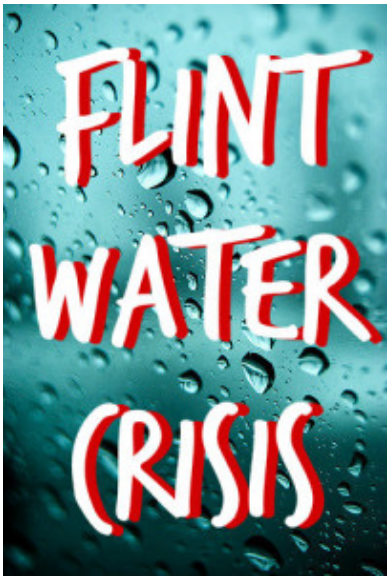
TUESDAY MORNING: #FLINTWATERCRISIS HEARING TODAY



[image (mod): LeAnn E. Crowe via Flickr]

This is a semi-special morning roundup edition due to this morning's Congressional hearing on #FlintWaterCrisis. Details:

> **Tuesday 15-MAR – 10:00 AM – Hearing on Flint, Michigan Water Contamination** (est 3 hours, on C-SPAN3)
> Former Flint, Michigan Mayor Dayne Walling, former Emergency Manager Darnell Earley, EPA Region 5 Administrator Susan Hedman, and Virginia Tech University's Marc Edwards testify at a House Oversight Committee hearing on water contamination in Flint. Link to House Oversight Committee calendar entry

If you don't catch today's hearing, there will be another on Thursday morning:

> **Thursday 17-MAR – 9:00 AM – Gov. Snyder (R-MI) & EPA Head McCarthy: House Hearing on Flint, MI Water Crisis** (est 3 hours, on C-SPAN3) Link to House Oversight Committee

calendar entry

You can find my timeline on Flint's water here – it still needs a number of new entries.* Of particular note today will be the first half of 2014 when the decision to cut over from Detroit's water (DWSD) to the Flint River was finalized and enacted, under then-Emergency Manager Darnell Earley. Earley was the third EM appointed to Flint after December 2011; he had been preceded by Michael Brown (twice) and Ed Kurtz (once).

You'll recall that Michigan implemented an emergency manager law in 2011, allowing the state to appoint an administrator for insolvent municipalities. The EM law eliminated the powers of democratically elected municipal officials, vesting those powers and more in the appointee.

Reports this morning based on initial assessments of Darnell Earley's written statement for the hearing today indicate Earley was overwhelmed by the demands of the EM role in Flint, and he regrets not having pushed back more firmly on decisions about the water cut-over.

However, the timeline reveals that in early 2013 a previous EM Ed Kurtz actually signed the decision to buy water from the Karegnondi Water Authority (KWA) when it completed construction. Kurtz also notified the DWSD that Flint would leave in one year's time, in spite of a last-minute emailed offer on April 15, 2013 from DWSD offering a rate far cheaper than the rate Flint was paying in 2013, and possibly cheaper altogether than the KWA rate.

Did EM Ed Kurtz see this email? If he did, why was it ignored? If he didn't, why not?

Ditto for Darnell Earley – did he know there was an offer from DWSD making the KWA potentially irrelevant or redundant?

Why wasn't Flint able to accept the DWSD's cheaper rate from 2013 through to cut-over to the KWA upon the pipeline's completion as a

stop-gap, avoiding the debacle cutting over to the Flint River created?

Why was there so much pressure on development and implementation of the KWA, to the point that cheaper water from DWSD was ignored?

Michigan blogger Mark Maynard asked whether the KWA was really established to serve fracking wells in counties through which the pipeline ran from Lake Huron to Flint (see here and here). I would love to know if anybody has FOIA'd documents from the state, Flint, and the KWA regarding containing any of the search terms [fracking, hydraulic fracturing, wells, oil, natural gas, injection, energy].

We already know the state wasn't paying much attention (ahem) to fracking in northern Michigan; did they turn a blind eye to both bid rigging up north, and the development of water resources in eastern Michigan?

Get your popcorn maker out and ready for 10:00 a.m. EST. You know what I'll be doing – join me.

UPDATE – 8:25 a.m. EST –
I do have one more question I'd ask Darnell Earley about early 2014. Knowing the city's water would be cut over from DWSD to KWA in April, were there any tests conducted prior to the date DWSD was cut off as a source? In other words, did Flint River water enter the Flint water system anytime BEFORE the end of the contract with DWSD? Or was the city simply supposed to assume the cut over would work without fail?

I'd like to see when Genesee County Health Department first noticed changes in health services required, along with any anonymized health service data from hospitals serving Flint residents. Would the health data show illness in sync with the official cut-over to river water – or earlier?

UPDATE – 2:20 p.m. EST –
Drive-by impressions after hearing:

- Didn’t get answers to my questions. Also, Earley should have been asked whether Snyder, as his boss, 1) asked him to limit contact with public for feedback, or 2) if it was clear going into EM role that public feedback should be limited, and 3) if it had been made clear by governor to Earley that financial concerns overrode all others in performance of EM duties.
- Susan Hedman’s testimony helter-skelter, did not improve impression of her ability as a regulator. She’s still on the hot seat. Email cited in hearing from EPA’s Region 5 Water Division Branch Chief Debbie Baltazar which said, “I’m not so sure Flint is the community we want to go out on a limb for” did not help Hedman’s case whatsoever.
- Do not recall any mention of Legionnaire’s cases during questioning, though contamination was mentioned. Not good – lot of important focus on lead poisoning, but to forget about deaths due to this crisis?
- C-SPAN cameras caught Dr. Marc Edwards giving

> interviews after hearing ended; he told interviewers Flint's water was safe for bathing (non-consumption hygiene purposes), but could not say when Flint's water was safe to drink because of testing still underway across Flint.

Ugh. Thursday's hearing will be must-see TV.

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** Sorry, harpie, I still have to follow up with the additional links you've shared recently.*

A BIG DAY AT SCOTUS ON OBAMACARE AND FAIR HOUSING

A little more than two hours ago, a fairly monumental day at the Supreme Court got underway. Two big boxes of opinion were brought out signaling at least two, and perhaps as many as four, new decisions were going to be announced. It was only two, but they are huge and critically important decisions *King v. Burwell*, better known as the "Obamacare case", and *Texas Dept of Housing v. Inclusive Communities Project*, better known as the Fair Housing case.

Both *King* and *Texas Housing* are big, and both have been the cause of serious apoplexy and fear among liberals and progressives. And both were decided very much in the favor of the liberal position, so it was a very good day on both issues.

