the Wall Street Journal:

> We are no longer interrogating terrorists in part because we are no longer capturing terrorists. Since taking office, the president has recklessly pursued his objective of closing the detention facility at Guantanamo by releasing current detainees—regardless of the likelihood they will return to the field of battle against us. Until recently, the head of recruitment for ISIS in Afghanistan and Pakistan was a former Guantanamo detainee, as is one of al Qaeda's most senior leaders in the Arabian Peninsula.
>
> As he released terrorists to return to the field of battle, Mr. Obama was simultaneously withdrawing American forces from Iraq and Afghanistan. He calls this policy "ending wars." Most reasonable people recognize this approach as losing wars.

Times may change, but the bottomless pit of Cheney lies and evil do not. As Charlie Savage pointed out on Twitter, the two terrorists the Cheneys refer to were actually released back to the "field of battle" by Bush and Cheney, not Obama. Was Obama involved in the story? Yes, he would be the one who actually tracked them down and killed them.

And then there is the failure to learn the lessons of the failed torture regime Bush and

Cheney instituted as the hallmark of the “War on Terror”. Our friend, and former colleague, Spencer Ackerman has a must read three part series over the last three days in The Guardian (Part One, Part Two and Part Three) detailing how the CIA rolled the Obama Administration and prevented any of the necessary exposure, accountability and reform that was desperately needed in the aftermath of the torture regime and war of aggression in Iraq. It will take a while, but read all three parts. It is exasperating and maddening. It is also journalism at its finest.

And so, as we glide through the fifteenth anniversary of September 11, what are we left with from our response to the attacks? A destabilized world, an ingraining of hideous mistakes and a domestic scene more notable for jingoism and faux patriotism than dedication to the founding principles that America should stand for.

That is not what the real heroes, not only of 9/11 but the totality of American history, died to support and protect. In fact, it is an insult to their efforts and lives. If America wants to win the “War on Terror”, we need to get our heads out of our asses, quit listening to the neocons, war mongers, and military industrial complex Dwight Eisenhower warned us about, and act intelligently. This requires a cessation of adherence to jingoistic and inane propaganda and thought, and a focus on the principles we are supposed to stand for.

WAVING THE CONSTITUTION AT

THOSE WHO IGNORE IT

In real time Thursday night, I caught only the final few seconds of Khizer Khan's powerful speech at the Democratic National Convention in Philadelphia. Through the rest of Thursday and Friday, more and more of the details of the speech flitted through my Twitter stream and then my heart was warmed when I saw photos of Khan pulling out his pocket copy of the Constitution and waving it at Donald Trump. Almost exactly eight years ago, I had done the same thing, waving my pocket copy at Nancy Pelosi, who then was Speaker of the House and appearing at Netroots Nation in Austin.

Khan was confronting Trump about his campaign in which he had noted that "Trump consistently smears the character of Muslims. He disrespects other minorities, women, judges, even his own party leadership. He vows to build walls and ban us from this country." (Quotes come from this copy of Khan's transcript.) Khan then continued, presumably in reference to banning Muslims from the US: "Donald Trump, you are asking Americans to trust you with our future. Let me ask you: Have you even read the U.S. Constitution? I will gladly lend you my copy."

In my case, as I noted here and then in a follow-up a couple of months later here, I was urging Pelosi to act on the clear evidence that the George W. Bush administration had committed war crimes including torture. Sadly, as we now approach the end of two terms with Barrack Obama as President, no significant Bush Administration official has faced any consequences for the torture and other war crimes carried out in our name. Further, despite clear-cut evidence of many crimes by banksters in the massive foreclosure fraud crisis that dispossessed a significant proportion of the US middle class, no significant prosecutions have been undertaken by the Department Formerly Known as Justice.

Khan is so right to wave the Constitution in Trump's face. Note that a central feature at

