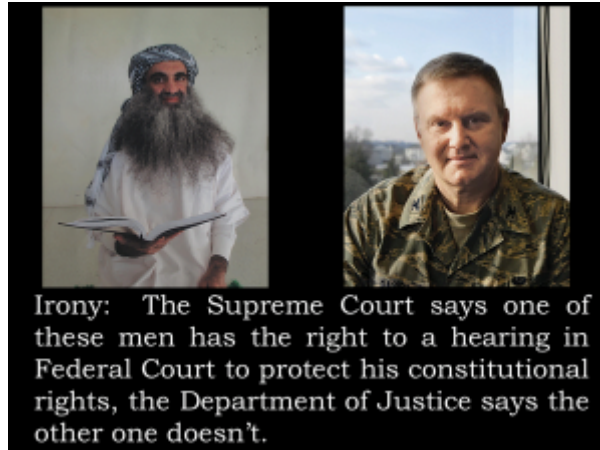


1ST AMENDMENT JUSTICE DELAYED IS JUSTICE DENIED FOR COL. MORRIS DAVIS

Col.
Morris
Davis
is, at
least
for my
money,
an
Americ
an
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 impartiality 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.

BREAKING: FOUR SENATORS REDISCOVER CONGRESS HAS OVERSIGHT ROLE FOR COMMITTING TROOPS

Don't look for this important bit of news in the New York Times or Washington Post. At least at the time I started writing this, they hadn't noticed that Senators Jeff Merkley, (D-OR), Mike Lee (R-UT), Joe Manchin (D-WV), and Rand Paul (R-KY) put out a press release yesterday calling for a Congressional vote on whether to authorize keeping US troops in Afghanistan beyond 2014. President Barack Obama and the Pentagon have been bargaining with Afghan President Hamid Karzai for over a year now to get a Bilateral Security Agreement that will authorize keeping US troops there after the current NATO mission officially ends at the end of this year, but we have heard almost nothing at all from Congress. Well, we did have some hypocrisy tourists calling for Karzai to sign the agreement immediately or suffer the financial consequences, but they didn't call for using their Constitutional role in authorizing use of troops.

This bipartisan group had some pretty strong language about the push to exclude Congress from the decision-making on keeping troops in Afghanistan:

Today, Senators Jeff Merkley (D-OR), Mike Lee (R-UT), Joe Manchin (D-WV), and Rand Paul (R-KY) announced the introduction of a bipartisan resolution

calling for Congress to have a role in approving any further United States military involvement in Afghanistan after the current mission ends on December 31, 2014. The Administration is reportedly negotiating an agreement that could keep 10,000 American troops or more in Afghanistan for another ten years.

"The American people should weigh in and Congress should vote before we decide to commit massive resources and thousands of troops to another decade in Afghanistan," **Merkley said**. "After over 12 years of war, the public deserves a say. Congress owes it to the men and women in uniform to engage in vigorous oversight on decisions of war and peace."

"After over a decade of war, Congress, and more importantly the American people, must be afforded a voice in this debate," **Lee said**. "The decision to continue to sacrifice our blood and treasure in this conflict should not be made by the White House and Pentagon alone."

"After 13 years, more than 2,300 American lives lost and more than \$600 billion, it is time to bring our brave warriors home to the hero's welcome they deserve and begin rebuilding America, not Afghanistan," **Manchin said**. "We do not have an ally in President Karzai and his corrupt regime. His statements and actions have proven that again and again. Most West Virginians believe like I do money or military might won't make a difference in Afghanistan. It's time to bring our troops home."

"The power to declare war resides in the hands of Congress," **Paul said**. "If this President or any future President has the desire to continue to deploy U.S."

troops to this region, it should be done so only with the support of Congress and the citizens of the United States.”

After 12 years and hundreds of billions of dollars spent, the Administration has declared that the war in Afghanistan will be wound down by December 31, 2014. However, the Administration is also negotiating an agreement with the Government of Afghanistan that would set guidelines for U.S. troops to remain in training, support, and counter-terrorism roles through at least 2024.