First off is King v. Burwell, and the full opinion is here. It is a 6-3 opinion written by Chief Justice Roberts. Many people seem shocked that the majority was 6-3. I am not. While I thought the challenger King plaintiffs had a cognizable legal argument, it always struck me as a losing one, and one the Chief Justice was unlikely to sign off on after his sleight of hand to keep the ACA alive in the earlier *NFIB* case.

Similarly, though Anthony Kennedy was a bigger concern because of his states rights history, he has a long history on protecting citizens on social justice issues (which is why we are about to get marriage equality, maybe as soon as tomorrow). And, once Obamacare was upheld in *NFIB*, and all the millions of additional Americans had been given health insurance access (which, let us keep in mind, is still different than actual healthcare), it really became a social justice issue, and thus one Kennedy would be very troubled to strip away.

As to the general overview, Rick Hasen at Election Law Blog has a great summary:

> Before the case, so much ink was spilled (and more virtual ink virtually spilled) on the question of deference to the IRS's interpretation of ambiguity under the statute (under the so-called "Chevron" doctrine) as well as principles of federalism, which were used to argue for results for and against the Administration in the case. There were also questions about the standing of various plaintiffs. There were arguments about the intent of the drafters, and what MIT economist Gruber said, or may have said, or may have

> misspoken about the way the law was supposed to work. In the end, the Court rejected application of Chevron deference to the IRS and federalism made no appearance. Nor did standing or Gubert get discussed. Instead the Court's analysis went basically like this:
>
> The question whether tax subsidies applied to poor people in states that did not set up their own health care exchange is important, so important that it is hard to believe that Congress would have delegated that question to an agency (and particularly to the IRS, whose job it is to collect revenue not design health care policy). So there is no "Chevron" deference on the question. The court has to use its tools of statutory interpretation to decide the case. The law, read as a whole, is ambiguous. It is certainly possible to read the challenged language as giving subsidies only to people in state exchanges and not in the federal exchange. But there are other parts of the law, read in context, that only make sense if subsidies apply to those in state or federal exchanges. In such an ambiguous case, it is the purpose of the law that should govern. "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."

Go read all of Rick's post, it is also notable for its explanation as to why *King* is likely the last word on the ACA as a viable entity and Obamacare is here to stay. I concur.

I would like to point out one aspect of the King decision I find particularly rewarding – the lack of attention to all the extrinsic noise

that has been generated over the many months the *King* case was pending by all the crazed pundits on both sides of the issue at heart. Absent was all the relentless sturm and drang about standing, loss of standing, federalism, what Hans, err Jon, Gruber said or didn't say, post hoc interviews with Congress members, their staff and lobbyists and what it meant, and all other sundry sorts of faux legislative history by people that apparently would not recognize real "legislative history" if it hit them in the butt. That is very satisfying thing for somebody that thinks appellate decisions should, at their core, be based on the statutes, precedence and the record on appeal.

For this I am thankful for the clarity and cleanliness of Roberts opinion. As a side note, the majority's scuppering of the *Chevron* basis has created a side issue among us in the legal chattering class as to whether it signals a weakening of the "Chevron Doctrine". Rick seems to think there is a fundamental weakening here. I am not so sure of that at all, even though I have had sincere problems with *Chevron* pretty much as long as I have been practicing law, as it gives far too much deference to often out of control administrative agencies, and the appellate burden is very onerous to overcome bad administrative rulings.

We shall see how the components of today's decision in King play out in the future, but it was a very good day for the law, and the ACA, today.

The second, and also huge, case handed down today is the Texas Fair Housing decision, and the full opinion is here. Although it will be overshadowed today by the more famous (infamous?) *King* Obamacare decision, the *Texas* case is absolutely critical to the ability to fight and control discrimination.

As the excellent Lawrence Hurley reports for Reuters:

> On a 5-4 vote in a major civil rights

> case, the court decided that the law allows for discrimination claims based on seemingly neutral practices that may have a discriminatory effect. Justice Anthony Kennedy, a conservative who often casts the deciding vote in close cases, joined the court's four liberals in the majority.
>
> The ruling also was a triumph for President Barack Obama and his administration, which had backed Inclusive Communities Project Inc, a nonprofit group in Texas that claimed the state violated the law by disproportionately awarding low-income housing tax credits to developers who own properties in poor, minority-dominated neighborhoods.
> …..
> Although a broad win for civil rights advocates on the legal theory, Kennedy, writing for the court, indicated in the ruling that the Texas plaintiffs could ultimately lose when the case returns to lower courts.
>
> The court was considering whether the 1968 law allows for so-called disparate impact claims in which plaintiffs only need to show the discriminatory effect of a particular practice and not evidence of discriminatory intent. There was no dispute over the law's prohibition on openly discriminatory acts in the sale and rental of housing.
>
> Kennedy wrote that Congress indicated in 1988 when it amended the law that it intended disparate impact claims to be available.
>
> "It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification," Kennedy added.
>
> Kennedy also made clear there are limits

> to the types of claims that can be brought, saying that “statistical disparity” alone is not enough. Plaintiffs must “point to a defendant’s policy or policies causing that disparity,” Kennedy added.

As Adam Serwer said on Twitter (here and here), “banks and insurance companies have been trying to tee up this case for years because they thought the Roberts court would rule in their favor” and “without this law, it’s unlikely any of the banks would have paid any price for trapping minorities in bad loans regardless of credit”. That is right. But it goes further than that, the “disparate impact” claim is one of the most important tools available to fight discrimination that may not be apparent on the face of a cagily crafted provision or business model policy, but which nevertheless is effected by it. Discriminatory animus has gotten very sophisticated, and this tool under the Fair Housing Act of 1968 is necessary to have to fight it.

Texas Fair Housing was a 5-4 decision authored, somewhat surprisingly, by Anthony Kennedy where he joined the four justices of the “liberal bloc”. It is yet another indication of where Tony Kennedy is on “social justice” issues, again a trend that augurs well for marriage equality. We shall know soon enough!

LORETTA LYNCH IS A DUBIOUS NOMINEE FOR ATTORNEY GENERAL

Loretta Lynch is an excellent nominee for Attorney General, and her prior actions in whitewashing the blatant and rampant criminality of HSBC should not be held against her, because she didn't know that at the time she last whitewashed that criminal enterprise, right?

No. Nothing could be further from the truth.