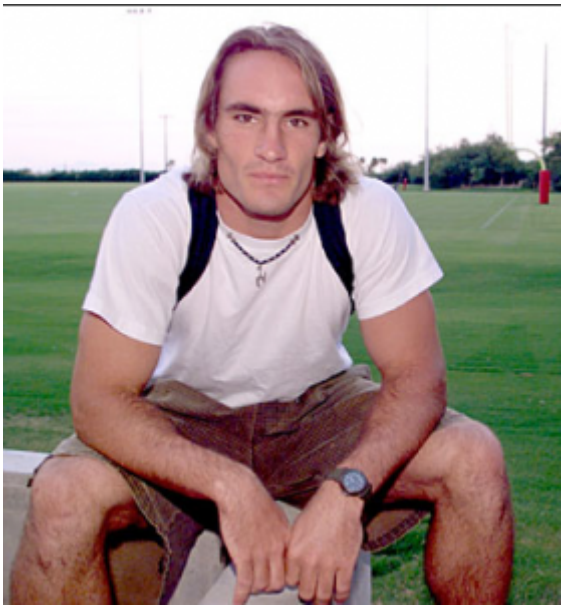
recent Trump rallies has been endless chanting of “Lock her up”, calling for prosecution of Hillary Clinton for crimes associated with her use of a private email server (and presumably also for Benghazi!!1!) while serving as Secretary of State.

And that is where I see potential huge danger for our dear Constitution. We already have seen failure to prosecute crimes of tremendous impact to the world and to ordinary citizens here at home. Should Trump win, how could a “Justice Department” that already has shown a willingness to ignore the law in response to the desires of two presidents in a row refuse Trump’s insistence that Clinton be incarcerated through massive overcharging of any technical violation (if it even occurred, which is a huge stretch on its own) on the email front and totally fabricated charges on Benghazi.

Thank you, Khizr Khan for reminding our country that we are founded on what should be a sacred document that lays out how we should establish justice. And thank you for the sacrifice of your son Humayun, who was lost while taking part in an ill-advised war in which many of the war crimes discussed above were carried out.

Here is the full video of Khan’s speech. Standing next to him is his wife, Ghazala Khan.

PAT TILLMAN WAS A MAN, NOT JUST A SYMBOL



As you probably know by now, yesterday was the tenth anniversary of the death of Pat Tillman. The media has been replete with stories, remembrances, tributes and the like from the sad tale of a fellow Army Ranger who lives with the fear it was he who shot Pat, to calls for Pat to be in the Pro Football Hall of Fame, to Dave Zirin's renewed questions on the events surrounding Pat's death and many others.

To be honest, I have mixed emotions about it all. It is fantastic Pat Tillman is so fondly and deeply remembered, but at the same time, it stirs negative emotions from how much Pat became a symbol, first for the pro war crowd, and then the anti-war crowd upon his death. The Pat Tillman I knew would have been more than uncomfortable with both and, similarly, uncomfortable with much of the hagiography over the last couple of days.

For these reasons, I vacillated with whether to join in the fray; part of me just felt uneasy with it all despite my respect for Pat. In fact, it is my deep respect for Pat that gave me pause. But there is another side of Pat Tillman that really needs more emphasis.

The article I most suggest is a long and beautiful piece in The Arizona Republic centered on Marie Tillman, Pat's long time love and, now, widow. Marie talks a lot about Pat the man, their growing up together in California, move to Arizona, and how she has come to both accept,

and at the same time move on in peace from, Pat's death. It is really beautiful, please read it.

As Marie Tillman wants to focus on who Pat Tillman the person was, so too do I. Back on the day the Phoenix Cardinals played the Pittsburgh Steelers in the Super Bowl, on February 1, 2009, we did a post here at Emptywheel entitled "Pat Tillman's Super Bowl". The first part was by Marcy and was a great discussion of the problems and questions with the government's conduct after Pat's death, and I suggest you read that.

The second part of "Pat Tillman's Super Bowl" was written by me and was exactly what I am trying to convey today: Pat was a man, not just a symbol. He stood for so much that is good as a human, and that seems to get lost in all the rah rah symbolism and martyrdom. I cannot say it better than I did then, so I am going to reprint that portion here in this post:

> Earlier this morning, Marcy posted this serious and wonderful piece on Pat Tillman, and the Super Bowl he is missing. Unfortunately, it has turned somewhat, and predictably, into a knock down drag out on conspiracy theories and acts, I would like to return for a moment to the subject of her post, namely who Pat was, and what he did, which is why the answers his family seeks are so important in the first place.
>
> First off, Pat gave up a large contract with the Cardinals to join the Army after 9/11. That is well known and part of the lore. What you should also know is that the contract offer could have been much bigger than that, but Pat was willing to take less money than he was worth on the open market to stay with the Cardinals because he believed in their redemption and he loved the community of Tempe and Phoenix. He had grown roots here from his four years at