In November, the Senators introduced this bill as an amendment to the Defense Authorization bill, but it wasn’t allowed a vote. In June, the House of Representatives approved a similar amendment to the NDAA stating that it is the Sense of Congress that if the President determines that it is necessary to maintain U.S. troops in Afghanistan after 2014, any such presence and missions should be authorized by Congress. The House amendment passed by a robust, bipartisan 305-121 margin.

But Merkley added yet another zinger. From the AFP story on the move, as carried in Dawn (emphasis added):

“We are introducing a bipartisan resolution to say before any American soldier, sailor, airman or Marine is committed to stay in Afghanistan after 2014, Congress should vote,” Democratic Senator Jeff Merkley told reporters.

“Automatic renewal is fine for Netflix and gym memberships, but it isn’t the right approach when it comes to war.”

Wow. What a concept. Actual politicians saying that their jobs don’t consist of applying a

rubber stamp to whatever the President wants. They say that they want to carry out their official duties and have a say in whether the US continues to send troops and money into a cause that has been hopeless for years. [I will interject here that it would be even more refreshing if a similar attitude could break out over automatic renewal of the FISA Amendment Act, but that's probably too greedy.] Of course, with public opinion now solidly opposed to the war, politicians can assume that finally taking a stand will be popular.

As noted in *The Nation*, Congress gave the President a blank check on fighting "terrorism" in the 2001 AUMF, prompting the Senators to speculate on whether the AUMF needs changing if they aren't given a vote on keeping troops in Afghanistan:

If this effort doesn't work out, more aggressive measures could be taken—like modifying the 2001 authorization for use of military force. Manchin said they would "look at everything available" but were first focused on at least having a debate in Congress.

While the 2001 authorization legally allows Obama to continue the war on his own, the Senators present on Thursday feel that the spirit of congressional input would still be violated if the war was extended another decade.

"The president has said repeatedly, including very recently in his State of the Union address, that the military will conclude operations in Afghanistan at the end of 2014. Therefore it only makes sense that any proposal to keep troops in Afghanistan past the end of the year would begin a new chapter in our relationship with Afghanistan," Lee said. "The decision to sacrifice American blood and treasure in this conflict must not be made by the White House and Pentagon alone."

“This is about rejecting military action on autopilot,” said Merkley.

Of course, some dirty hippie has been talking about the 2001 AUMF for years. That is, when she isn't talking about the need to repeal the Iraq AUMF. But at any rate, it is refreshing to see Senators on both sides of the aisle suddenly rediscover the oversight portion of their jobs. Even if it only came from reading the polls.

But wait! There's more! In coverage of this move at The Hill, we see a clear call for a full withdrawal:

The senators on Thursday's resolution, who have previously pressed Obama on quickening the U.S. withdrawal from Afghanistan, said that the public was on the side of a full withdrawal.

“The American people are totally in favor of this direction from every corner of this country,” Manchin said. “When you talk about bringing the troops home and stopping this absolute endless war in Afghanistan, that's the one resonating thing that brings the crowd together.”

Gosh, it would be nice if some of this news made it into the primary media.

THE CIVIL LIBERTIES CELEBRATION HANGOVER WEARS OFF



At the end of last week, I joked a little about privacy and civil liberties advocates having had the “best week ever”. It was indeed a very good week, but only relatively

compared to the near constant assault on the same by the government. But the con is being put back in ICon by the Administration and its mouthpieces.

As I noted in the same post, Obama himself has already thrown cold water on the promise of his NSA Review Board report. Contrary to some, I saw quite a few positives in the report and thought it much stronger than I ever expected. Still, that certainly does not mean it was, or is, the particularly strong reform that is needed. And even the measures and discussion it did contain are worthless without sincerity and dedication to buy into them by the intelligence community and the administration. But if Obama on Friday was the harbinger of the walkback and whitewash of real reform, the foot soldiers are taking the field now to prove the point.