This is a cop out by Lynch's advocates. Lynch either knew, or damn well should have known. She signed off on the HSBC Deferred Prosecution Agreement (DPA), if she was less than fully informed, that is on her. That is what signing legal documents stands for….responsibility. Banks like HSBC, Credit Suisse, ING etc were, and still are, a cesspool of criminal activity and avoidance schemes. Willful blindness to the same old bankster crimes by Lynch doesn't cut it (great piece by David Dayen by the way).

But, all the above ignores the Swiss Alps sized mountains of evidence that we know Lynch was aware of and blithely swept under the rug by her HSBC DPA. So, we are basically left to decide whether Lynch is a bankster loving toady that is her own woman and cravenly whitewashed this all on her own, or whether she is a clueless stooge taking orders to whitewash it by DOJ Main. Both views are terminally unattractive and emblematic of the oblivious, turn the other cheek to protect the monied class, rot that infects the Department of Justice on the crimes of the century to date.

And that is only scratching the real surface of my objections to Lynch. There are many other areas where Lynch has proven herself to be a dedicated, dyed in the wool "law and order

adherent" and, as Marcy Wheeler artfully coined, "executive maximalist". Lynch's ridiculous contortion, and expansion, of extraterritorial jurisdiction to suit the convenient whims of the Obama Administration's unparalleled assault on the Rule of Law in the war on terror is incredibly troubling. Though, to be fair, EDNY is the landing point of JFK International and a frequent jurisdiction by designation. Some of these same questions could have been asked of Preet Bharara (*see, e.g. U.S. v. Warsame*) Loretta Lynch has every bit the same, if not indeed more, skin in the game as Bharara, whether by choice or chance.

Lynch has never uttered a word in dissent from this ridiculous expansion of extraterritorial jurisdiction. Lynch's record in this regard is crystal clear from cases like *US v. Ahmed, Yousef, et. al.* where even Lynch and her office acknowledged that their targets could not have "posed a specific threat to the United States" much less have committed specific acts against the US.

This unconscionable expansion is clearly all good by Lynch, and the ends justify the means because there might be "scary terrists" out there. That is just dandy by American "executive maximalists", but it is toxic to the Rule of Law, both domestically and internationally (See, supra). If the US, and its putative Attorney General, are to set precedents in jurisdictional reach on common alleged terroristic support, then they ought live by them on seminal concerns like torture and war crimes under international legal norms. Loretta Lynch has demonstrated a proclivity for the convenience of the former and a toady like disdain for the latter.

And the same willingness to go along to get along with contortion of the Rule of Law in that regard seems beyond certain to extend to her treatment of surveillance issues and warrant applications, state secrets, over-classification, attack on the press and, critically, separation of powers issues. Those

types of concerns, along with how the Civil Rights Division is utilized to rein in out of control militarized cops and voting rights issues, how the OLC stands up to Executive overreach, whether OPR is allowed to continue to shield disgraceful and unethical AUSAs, and whether she has the balls to stand up to the infamously insulated inner Obama circle in the White House. Do you really think Loretta Lynch would have backed up Carolyn Krass and OLC in telling Obama no on the Libyan War Powers Resolution issue?

For my part, I don't think there is a chance in hell Lynch would have stood up to Obama on a war powers, nor any other critical issue, and that is a huge problem. Krass and Holder may have lost the Libyan WPR battle, but at least they had the guts to stand up and say no, and leave a record of the same for posterity.

That is what really counts, not the tripe being discussed in the press, and the typically preening clown show "hearing" in front of SJC. That is where the rubber meets the road for an AG nominee, not that she simply put away some mobsters and did not disgrace herself – well, beyond the above, anyway (which she absolutely did) – during her time as US Attorney in EDNY. If you are a participant in, or interested observer of, the criminal justice system as I am, we should aspire to something better than Eric Holder. Holder may not have been everything hoped for from an Obama AG when the Administration took office in January of 2009, but he was a breath of fresh air coming off the AG line of the Bush/Cheney regime. Loretta Lynch is not better, and is not forward progress from Holder, indeed she is several steps down in the wrong direction. That is not the way to go.

The fact that Loretta Lynch is celebrated as a great nominee by not just Democrats in general, but the so called progressives in specific, is embarrassing. She is absolutely horrible. If Bush had put her up for nomination, people of the progressive ilk, far and wide, would be

screaming bloody murder. Well, she is the same person, and she is a terrible nominee. And that does not bode well for the Rule of Law over the remainder of the Obama Administration.

And this post has not even touched on more mundane, day to day, criminal law and procedure issues on which Lynch is terrible. And horrible regression from Eric Holder. Say for instance pot. Decriminalization, indeed legalization, of marijuana is one of the backbone elements of reducing both the jail and prison incarceration rate, especially in relation to minorities. Loretta Lynch is unconscionably against that (See, e.g., p. 49 (of pdf) et. seq.). Lynch appears no more enlightened on other sentencing and prison reform, indeed, she seems to be of a standard hard core prosecutorial wind up law and order lock em up mentality. Lynch's positions on relentless Brady violations by the DOJ were equally milquetoast, if not pathetic (See, e.g. p. 203 (of pdf) et. seq.). This discussion could go on and on, but Loretta Lynch will never come out to be a better nominee for Attorney General.

Observers ought stop and think about the legal quality, or lack thereof, of the nominee they are blindly endorsing. If you want more enlightened criminal justice policy, to really combat the prison state and war on drugs, and to rein in the out of control security state and war on terror apparatus, Loretta Lynch is a patently terrible choice; we can, and should, do better.

CUBA LIBRE! A MOMENTOUS SHIFT IN RELATIONS

Without any question, the news of the day is the direct turnabout in relations between the United

States and Cuba announced this morning. There is a rather long list of areas in which many people, including me, have profound disappointment with Barack Obama over. Lack of accountability for torture is but the latest and greatest in the news consciousness of the attuned public. But today is not such a day; today Barack Obama has risen to at least part of his once heralded promise. Today, Mr. Obama has my love and affection. Today is one of the type and kind of foreign policy, whether toward middle east or other global neighbors, moments promised in Cairo and rarely, if ever, fulfilled in tangible deeds instead of words. So, today, sincere thanks and appreciation to President Obama.