> Arizona State and was determined to see the Cardinals through the transformation into a winning team. The contract he walked away from with the Cardinals was for about 3.6 million; he had turned down previously a 9 million dollar multi-year contract with the St. Louis Rams, right in the middle of their Super Bowl years, in order to stay with and build the Cardinals in what he considered to be his home at the time. That is the kind of man that Pat was.
>
> Pat didn't give a damn about money and the trappings of celebrity. Years after already being a high paid and wealthy NFL star, you would still find Pat traversing the streets of Tempe on his bicycle, looking like a hippy with his long hair and book bag. This was literally how he would go to work every day at the Cardinals training center in South Tempe. Pat was an avid reader. Of everything. He loved politics and world events, and there was nothing he loved more than spirited discussion of the same, whether it was current events, WW II, or ancient European battles. And he could discuss all intelligently, deeply and passionately. Pat knew business and marketing as well, that was his major at ASU and he was brilliant at how he understood, and could see through, the forces at work in our economy.
>
> Pat was an iconoclast. He was his own man and would back down from nothing, and no one, if he thought he was right. This is what made him an odd fit for the military. He had every ounce of the heroism, valor, trust and honesty that the military has always purported to stand for, and then some. But he was not a yes man and was trained, from my estimation since birth, to question authority, especially if it was malignant and wrong. I believe this may

have caused a rougher ride for him in the military than most would have expected, or would suspect even now, from the outside, and almost certainly played a huge role in how his death was handled, irrespective of how his death occurred. LabDancer spoke the word in comments:

> Pat's death was caused by our side; our side covered that up, employing things our side knew were untrue; our side used that same cover to distort, turn and pervert the story of his death into a symbol aimed at promoting a falsehood: that Pat died pursuing a myth our side knew for a fact he'd personally determined beforehand to be a lie — meaning that, in end, our side rendered an obscenity from Pat's death. That's more than enough to earn him the status emptywheel submits as his due.

That is right on the money. It is also what motivated me to write this, the use of Pat is, at this point, not just by the Bush Administration for their glory, but by the contra for theirs as well. From being a player who loved football as a game, Pat has become the football in the game. That is wrong, very very wrong.

As you may surmise here, or as some may recall from discussions at The Next Hurrah long ago, I had the privilege of knowing Pat Tillman a little. I did not know him well, but well enough to get the measure of the man he was. I used to live a little less than a mile from the Cardinals headquarters and practice facility in South Tempe. On days when I worked at home, I used to ride my bicycle to a little deli, Capistrano's,

> between my house and the Card's facility. It was there that I met Pat, who also stopped in on his bicycle, and had a few long lunch conversations with him. He was everything he has been made out to be and more. He was twenty years younger than I, but you would never know it. He was such a deep and diverse thinker that he was almost the antithesis to the world as we currently know it.
>
> The nation, and the world, lost a lot with Pat Tillman's death. When we talk about the type of people we need to foster and grow to lead into the future, he was a prime example. That, to me, is why his loss stings, and lingers, so deeply. Pat's family, the nation, and the world deserve the answers to what happened, it is, and remains, important.
>
> But, above and beyond all else, what people should be taking away is not the dickering over the mechanism and coverup of his death, although that is important; but more importantly, the facts and honor of his life, beliefs and hopes. Honor and fight what he stood for, and what he wanted the country to stand for, that is what he would want.

Pat Tillman was quite a guy. He learned, and lived, a lot in his all too short stay on this earth. He was so much more than the football and war hero, and symbol, that has comprised most of the remembrances on this tenth anniversary of his death.

Pat Tillman had a love for life, for his wife Marie, for literature, and for all knowledge he could possibly absorb, and he could absorb a lot. He was a critical thinker. And he was a great guy. Let him be remembered, and honored as a role model, for that too. RIP.

1ST AMENDMENT JUSTICE DELAYED IS JUSTICE DENIED FOR COL. MORRIS DAVIS

Col. Morris Davis is, at least for my money, an American hero. He served and fought not only for his country, but for the Constitution he swore to protect. The subject of what happened to him at the hands of the very government he defended deserves a much longer, and deeper, dive than I have time for in this post. We will likely come back for that at a later date as it seems as if the legal case Col. Davis brought to correct the wrongs done to him will likely go on forever.