Sunday morning brought out former CIA Deputy Director Michael Morrell on CBS Face the Nation to say this:

I think that is a perception that's somehow out there. It is not focused on any single American. It is not reading the content of your phone calls or my phone calls or anybody else's phone calls. It is focused on this metadata for one purpose only and that is to make sure that foreign terrorists aren't in contact with anybody in the United States.

Morrell also stated that there was “no abuse” by

the NSA and that Ed Snowden was a “criminal” who has shirked his duties as a “patriot” by running. Now Mike Morrell is not just some voice out in the intelligence community, he was one of the supposedly hallowed voices that Barack Obama chose to consider “reform”.

Which ought to tell you quite a bit about what Barack Obama really thinks about true reform and your privacy interests. Not much. In fact, Morrell suggested (and Obama almost certainly agrees) that the collection dragnet should be expanded from telephony to also include email. Not exactly the kind of “reform” we had in mind.

Then, Sunday night 60 Minutes showed that fluffing the security state is not just a vice, but an ingrained habit for them. Hot on the heels of their John Miller blowjob on the NSA, last night 60 Minutes opened with a completely hagiographic puff piece on and with National Security Advisor Susan Rice. There was absolutely no news whatsoever in the segment, it was entirely a forum for Rice and her “interviewer”, Lesley Stahl, to spew unsupported allegations about Edward Snowden (He “has 1.5 million documents!”), lie about how the DOJ has interacted with the court system regarding the government surveillance programs (the only false statements have been “inadvertent”) and rehab her image from the Benghazi!! debacle. That was really it. Not exactly the hard hitting journalism you would hope for on the heels of a federal judge declaring a piece of the heart of the surveillance state unconstitutional.

Oh, yes, Susan Rice also proudly proclaimed herself “a pragmatist like Henry Kissinger which, as Tim Shorrock correctly pointed out, is not exactly reassuring from the administration of a Democratic President interested in civil liberties, privacy and the rule of law.

So, the whitewashing of surveillance dragnet reform is in full swing, let the giddiness of last week give way to the understanding that Barack Obama, and the Intelligence Community, have no intention whatsoever of “reforming”. In

fact, they will use the illusion of “reform” to expand their authorities and power. Jonathan Turley noted:

Obama stacked the task force on NSA surveillance with hawks to guarantee the preservation of the program.

Not just preserve, but to give the false, nee fraudulent, patina of Obama Administration concern for the privacy and civil liberties concerns of the American citizenry when, in fact, the Administration has none. It is yet another con.

Or, as Glenn Greenwald noted:

The key to the WH panel: its stated purpose was to re-establish public confidence in NSA – NOT reform it.

There may be some moving of the pea beneath the shells, but there will be no meaningful reform from the administration of Barack Obama. The vehicle for reform, if there is to be one at all, will have to come from the Article III federal courts. for an overview of the path of Judge Leon’s decision in *Klayman* through the DC circuit, see this piece by NLJ’s Zoe Tillman.

Lastly, to give just a little hope after the above distressing content, I recommend a read of this excellent article by Adam Serwer at MSNBC on the cagy pump priming for surveillance reform Justice Sotomayor has done at the Supreme Court:

If Edward Snowden gave federal courts the means to declare the National Security Agency’s data-gathering unconstitutional, Sonia Sotomayor showed them how.

It was Sotomayor’s lonely concurrence in *U.S. v Jones*, a case involving warrantless use of a GPS tracker on a suspect’s car, that the George W. Bush-appointed Judge Richard Leon relied on when he ruled that the program was

likely unconstitutional last week. It was that same concurrence the White House appointed review board on surveillance policy cited when it concluded government surveillance should be scaled back.

“It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties,” Sotomayor wrote in 2012. “This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”

Give the entire article a read, Adam is spot on. If there is to be reform on the surveillance dragnet, it will almost certainly have to be the handiwork of the courts, and Justice Sotomayor planted the seed. The constant barrage of truth and facts coming from the Snowden materials, what Jay Rosen rightfully terms “The Snowden Effect” is providing the food for Sotomayor’s seed to flower. Hopefully.