Here are the basics from the AP:

> The United States and Cuba have agreed to re-establish diplomatic relations and open economic and travel ties, marking a historic shift in U.S. policy toward the communist island after a half-century of enmity dating back to the Cold War, American officials said Wednesday.
>
> The announcement came amid a series of sudden confidence-building measures between the longtime foes, including the release of American prisoner Alan Gross, as well as a swap for a U.S. intelligence asset held in Cuba and the freeing of three Cubans jailed in the U.S.
>
> President Barack Obama and Cuban President Raul Castro were to separately address their nations around noon Wednesday. The two leaders spoke by phone for more than 45 minutes Tuesday, the first substantive presidential-level discussion between the U.S. and Cuba since 1961.
>
> Wednesday’s announcements followed more than a year of secret talks between U.S. and Cuban officials in Canada and the

> Vatican. U.S. officials said Pope Francis was personally engaged in the process and sent separate letters to Obama and Castro this summer urging them to restart relations.

This news alone would have constituted something earth shattering, but there is much more than just that. In fact, the AP laid out the merest of backgrounds with that opening. There is much, much, more. I have the official press release, and

it is so good, and compelling, I am going to put it up, all here, right now (it is long, and makes this post long, so bear with me. If you want to, feel free to skip back down to analysis and thoughts):

> Today, the United States is taking historic steps to chart a new course in our relations with Cuba and to further engage and empower the Cuban people. We are separated by 90 miles of water, but brought together through the relationships between the two million Cubans and Americans of Cuban descent that live in the United States, and the 11 million Cubans who share similar hopes for a more positive future for Cuba.
>
> It is clear that decades of U.S. isolation of Cuba have failed to accomplish our enduring objective of promoting the emergence of a democratic, prosperous, and stable Cuba. At times, longstanding U.S. policy towards Cuba has isolated the United States from regional and international partners, constrained our ability to influence outcomes throughout the Western Hemisphere, and impaired the use of the full range of tools available to the United States to promote positive change in Cuba. Though this policy has been rooted in the best of intentions, it has

had little effect – today, as in 1961, Cuba is governed by the Castros and the Communist party.

We cannot keep doing the same thing and expect a different result. It does not serve America's interests, or the Cuban people, to try to push Cuba toward collapse. We know from hard-learned experience that it is better to encourage and support reform than to impose policies that will render a country a failed state. With our actions today, we are calling on Cuba to unleash the potential of 11 million Cubans by ending unnecessary restrictions on their political, social, and economic activities. In that spirit, we should not allow U.S. sanctions to add to the burden of Cuban citizens we seek to help.

Today, we are renewing our leadership in the Americas. We are choosing to cut loose the anchor of the past, because it is entirely necessary to reach a better future – for our national interests, for the American people, and for the Cuban people.

Key Components of the Updated Policy Approach:
Since taking office in 2009, President Obama has taken steps aimed at supporting the ability of the Cuban people to gain greater control over their own lives and determine their country's future. Today, the President announced additional measures to end our outdated approach, and to promote more effectively change in Cuba that is consistent with U.S. support for the Cuban people and in line with U.S. national security interests. Major elements of the President's new approach include:

Establishing diplomatic relations with

Cuba-

· The President has instructed the Secretary of State to immediately initiate discussions with Cuba on the re-establishment of diplomatic relations with Cuba, which were severed in January 1961.

· In the coming months, we will re-establish an embassy in Havana and carry out high-level exchanges and visits between our two governments as part of the normalization process. As an initial step, the Assistant Secretary of State for Western Hemisphere Affairs will lead the U.S. Delegation to the next round of U.S.-Cuba Migration Talks in January 2015, in Havana.

· U.S. engagement will be critical when appropriate and will include continued strong support for improved human rights conditions and democratic reforms in Cuba and other measures aimed at fostering improved conditions for the Cuban people.

· The United States will work with Cuba on matters of mutual concern and that advance U.S. national interests, such as migration, counternarcotics, environmental protection, and trafficking in persons, among other issues.

Adjusting regulations to more effectively empower the Cuban people-

· The changes announced today will soon be implemented via amendments to regulations of the Departments of the Treasury and Commerce. Our new policy changes will further enhance our goal of empowering the Cuban population.

· Our travel and remittance policies are helping Cubans by providing alternative sources of information and opportunities for self-employment and private property ownership, and by strengthening

independent civil society.

· These measures will further increase people-to-people contact; further support civil society in Cuba; and further enhance the free flow of information to, from, and among the Cuban people. Persons must comply with all provisions of the revised regulations; violations of the terms and conditions are enforceable under U.S. law.

Facilitating an expansion of travel under general licenses for the 12 existing categories of travel to Cuba authorized by law-

· General licenses will be made available for all authorized travelers in the following existing categories: (1) family visits; (2) official business of the U.S. government, foreign governments, and certain intergovernmental organizations; (3) journalistic activity; (4) professional research and professional meetings; (5) educational activities; (6) religious activities; (7) public performances, clinics, workshops, athletic and other competitions, and exhibitions; (8) support for the Cuban people; (9) humanitarian projects; (10) activities of private foundations or research or educational institutes; (11) exportation, importation, or transmission of information or information materials; and (12) certain export transactions that may be considered for authorization under existing regulations and guidelines.

· Travelers in the 12 categories of travel to Cuba authorized by law will be able to make arrangements through any service provider that complies with the U.S. Treasury’s Office of Foreign Assets Control (OFAC) regulations governing

travel services to Cuba, and general licenses will authorize provision of such services.

· The policy changes make it easier for Americans to provide business training for private Cuban businesses and small farmers and provide other support for the growth of Cuba's nascent private sector. Additional options for promoting the growth of entrepreneurship and the private sector in Cuba will be explored.

Facilitating remittances to Cuba by U.S. persons-

· Remittance levels will be raised from $500 to $2,000 per quarter for general donative remittances to Cuban nationals (except to certain officials of the government or the Communist party); and donative remittances for humanitarian projects, support for the Cuban people, and support for the development of private businesses in Cuba will no longer require a specific license.

· Remittance forwarders will no longer require a specific license.

Authorizing expanded commercial sales/exports from the United States of certain goods and services-

· The expansion will seek to empower the nascent Cuban private sector. Items that will be authorized for export include certain building materials for private residential construction, goods for use by private sector Cuban entrepreneurs, and agricultural equipment for small farmers. This change will make it easier for Cuban citizens to have access to certain lower-priced goods to improve their living standards and gain greater economic independence from the state.

Authorizing American citizens to import additional goods from Cuba-

· Licensed U.S. travelers to Cuba will

be authorized to import $400 worth of goods from Cuba, of which no more than $100 can consist of tobacco products and alcohol combined.

Facilitating authorized transactions between the United States and Cuba-

· U.S. institutions will be permitted to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions.

· The regulatory definition of the statutory term “cash in advance” will be revised to specify that it means “cash before transfer of title”; this will provide more efficient financing of authorized trade with Cuba.