And the going on forever part is the subject of this post. Col. Davis was scheduled to have a hearing in United States District Court in Washington DC tomorrow in front of Judge Reggie Walton. But the hearing was postponed. And that is the problem, this is the FOURTEENTH (14th) TIME hearing on Col. Davis' case has been delayed. One delay was due to a conflict on Judge Walton's part, and one because the offices of Davis' attorneys at the ACLU in New York were substantially damaged by Hurricane Sandy. Other than that, the delay has been at the hands of an intransigent and obstreperous DOJ. If the actions of the DOJ in relation to Col. Davis are

not “bad faith”, it is hard to imagine what the term stands for.

Now, to be fair, it appears the latest delay was at the unilateral hand of the court, as yesterday’s minute entry order reads:

> In light of the fact that potentially dispositive motions remain pending, it is hereby ORDERED that the status hearing currently scheduled for Friday, February 21, at 9:15 a.m. is CONTINUED to a date and time to be determined by the Clerk.

The problem with that is that the “dispositive motions” the court speaks of as being “pending” have been “pending” for a VERY long time, since July of last year. And the case itself has been going on since the complaint was filed on January 8, 2010.

Why is it taking so long you ask? Because of the aforementioned bad faith and obstreperousness of the Department of Justice, that’s why. To get an idea of just what is going on here, a little background is in order. Peter Van Buren gives a good, and relatively brief synopsis:

> Morris Davis is not some dour civil servant, and for most of his career, unlikely to have been a guest at the Playboy Mansion. Prior to joining the Library of Congress, he spent more than 25 years as an Air Force colonel. He was, in fact, the chief military prosecutor at Guantánamo and showed enormous courage in October 2007 when he resigned from that position and left the Air Force. Davis stated he would not use evidence obtained through torture. When a torture advocate was named his boss, Davis quit rather than face the inevitable order to reverse his position.
>
> Morris Davis then got fired from his research job at the Library of Congress

> for writing an article in the Wall Street Journal about the evils of justice perverted at Guantanamo, and a similar letter to the editor of the Washington Post. (The irony of being fired for exercising free speech while employed at Thomas Jefferson's library evidently escaped his bosses.) With the help of the ACLU, Davis demanded his job back. On January 8, 2010, the ACLU filed a lawsuit against the Library of Congress on his behalf. In March 2011 a federal court ruled against the Obama Administration's objections that the suit could go forward (You can read more about Davis' struggle.)
>
> Moving "forward" is however a somewhat awkward term to use in regards to this case. In the past two years, forward has meant very little in terms of actual justice done.

Yes, you read that right. Col. Davis was fired from the job he truly loved at the Congressional Research Service because he, on his own time as a private citizen, exercised his First Amendment right to speak. As one of Davis' pleadings puts it:

> Col. Davis was unconstitutionally removed from his position at the Library of Congress' Congressional Research Service for writing opinion pieces in the Wall Street Journal and the Washington Post expressing his nonpartisan, personal views on the failures of the American military commissions established to try detainees at Guantánamo Bay, Cuba. His speech lies at the very core of the First Amendment and exemplifies the kind of speech that federal courts have been most vigilant in protecting from government retaliation.

The full pleading that quote came from, Col. Davis' response to the government's motion for summary judgment (one of the "pending dispositive motions") can be found here and is a good read if you are interested in more background.

That is exactly what happened and what is at stake. And you do not have to take my word for it, Judge Walton thinks it is a solid and valid claim too. Here is language from Judge Walton in an order in late January 2010, not long after the case was filed:

> The Court is satisfied that the plaintiff has established, at least based on the record before the Court at this time, that the likelihood of success on the merits and public policy prongs of the preliminary injunction standard weigh in his favor. Essentially, the record before the Court suggests that the plaintiff was terminated immediately after two specific opinion editorials he authored were published in national newspapers. Regardless of the defendants' contention to the contrary, it appears that the content of the plaintiff's published opinions was one of the reasons, if not the primary reason, he was fired, i.e., because the plaintiff took a position on the prosecution of detainees being housed at the United States military's Guantánamo Bay facility which the Congressional Research Service felt would call into question its impartially as to any policy recommendation it would make and any research it would conduct on that issue. This conclusion is supported by the fact that the opinion articles were specifically referenced in the plaintiff's termination letter, and also the timing of the letter, which was issued only several days after his writings were published. The plaintiff's likelihood of success position therefore

> is well-founded, at least with respect to the record the Court now has before it. And as to the public interest prong, it cannot be questioned that government employees retain First Amendment rights. (citations omitted)

So, there is really no question but that protected First amendment rights were involved, and that Col. Davis was wrongfully fired for exercising them. Makes you wonder why the DOJ would string him out and fight so hard in a case that is only about the rights and not even about the money damages he suffered as a result (that would have to be litigated in a separate action).