MEK PURCHASES 27 US SENATE VOTES FOR WAR WITH IRAN

On Tuesday, I posited that the threat of new sanctions kicking in if a final agreement on nuclear technology is not reached could serve as a strong incentive for Iran to bargain in good

faith with the P5+1 group of nations. But then, on Thursday, an actual sanctions bill was introduced. Ali Gharib took the time to read it (he got an advance copy and posted about it Wednesday) and what he found is profoundly disturbing (emphasis added):

The legislation would broaden the scope of the sanctions already imposed against Iran, expanding the restrictions on Iran's energy sector to include all aspects of its petroleum trade and putting in place measures targeting Iran's shipping and mining sectors. The bill allows Obama to waive the new sanctions during the current talks by certifying every 30 days that Iran is complying with the Geneva deal and negotiating in good faith on a final agreement, as well as meeting other conditions such as not sponsoring or carrying out acts of terrorism against U.S. targets.

In accordance with goals laid out frequently by hard-liners in Congress and the influential lobbying group the American Israel Public Affairs Committee, the bill sets tough conditions for a final deal, should one be reached with Iranian negotiators.

Among those conditions is **a provision that only allows Obama to waive new sanctions, even after a final deal has been struck, if that deal bars Iran from enriching any new uranium whatsoever.**

The bill states Obama may not waive sanctions unless the United States and its allies "reached a final and verifiable agreement or arrangement with Iran that will ... dismantle Iran's illicit nuclear infrastructure, including enrichment and reprocessing capabilities and facilities." (Congress could also block Obama's waivers by passing a "joint resolution of disapproval" against a final deal.)

Although Gharib ascribes the war mongering aspects of this bill to positions advocated by AIPAC, the work (and funding money) of MEK, which advocates for (in my opinion, violent) regime change in Iran, seems to be just as likely, if not more likely, to be behind this hideous piece of legislation. The chief architect of the bill is Robert Menendez (D-NJ). He lists his cosponsors (Menendez's original release claimed 26 cosponsors and the news stories linked below also cite 26, but Corey Booker was added to the list this morning while this post was being written. The press release was changed to add Booker to the list without changing the 26 to 27. The press release at the old URL was wiped out so that an empty page is returned. The date of December 19 for the release was also retained.):

The legislation was co-sponsored by twenty-six senators [sic], including: Senators Menendez, Kirk, Schumer, Graham, Cardin, McCain, Casey, Rubio, Coons, Cornyn, Blumenthal, Ayotte, Begich, Corker, Pryor, Collins, Landrieu, Moran, Gillibrand, Roberts, Warner, Johanns, Hagan, Cruz, Donnelly, Blunt and Booker.

Perhaps the only encouraging aspect of this long list of bipartisan backers of war is that back in June of 2012 this group got 44 signatures on a Senate letter calling for all negotiations with Iran to cease unless three conditions were met:

The senators wrote that the "absolute minimum" Iran must do immediately to justify further talks is to shut down the Fordo uranium enrichment facility near Qom, freeze all uranium enrichment above 5 percent, and ship all uranium enriched above 5 percent out of the country.

Note that the current agreement does stop

enrichment above 5%. It also calls for half of the 20% uranium to be diluted back down to 5% while the other half is converted to a chemical form for fuel that can't easily be further enriched. Qom is not shut down, but the agreement does spell out specific numbers of centrifuges that can be used at the two enrichment sites.

But consider this for a moment. Most of what these war mongers were lobbying for last year actually appears in the interim agreement, and so they have been forced to move the goalposts in order to reach a point that they think won't be part of the final agreement. What they want is a war to change the regime in Iran, not a diplomatic solution that prevents nuclear weapons being developed by Iran.

It became obvious during the final discussions that led to this interim agreement that Iran insists on its right to low level enrichment to produce fuel for nuclear power plants. Since that is seen as a deal-breaker for Iran, it is precisely what the MEK now sets as the determinant of whether sanctions that will certainly lead to war are enacted.

The intellectual dishonesty surrounding this move by MEK shills in the Senate is stunning. They claim, as stated in Menendez's press release that their goal is "the complete and verifiable termination of Iran's illicit nuclear weapons program". Low level enrichment is not part of a weapons program and yet this group insists that Iran also must abandon low level enrichment along with any aspects of a weapons program.