· U.S. credit and debit cards will be permitted for use by travelers to Cuba.

· These measures will improve the speed, efficiency, and oversight of authorized payments between the United States and Cuba.

Initiating new efforts to increase Cubans’ access to communications and their ability to communicate freely-

· Cuba has an internet penetration of about five percent—one of the lowest rates in the world. The cost of telecommunications in Cuba is exorbitantly high, while the services offered are extremely limited.

· The commercial export of certain items that will contribute to the ability of the Cuban people to communicate with people in the United States and the rest of the world will be authorized. This will include the commercial sale of certain consumer communications devices, related software, applications, hardware, and services, and items for the establishment and update of communications-related systems.

· Telecommunications providers will be allowed to establish the necessary mechanisms, including infrastructure, in Cuba to provide commercial telecommunications and internet services, which will improve telecommunications between the United States and Cuba.

Updating the application of Cuba sanctions in third countries-

· U.S.-owned or -controlled entities in third countries will be generally licensed to provide services to, and engage in financial transactions with, Cuban individuals in third countries. In addition, general licenses will unblock the accounts at U.S. banks of Cuban nationals who have relocated outside of Cuba; permit U.S. persons to participate in third-country professional meetings and conferences related to Cuba; and, allow foreign vessels to enter the United States after engaging in certain humanitarian trade with Cuba, among other measures.

Pursuing discussions with the Cuban and Mexican governments to discuss our unresolved maritime boundary in the Gulf of Mexico-

· Previous agreements between the United States and Cuba delimit the maritime space between the two countries within 200 nautical miles from shore. The United States, Cuba, and Mexico have extended continental shelf in an area within the Gulf of Mexico where the three countries have not yet delimited any boundaries.

· The United States is prepared to invite the governments of Cuba and Mexico to discuss shared maritime boundaries in the Gulf of Mexico.

Initiating a review of Cuba's designation as a State Sponsor of

Terrorism-

· The President has instructed the Secretary of State to immediately launch such a review, and provide a report to the President within six months regarding Cuba's support for international terrorism. Cuba was placed on the list in 1982.

Addressing Cuba's participation in the 2015 Summit of the Americas in Panama-

· President Obama will participate in the Summit of the Americas in Panama. Human rights and democracy will be key Summit themes. Cuban civil society must be allowed to participate along with civil society from other countries participating in the Summit, consistent with the region's commitments under the Inter-American Democratic Charter. The United States welcomes a constructive dialogue among Summit governments on the Summit's principles.

Unwavering Commitment to Democracy, Human Rights, and Civil Society

A critical focus of our increased engagement will include continued strong support by the United States for improved human rights conditions and democratic reforms in Cuba. The promotion of democracy supports universal human rights by empowering civil society and a person's right to speak freely, peacefully assemble, and associate, and by supporting the ability of people to freely determine their future. Our efforts are aimed at promoting the independence of the Cuban people so they do not need to rely on the Cuban state.

The U.S. Congress funds democracy programming in Cuba to provide humanitarian assistance, promote human rights and fundamental freedoms, and support the free flow of information in

> places where it is restricted and censored. The Administration will continue to implement U.S. programs aimed at promoting positive change in Cuba, and we will encourage reforms in our high level engagement with Cuban officials.
>
> The United States encourages all nations and organizations engaged in diplomatic dialogue with the Cuban government to take every opportunity both publicly and privately to support increased respect for human rights and fundamental freedoms in Cuba.
>
> Ultimately, it will be the Cuban people who drive economic and political reforms. That is why President Obama took steps to increase the flow of resources and information to ordinary Cuban citizens in 2009, 2011, and today. The Cuban people deserve the support of the United States and of an entire region that has committed to promote and defend democracy through the Inter-American Democratic Charter.

The whole statement was put up here because every type inch of it is worth knowing and pointing out. I wonder if this letter from “America’s Society/Council of the Americas” didn’t presage a lot of today’s result (h/t Olivier Knox). Either way, it is nothing less than the formal ending of the cold war between the United States and Cuba, and that is one spectacular point in time. Cold War dead enders, and people whose hatred of the Castro regime supersedes their

common sense and acceptance of a changed world, will decry today's move and slime Mr. Obama for having made it. Mental midgets, from both sides of the aisle of idiocy, such as Bob Menendez and Marco Rubio, have already done that. But they are the rotting rump of over 50 years of failed policy that has denied Cubans the very means and base from which to effect the very change the critics demand.

I think the press release is both elegant, detailed, and compelling. Other than bullheadedness, there hasn't been any good reason to not do this for a long time. to quote Ken Gude on Twitter:

> Is there any real argument for not normalizing relations with #Cuba? It has been the single dumbest & least effective US policy for decades.

Yes, that is exactly correct. Hey, even the Pope was involved! And Americans who do travel to Cuba will be able to legally bring back cigars. So there is that too for "cigar aficionados", which undoubtedly, and illegally, have included some of the bellicose political humps in DC who have screamed against this for decades. Sorry backwards Beltway boobs, it is a new day now, and the American people, and even the Latino community in Florida, support the new day in substantial margins as shown in this Atlantic Council poll graph.

Okay, here are a few parting thoughts: First, Mr. Obama must immediately move his Administration to remove Cuba from the list of State Sponsors of Terrorism list. Secondly, the Obama Administration should immediately seek out and work with Bob Corker, the incoming Chair of the Senate Foreign Relations Committee, and a man whou ought be far more responsible and approachable than the foreign relations belligerent that has been Democrat Bob Menendez. Thirdly, the Administration should immediately facilitate, in every manner possible, the collaboration between American and Cuban health

officials and modalities, both to fight ebola, AIDS, and as to general medicine and treatment.

In closing, while there is still much to be done, and many deadenders to overcome, this is a beautiful day. The language from the opening paragraph of the Administration press release is a perfect close:

> We are separated by 90 miles of water, but brought together through the relationships between the two million Cubans and Americans of Cuban descent that live in the United States, and the 11 million Cubans who share similar hopes for a more positive future for Cuba.

A more positive future for both sides of that 90 miles of water is in order. And a long time coming. Today is the first day of a new, and exciting beginning. Before I was born, my parents' favorite place to travel was to Cuba. It was not just my mother's love of Hemmingway, but both of their love for Havana and the people and places of Cuba. I very much look forward to seeing what they saw, and felt so strongly.

TORTURE? OBVIOUSLY, BUT WHAT ABOUT LITANY OF OTHER CRIMES?