As the graphic at the top questions, why is the DOJ willing to give free speech rights to a terrorist at Guantanamo and not to Col. Morris Davis? Bad faith is the answer. Complete, scandalous, bad faith.

FRIDAY NEWS DUMP NOT DEAD YET: STEPHEN KIM GUILTY PLEA

Just when Kevin Drum declared the "Friday News Dump" dead, comes proof news of said death was greatly exaggerated.

As Josh Gerstein and others have reported, the plea will be entered this afternoon:

> Under the terms of the agreement, Kim will plead guilty to a single felony count of disclosing classified information to Rosen in June 2009, and serve a 13-month prison sentence. Judge

> Colleen Kollar-Kotelly would have to accept the sentence or reject it outright?, in which case Kim could withdraw his plea. Kim would also be on supervised release for a year, but would pay no fine.
>
> Judge Kollar-Kotelly is expected to accept the guilty plea at today's hearing, but will not impose a sentence until sometime later.

Well, that is kind of a big deal dropped out of nowhere on a Friday afternoon.

As you may recall, this is the infamous case where the Obama/Holder DOJ was caught classifying a journalist, James Rosen of Fox News, as an "aider and abettor" of espionage. As the Washington Post reported, the scurrilous allegation was clear as day in a formal warrant application filed as an official court document:

> "I believe there is probable cause to conclude that the contents of the wire and electronic communications pertaining to the SUBJECT ACCOUNT [the gmail account of Mr. Rosen] are evidence, fruits and instrumentalities of criminal violations of 18 U.S.C. 793 (Unauthorized Disclosure of National Defense Information), and that there is probable cause to believe that the Reporter has committed or is committing a violation of section 793(d), as an aider and abettor and/or co-conspirator, to which the materials relate," wrote FBI agent Reginald B. Reyes in a May 28, 2010 application for a search warrant.
>
> The search warrant was issued in the course of an investigation into a suspected leak of classified information allegedly committed by Stephen Jin-Woo Kim, a former State Department contractor, who was indicted in August 2010.

> The Reyes affidavit all but eliminates the traditional distinction in classified leak investigations between sources, who are bound by a non-disclosure agreement, and reporters, who are protected by the First Amendment as long as they do not commit a crime.
>
> [snip]
>
> As evidence of Mr. Rosen's purported culpability, the Reyes affidavit notes that Rosen and Kim used aliases in their communications (Kim was "Leo" and Rosen was "Alex") and in other ways sought to maintain confidentiality.
>
> "From the beginning of their relationship, the Reporter asked, solicited and encouraged Mr. Kim to disclose sensitive United States internal documents and intelligence information…. The Reporter did so by employing flattery and playing to Mr. Kim's vanity and ego."
>
> "Much like an intelligence officer would run an [sic] clandestine intelligence source, the Reporter instructed Mr. Kim on a covert communications plan… to facilitate communication with Mr. Kim and perhaps other sources of information."

Of course, the fully justifiable uproar over the Rosen treatment by DOJ eventually led to "new guidelines", being issued by the DOJ. The new guidelines are certainly a half step in the right direction, but wholly unsatisfactory for the breadth and scope of the current Administration's attack on the American free press.

But now the case undergirding the discussion in the Stephen Kim case will be shut down, and the questions that could play out in an actual trial quashed. All nice and tidy!

Frankly, I have mixed emotions about the reported Kim plea itself. It is, all in all, a pretty good deal for Kim and his attorney, the great Abbe Lowell. The case is done, bad precedent does not get etched into a jury verdict and appeal, and the nightmare has an end in sight for the defendant, Stephen Kim. All things considered, given the seriousness of the espionage and false statement charges in the indictment, 13 months is a good outcome. And it is not a horrible sentence to have as a yardstick for other leakers (were I Ed Snowden and Ben Wizner, I would like this result). By the same token, the damage done by the ridiculous antics and conduct of the DOJ in getting to this point is palpable. It will leave a stain that won't, and shouldn't, go away.

That still leaves the matter of Jeffrey Sterling, and reporter James Risen, though. Whither DOJ on that? And it is an important question since the much ballyhooed and vaunted "New Media Policies" announced by DOJ left wide open the ability to force Risen (and others that may some day be similarly situated) to testify about his sources of face jail for contempt.