Even more disturbing is that stories today by both the New York Times and CNN mention the introduction of the bill but don't get around to explaining that the bill calls for the extreme sanctions if all enrichment is not abandoned and that that condition is almost certainly a deal-breaker for Iran.

There is at least some push-back within the

Senate. A letter signed by ten Democratic committee heads has been sent to Harry Reid strongly advocating against bringing the bill up for a vote. Sadly, the letter fails to point out the manner in which Menendez's bill undercuts the ongoing negotiations by setting terms that almost certainly are not going to be a part of any final agreement with Iran. There also is an op-ed (in Politico!) by Carl Levin and Barbara Boxer lobbying against the bill. Significantly, Levin was one of the 44 signatories on the June, 2012 letter but now seems to have come around to favoring diplomacy over war. Failing all this, the White House has promised to veto any bills calling for new sanctions since they clearly violate the interim P5+1 agreement.

LAVABIT AND THE DEFINITION OF US GOVERNMENT HUBRIS

Well, you know, if you do not WANT the United States Government sniffing in your and your family's underwear, it is YOUR fault. Silly American citizens with your outdated stupid piece of paper you call the Constitution.

Really, get out if you are a citizen, or an American communication provider, that actually respects American citizen's rights. These trivialities the American ethos was founded on are "no longer operative" in the minds of the surveillance officers who claim to live to protect us.

Do not even think about trying to protect your private communications with something so anti-American as privacy enabling encryption like Lavabit which only weakly, at best, even deigned to supply.

Any encryption that is capable of protecting an

American citizen's private communication (or even participating in the TOR network) is essentially inherently criminal and cause for potentially being designated a "selector", if not target, of any number of searches, whether domestically controlled by the one sided ex-parte FISA Court, or hidden under Executive Order 12333, or done under foreign collection status and deemed "incidental". Lavabit's Ladar Levinson knows.

Which brings us to where we are today. Let Josh Gerstein set the stage:

A former e-mail provider for National Security Agency leaker Edward Snowden, Lavabit LLC, filed a legal brief Thursday detailing the firm's offers to provide information about what appear to have been Snowden's communications as part of a last-ditch offer that prosecutors rejected as inadequate.

The disagreement detailed in a brief filed Thursday with the U.S. Court of Appeals for the Fourth Circuit resulted in Lavabit turning over its encryption keys to the federal government and then shutting down the firm's secure e-mail service altogether after viewing it as unacceptably tainted by the FBI's possession of the keys.

I have a different take on the key language from Lavabit's argument in their appellate brief though, here is mine:

First, the government is bereft of any statutory authority to command the production of Lavabit's private keys. The Pen Register Statute requires only that a company provide the government with technical assistance in the installation of a pen- trap device; providing encryption keys does not aid in the device's installation at all, but rather in its use. Moreover, providing

private keys is not “unobtrusive,” as the statute requires, and results in interference with Lavabit’s services, which the statute forbids. Nor does the Stored Communications Act authorize the government to seize a company’s private keys. It permits seizure of the contents of an electronic communication (which private keys are not), or information pertaining to a subscriber (which private keys are also, by definition, not). And at any rate it does not authorize the government to impose undue burdens on the innocent target business, which the government’s course of conduct here surely did.

Second, the Fourth Amendment independently prohibited what the government did here. The Fourth Amendment requires a warrant to be founded on probable cause that a search will uncover fruits, instrumentalities, or evidence of a crime. But Lavabit’s private keys are none of those things: they are lawful to possess and use, they were known only to Lavabit and never used by the company to commit a crime, and they do not prove that any crime occurred. In addition, the government’s proposal to examine the correspondence of all of Lavabit’s customers as it searched for information about its target was both beyond the scope of the probable cause it demonstrated and inconsistent with the Fourth Amendment’s particularity requirement, and it completely undermines Lavabit’s lawful business model. General rummaging through all of an innocent business’ communications with all of its customers is at the very core of what the Fourth Amendment prohibits.