So, just a quick thought here, and with a little prompting by Jon Turley, obviously there is torture, and outright homicide thereon, spelled out and specified by the SSCI Torture Report. As I have said on Twitter, there are many things covered in the SSCI Torture Report and, yet, many things left out.

There are too many instances in the SSCI Torture Report to catalogue individually, but let’s be perfectly clear, the failure to prosecute the guilty in this cock up is NOT restricted to what is still far too euphemistically referred to as “torture”.

No, the criminality of US Government officials goes far beyond that. And, no, it is NOT “partisan” to point out that the underlying facts occurred under the Cheney/Bush regime (so stated in their relative order of power and significance on this particular issue).

As you read through the report, if you have any mood and mind for actual criminal law at all, please consider the following offenses:

18 U.S.C. §1001 False Statements

18 U.S.C. §1621 Perjury

18 U.S.C. §1505 Obstruction of Justice

These are but a few of the, normally, favorite things the DOJ leverages and kills defendants with in any remotely normal situation. I know my clients would love to have the self serving, toxically ignorant and duplicitous, work of John Yoo and Jay Bybee behind them. But, then, even if it were so, no judge, court, nor sentient human, would ever buy off on that bullshit.

So, here we are. As you read through the SSCI Torture Report, keep in mind that it is NOT just about “torture” and “homicide”. No, there is oh so much more there in the way of normally prosecuted, and leveraged, federal crimes. Recognize it and report it.

SSCI TORTURE REPORT

KEY: THEY KNEW IT WAS TORTURE, KNEW IT WAS ILLEGAL

Okay, here are the critical working documents:

> The SSCI Torture Report
>
> The Minority Response to SSCI Torture Report
>
> Dianne Feinstein's Statement

But, without any question, my best early takeaway key is that the United States Government, knew, they bloody well *knew*, at the highest levels, that what was going on in their citizens' name, legally constituted torture, that it was strictly illegal. They *knew* even a "necessity" self defense claim was likely no protection at all. All of the dissembling, coverup, legally insane memos by John Yoo, Jay Bybee et. al, and all the whitewashing in the world cannot now supersede the fact that the United States Government, knowing fully the immorality, and domestic and international illegality, proceeded to install an intentional and affirmative regime of torture.

Here, from page 33 of the Report, is the language establishing the above:

> …drafted a letter to Attorney General John Ashcroft asking the Department of Justice for "a formal declination of

> prosecution, in advance, for any employees of the United States, as well as any other personnel acting on behalf of the United States, who may employ methods in the interrogation of Abu Zubaydah that otherwise might subject those individuals to prosecution. The letter further indicated that “the interrogation team had concluded “that “the use of more aggressive methods is required to persuade Abu Zubaydah to provide the critical information we need to safeguard the lives of innumerable innocent men, women and children within the United States and abroad.” The letter added that these “aggressive methods” would otherwise be prohibited by the torture statute, “apart from potential reliance upon the doctrines of necessity or of self-defense.”

They knew. And our government tortured anyway. Because they were crapping in their pants and afraid instead of protecting and defending the ethos of our country and its Founders.

THE DISTURBING PARADOX OF THE DAVID BARRON NOMINATION

Barack Obama has a preternatural preference for ivory tower elites from Harvard when it comes to judicial and executive branch appointees, and David Barron is the latest example. The White House is in the final stages of an all out push to insure David Barron gets confirmed to a lifetime Article III seat on the First Circuit.

In this regard, Mr. Barron has gotten exactly the kind of fervent support and back channel whipping the Obama White House denied Goodwin Liu, and refused to give to the nominee at OLC that David Barron stood as the designated and approved Obama acting placeholder for, Dawn Johnsen.

It turns out Mr. Obama and his White House shop really can give appropriate support to nominees if they care, which seemed to be a trait entirely lacking earlier in the Obama Presidency. And by giving the ill taken legal cover to Mr. Obama for the extrajudicial execution of American citizens, that Obama had already attempted once without, Mr. Barron certainly earned the support of the Obama White House.

It would be wonderful if Mr. Obama were to give support to candidates for judicial seats and key legal agencies who protect the Constitution instead of shredding it for convenience, but it appears to not be in the offing all that consistently. Obama has never been the same since blowback from the release of the Torture Memos when he first took office. Even Federal judges like Mary Schroeder and Bill Canby who, less than a month after Obama took office, were stunned by the about face, and wholesale

adoption, by Obama of the Bush/Cheney security state protocols. From a New York Times article at the moment:

> During the campaign, Mr. Obama harshly criticized the Bush administration's treatment of detainees, and he has broken with that administration on questions like whether to keep open the prison camp at Guantánamo Bay, Cuba. But a government lawyer, Douglas N. Letter, made the same state-secrets argument on Monday, startling several judges on the United States Court of Appeals for the Ninth Circuit.
>
> "Is there anything material that has happened" that might have caused the Justice Department to shift its views, asked Judge Mary M. Schroeder, an appointee of President Jimmy Carter, coyly referring to the recent election.
>
> "No, your honor," Mr. Letter replied.
>
> Judge Schroeder asked, "The change in administration has no bearing?"
>
> Once more, he said, "No, Your Honor." The position he was taking in court on behalf of the government had been "thoroughly vetted with the appropriate officials within the new administration," and "these are the authorized positions," he said.

Make no mistake, from my somewhat substantial knowledge of Mary Schroeder, that was the voice of shock and dismay. But it was an early tell of who and what Barack Obama, and his administration, would be on national security issues from there forward. And so, indeed, it has been.

What was unconscionable and traitorous to the rule of law and Constitution for Obama, and the Democratic majority in the Senate, under George Bush is now just jim dandy under Barack Obama.

It is intellectual weakness and cowardice of the highest order.

So we come back to the case of David Barron. Frankly, it is not hard to make the argument that what Barron has done is actually worse than the travesties of John Yoo and Jay Bybee. As unthinkable, heinous and immoral as torture is, and it is certainly all that, it is a discrete violation of domestic and international law. It is definable crime.

But what David Barron did in, at a minimum, the Awlaki Targeted Kill Memo (there are at least six other memos impinging on and controlling this issue, at a minimum of which at least one more is known to be authored by Barron, and we don't even deign to discuss those apparently), was to attack and debase the the very foundational concept of Due Process as portrayed in the Bill of Rights. Along with Habeas Corpus, Due Process is literally the foundation of American criminal justice fairness and freedom under our Constitution.

David Barron attacked that core foundation. Sure, it is in the so called name of terrorism today, tomorrow it will justify something less in grade. And something less the day after. Such is how Constitutional degradation happens. And there is absolutely nothing so far known in Mr. Barron's handiwork to indicate it could not be adapted for use domestically if the President deems it so needed. Once untethered from the forbidden, once unthinkable Executive Branch powers always find new and easier uses. What were once vices all too easily become habits. This is exactly how the once proud Fourth Amendment has disappeared into a rabbit hole of "exceptions".

This damage to Due Process occasioned by David Barron can be quite easily argued to be more fundamental and critical to the Constitution, the Constitution every political and military officer in the United States is sworn to protect, than a temporally limited violation of criminal statutes and international norms on

torture as sanctioned by Yoo and Bybee. But it is not treated that way by cheering Dems and liberals eager to confirm one of their own, a nice clean-cut Harvard man like the President, to a lifetime post to decide Constitutional law. What was detested for Jay Bybee, and would certainly be were John Yoo ever nominated for a federal judgeship, is now no big deal when it comes to David Barron. Constitutional bygones baybee; hey Barron is cool on same sex marriage, what a guy! Screw Due Process, it is just a quaint and archaic concept in a piece of parchment paper, right?

If the above were not distressing enough, the Barron nomination was supposed to, at a minimum, be used as leverage to get public release of the Barron handiwork legally sanctioning Mr. Obama to extrajudicially execute American citizens without a whiff of Due Process or judicial determination. Did we get that? Hell no, of course not. A scam was run by the Obama White House, and the Senate and oh so attentive DC press fell for it hook, line and sinker. We got squat and Barron is on the rocket path to confirmation with nothing to show for it, and no meaningful and intelligent review of his facially deficient record of Constitutional interpretation.

Barron cleared cloture late Wednesday and is scheduled for a floor vote for confirmation today, yet release of the "redacted memo" is nowhere remotely in sight. This framing on Barron's nomination, irrespective of your ultimate position on his fitness, is a complete and utter fraud on the American citizenry in whose name it is being played. And that is just on the one Awlaki Memo that we *already know* the legal reasoning on from the self serving previous release of the "white paper" by the Administration. Discussion of the other six identified pertinent memos has dropped off the face of the earth. Booyah US Senate, way to do your job for the citizens you represent! Or not.

Personally, there is more than sufficient

information about David Barron's situational legal, and moral, ethics in the white paper alone to deem him unfit for a lifetime Article III confirmed seat on a Circuit Court of Appeal.

But, even if you disagree and consider Barron fit, you should admit the American citizenry has been ripped off in this process by the Democratically led Senate, and an Obama Administration who has picked a dubious spot to finally get aggressive in support of one of their nominees.

If Goodwin Liu and Dawn Johnsen, two individuals who had proven their desire to protect the Constitution, had received this kind of support, this country, and the world, would be a better place. Instead, Mr. Obama has reserved his all out push for a man who, instead, opted to apply situational ethics to gut the most basic Constitutional concept of Due Process. That's unacceptable, but at a minimum we should have the benefit of proper analysis of Barron's work before it happens.

THE NAKED AND UNBOUND AMBITION OF KYRSTEN SINEMA

As the kerfuffle over SB-1062 dies down, politics march on here

at ground zero in Arizona. The GOP runs the key Executive Branch offices such as governor and Secretary of State but, more importantly in many respects, also the state legislature, and as long as they do state politics will continue to be dominated by clusterfucks and cleanups. But Arizona has issues with their statewide federal elected officials too. The current manifestation is not McCain, Flake, nor even the Pleistocene era brainfart known as Trent Franks.

No, today's issue is the once and forever self proclaimed liberal Democrat, Kyrsten Sinema. The transformation of Sinema, who aggressively sold herself as progressive liberal when seeking election, to a conservative Blue Dog toadie of the Minority centrist Dem leadership has been nothing short of astounding, especially for those of us who reside in her district and voted for her in 2012. She completely betrayed her base constituents in Arizona District 9. That is mostly a story for another day though, today's story is not about discrete policy issues, but wholesale admission of the deceptive nature of Kyrsten Sinema's incursion into AZ-9 to start with.

The baseline is this: Thursday, longtime Arizona Democratic Congressman Ed Pastor of AZ-7 announced his decision to retire and not seek reelection in 2014. Local politicians, from seemingly forever Maricopa Board of Supervisor's member Mary Rose Wilcox to new and fairly refreshing voices like state legislature member Ruben Gallego, were literally stepping over one another to announce they would be running for Pastor's seat. They are almost all minorities vying to represent a solidly minority district. And this is no small thing, as most all of them have to give up their current position to do so under Arizona's "resign to run" law.

I was asked early on Thursday, not long after Pastor's announcement, by a friend who supports liberal Dems nationwide, about Kyrsten Sinema jumping in. I thought it was a joke question and said so. Because it was crazy talk. The joke,

however, was squarely on me and her other constituents in AZ-09. Yeah, Kysten Sinema, who pledged herself to AZ-09, started lusting after AZ-07 the second it was announced available.

Not that Kyrsten Sinema (see her Twitter feed, which is a litany of everything but her contemplated district switch) or her managers/spokespeople will admit it, or even address the subject, but she was ready to walk from second one. How do we know? Because the Arizona Republic/12 News (via the excellent Brahm Resnik) got a copy of an email to Sinema's inside staff proving it.

So, why is this a big deal? Because it shows that, for first term congresswoman Kyrsten Sinema, her own raw narcissistic ambition, in a dynamic situation, immediately trumps loyalty to her constituents and her party.

How it trumps her constituents is easy. Sinema represents AZ-09, which though a new district emanating out of redistricting from the 2010 Census, consists of a significant portion of John Shadegg's old district that was taken over by Ben Quayle after Shadegg's retirement. Sinema did not live in the still leaning conservative district, and explicitly came from an out of district seat in the state legislature to run for the seat when it opened for the 2012 election. She painted herself as a classic liberal of the old Tucson school, who was a progressive and sexually liberated voice. It was a bill of goods, but Sinema was an extremely aggressive campaigner who worked her ass off thusly selling herself. She eked out a victory over a very weak Republican thanks in part to a helpful diversion of votes by a third party Libertarian candidate.

And, though she has been a disappointment to any liberal, at least we thought we had a Democratic representative of some sort for the foreseeable future. Sinema came here and took our votes, surely she was ours at least until she could run for a Senate seat or something larger, right? Apparently not.

Kyrsten Sinema has proved herself willing to leave her, apparently carpetbagged, home in AZ-09 at a moment's notice before even consummating a whole two year Congressional term.