The legal niceties of Lavabit’s arguments are thus:

The Pen Register Statute does not come close. An anodyne mandate to provide information needed merely for the “unobtrusive installation” of a device will not do. If there is any doubt, this Court should construe the statute in light of the serious constitutional concerns discussed below, to give effect to the “principle of constitutional avoidance” that requires this Court to avoid constructions of statutes that raise colorable constitutional difficulties. *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 156–57 (4th Cir. 2010).

And, later in the pleading:

By those lights, this is a very easy case. Lavabit’s private keys are not connected with criminal activity in the slightest—the government has never accused Lavabit of being a co-conspirator, for example. The target of the government’s investigation never had access to those private keys. Nor did anyone, in fact, other than Lavabit. Given that Lavabit is not suspected or accused of any crime, it is quite impossible for information known only to Lavabit to be evidence that a crime has occurred. The government will not introduce Lavabit’s private keys in its case against its target, and it will not use Lavabit’s private keys to impeach its target at trial. Lavabit’s private keys are not the fruit of any crime, and no one has ever used them to commit any crime. Under those circumstances, absent any connection between the private keys and a crime, the “conclusion[] necessary to the issuance of the warrant” was totally absent. *Zurcher*, 436 U.S., at 557 n.6 (quoting, with approval, Comment, 28 U. Chi. L. Rev. 664, 687 (1961)).

What this boils down to is, essentially, the government thinks the keys to Lavabit's encryption for their customers belong not just to Lavabit, and their respective customers, but to the United States government itself.

Your private information cannot be private in the face of the United States Government. Not just Edward Snowden, but anybody, and everybody, is theirs if they want it. That is the definition of bullshit.

[Okay, big thanks to Darth, who generously agreed to let us use the killer Strangelovian graphic above. Please follow Darth on Twitter]

LAST WEEK'S BLIZZARD, THIS WEEK'S HELL

Did you know there was a blizzard last week? I'll admit I didn't. Never saw a peep about it across several Twitter and internet news feeds until today.

Between 28 and 60 inches of snow fell across parts of South Dakota late last week in a freakishly early snow storm, the white stuff accumulating rapidly while many of us were picking apart reports about the National Security Agency's breaching of Tor. I was watching my feed pretty closely at the time, and never saw a thing about South Dakota's weather.

Many if not all of South Dakota's cattle ranchers still had herds out in summer grazing areas at the time the storm hit. The results are still being measured; somewhere between 15% and 50% of the entire South Dakota herd died in the storm, with long-term effects on the remaining herd as yet unknown.

I haven't seen a map of the affected area, but I'll bet these same ranchers may have been

impacted by flooding earlier this year. Comprehensive maps detailing the affected area probably won't be widely available until after Congress resolves the budget and debt ceiling disputes, restoring funding to government agencies like National Oceanic and Atmospheric Administration (NOAA) National Weather Service. Fortunately less detailed maps are available, reflecting flood warnings in western South Dakota.

The worst part of this situation isn't the lack of predictive information in advance of the storm or impact maps in the wake of the blizzard. It's the lack of any federal assistance to ranchers devastated by this storm; state agencies struggling with the impact of the storm on their normal operations will be challenged to respond without additional aid. Was adequate advance warning possible from NOAA's skeleton crew? Should the affected area have been declared a federal disaster? Should there be assistance for cleanup and disposal of approximately 75,000 head of cattle? Should there be agencies looking into financial aid for those ranchers most impacted? Should there be health assessments with regard to the potential spread of disease among humans and cattle alike as the storm's damage is documented?

Of course there should be assessments and assistance. We've agreed as a nation these kinds of services and more are in the best interest of the public as a whole, and we've funded them in the past. We help our neighbors in times of trouble just as they help us – this is and has been part of our American values.