But Kyrsten Sinema's knee jerk willingness to dally with AZ-07 does not just sell out her constituents in AZ-09, no it is contemplated treachery to her Democratic party and Congressional caucus as well. Why? Because there is no Democratic alternative to replace Sinema in AZ-09. None. Over the last few months, several of us Democrats here in AZ-09 toyed with the idea of finding a primary challenger for Sinema, because she has been so awful as to genuinely progressive ideas and votes in the House. But there simply are none; it was either Sinema or turn the seat back over to the GOP, which was a non-starter. At least for us. So, if Sinema leaves, AZ-09 is going to flip and the House Democrats are going to lose yet another precious seat.

What's worse is that if Kyrsten Sinema takes her big campaign war chest to try to claim AZ-07, she will be trying to suck up a seat that has been held by a member of the Latino minority, Ed Pastor, for over 22 years. Again, Arizona's Congressional districts have evolved over that time, and AZ-07 is a somewhat a new creation. But the core that Pastor now represents, and has always represented, is well over 60% minority, with the majority of those being Hispanic.

Kyrsten Sinema is not only thinking HARD about abandoning her current constituents that she just came to represent, and abandoning a seat for Democratic caucus to the Republicans, she is thinking hard about trying to pilfer a minority seat away from what would otherwise almost surely be a minority Democratic replacement for Ed Pastor.

Why would Kyrsten Sinema think about doing such a loathsome thing? Raw, naked, selfish ambition is the only explanation. Sinema is an aggressive political climber. And her ability to get her

mug in between any scene and the TV camera was clearly learned from the great Chuck Schumer and/or John McCain. She has that skill. What it boils down to is that Sinema is on the move, but a real higher office is not in the offing, either this election or next, as Arizona's two Senate seats are locked up – McCain appears to be running again in 2016, and Jeff Flake is young, just got elected, and may never leave.

So, Kyrsten Sinema is left to ply her trade in the House for the time being. Thing is, AZ-07, once you are in, is a lifetime sinecure for a Democrat. You wouldn't even have to work your ass off to stay elected, like Sinema will have to in the conservative trending AZ-09. In AZ-07, Sinema could kick back and build up her warchest for the future ambition she most surely holds, and if she never gets there, can ride out eternity in the seat easily and safely. That's why Kyrsten Sinema wants it. Oh, and it was effectively where she came from before she so benevolently decided to insincerely grace the good folks in AZ-09 with her naked ambition.

What Kyrsten Sinema does at this point is anybody's guess, and she is certainly not telling even top political reporters here in Phoenix (see: here and here). She is, however, push polling aggressively in AZ-07 over the weekend. Whatever it may be, the real Kyrsten Sinema has been exposed, and it is not a pretty sight for whatever lucky duckies that may be her future district constituents. Blue dogs are going to hunt I guess.

[**UPDATE**: I was negligent in my attribution. I have been discussing, on Twitter and off, the Pastor/Sinema dynamic since news of Ed Pastor's retirement broke last Thursday. A lot of us were talking about Sinema from the start, but the actual first to go to print with the speculation was Rebekah Sanders of the Arizona Republic, who had this report Friday night, the 28th of February.]

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.

WHITE HOUSE, CONGRESS ARGUING OVER WHICH SENATE COMMITTEE SHOULD FAIL IN DRONE OVERSIGHT

Ken Dilanian has a very interesting article in the Los Angeles Times outlining the latest failure in Congress' attempts to exert oversight over drones. Senator Carl Levin had the reasonable idea of calling a joint closed session of the Senate Armed Services and Intelligence Committees so that the details of consolidating drone functions under the Pentagon

(and helping the CIA to lose at least one of its paramilitary functions) could be smoothed out. In the end, “smooth” didn’t happen:

> An effort by a powerful U.S. senator to broaden congressional oversight of lethal drone strikes overseas fell apart last week after the White House refused to expand the number of lawmakers briefed on covert CIA operations, according to senior U.S. officials.
>
> Sen. Carl Levin (D-Mich.), who chairs the Armed Services Committee, held a joint classified hearing Thursday with the Senate Intelligence Committee on CIA and military drone strikes against suspected terrorists.
>
> But the White House did not allow CIA officials to attend, so military counter-terrorism commanders testified on their own.

But perhaps the White House was merely retaliating for an earlier slight from Congress:

> In May, the White House said it would seek to gradually move armed drone operations to the Pentagon. But lawmakers added a provision to the defense spending bill in December that cut off funds for that purpose, although it allows planning to continue.

Dilanian parrots the usual framing of CIA vs JSOC on drone targeting:

> Levin thought it made sense for both committees to share a briefing from generals and CIA officials, officials said. He was eager to dispel the notion, they said, that CIA drone operators were more precise and less prone to error than those in the military.

The reality is that targeting in both the CIA

and JSOC drone programs is deeply flawed, and the flaws lead directly to civilian deaths. I have noted many times (for example see here and here and here) when John Brennan-directed drone strikes (either when he had control of strike targeting as Obama's assassination czar at the White House or after taking over the CIA and taking drone responsibility with him) reeked of political retaliation rather than being logically aimed at high value targets. But those examples pale in comparison to Brennan's "not a bake sale" strike that killed 40 civilians immediately after Raymond Davis' release or his personal intervention in the peace talks between Pakistan and the TTP. JSOC, on the other hand, has input from the Defense Intelligence Agency, which, as Marcy has noted, has its own style when it comes to "facts". On top of that, we have the disclosure from Jeremy Scahill and Glenn Greenwald earlier this week that JSOC will target individual mobile phone SIM cards rather than people for strikes, without confirming that the phone is in possession of the target at the time of the strike. The flaws inherent in both of these approaches lead to civilian deaths that fuel creation of even more terrorists among the survivors.

Dilanian doesn't note that the current move by the White House to consolidate drones at the Pentagon is the opposite of what took place about a year before Brennan took over the CIA, when his group at the White House took over some control of JSOC targeting decisions, at least with regard to signature strikes in Yemen.

In the end, though, it's hard to see how getting all drone functions within the Pentagon and under Senate Armed Services Committee oversight will improve anything. Admittedly, the Senate Intelligence Committee is responsible for the spectacular failure of NSA oversight and has lacked the courage to release its thorough torture investigation report, but Armed Services oversees a bloated Pentagon that can't even pass an audit (pdf). In the end, it seems to me that this entire pissing match between Congress and

the White House is over which committee(s) will ultimately be blamed for failing oversight of drones.