It's too damned bad, though, that Congressional Republicans have decided hard-working farmers – folks who ordinarily might be their base – are less important than a massive temper tantrum about health care and debts they agreed to under the last three presidential terms. Compare the speed with which Congress agreed to bail out soft-handed, flabby-assed bankers back in 2008 – the same bankers who made money off

shady subprime mortgages and then tanked the economy with equally shady derivatives based on the same. It took one week from the time Congress reached a tentative agreement between parties, and passage of the Emergency Economic Stabilization Act of 2008. If speed of Congressional response were a measure of importance, helping hard-working but distressed small business owners in the heartland clearly isn't a benchmark of note.

BADLY BROKEN: WE ARE WALTER WHITE

I'll bet tonight's blog traffic will drop sharply, and explode on Twitter – and at 9:00 p.m. EDT exactly. That's when the last episode of AMC's Breaking Bad will air, following a

61-hour marathon of all preceding episodes from the last five years.



A friend expressed concern and astonishment at the public's investment in this cable TV program, versus the Intergovernmental Panel on Climate Change's Fifth Assessment Report published Friday, expressing heightened confidence in anthropogenic climate change:

"The report increases the degree of certainty that human activities are driving the warming the world has experienced, from "very likely" or 90%

confidence in 2007, to “extremely likely” or 95% confidence now.” [source]

He’s right; we’ll be utterly absorbed by the conclusion of former high school chemistry teacher and cancer patient Walter White’s tale. We’ll have spent a fraction of intellectual energy on our own existential threat, in comparison to the mental wattage we’ll expend on a fictional character’s programming mortality.

But perhaps Breaking Bad’s very nature offers clues to our state of mind. Viewers are addicted to a program that upends perspectives and forces greater examination.

– The entire story of Walter White, a middle class white guy with a good education whose cancer threatens his life and his family’s long-term financial well-being, would not be viable were it not for the dismal state of health care in America. There are no Walter Whites in Canada, for example; the U.S. has become little better than a third world narco-state, our health and shelter dependent on ugly choices like crime because our system of governance cannot respond appropriately under pressure for corporate profitability.

We cling to White, though he has become the very thing we pay our law enforcement to battle, because he is us – morally conflicted, trying to safeguard our lives and our families in a deeply corrupt system. At the end of each Breaking Bad episode the distortion of our values is evident in viewers’ failure to reject a criminal character depicting a drug lord manufacturing and selling a controlled substance, while guilty of conspiracy, murder, and racketeering in the process.

In the background as we watch this program, we permit corporate-owned congresspersons to shut down our government in a fit of pique over the illusion of better health care for all.

– Like White, the existential threats we face are ignored once we reach a degree of stasis.

White gets treatment for cancer, which goes into remission. But he has become hooked on the money, the power, the rush that comes with this new dark world he has entered. No day is the same, unlike that of the meek, mild-mannered chemistry teacher's world he once inhabited. With this addiction comes new existential threats that in turn increase the likelihood the original cancer will return. The meth White began to cook to resolve his cancer has become a new cancer in itself.

We are in similar straits: though we've been informed for decades that our consumption and incumbent pollution is problematic, we have become addicted to newer, better, faster anything, adopting a culture of disposability, if we can just have our next new fix whether it's a car, a computer, a cellphone, pick it, it's all ultimately petroleum and rare minerals assembled using the sweat and blood of the poor. We'll keep consuming in spite of the fact that our consumption is threatening our way of life.

We are become Death, the destroyer of worlds.

Well, this one in particular. We toy with the notion of expanding our empire to the moon and Mars.

— White does this for his family, he says all along. So do we; we stay in our narrow grooves, consuming as we travel forward, telling ourselves we are making jobs, increasing productivity, improving standards of living for ourselves and our loved ones. Yet the truth is quite the opposite. What we are doing within our well-worn track in the rat race is as destructive as it is clueless. We are not happier; we are sicker; we are less well-off.

Because family, we say. And better living through chemistry.

Ultimately, as we peer into our own black monolithic mirrors tonight, watching Walter White or tweeting about him, we see our addicted selves, our troubled families, our malignant government, our sickened world. Art imitates

life – it's a very ugly piece of work reflected in Breaking Bad, were we to see past the superficial bread and circuses to the truth within.

[Pssst...Netflix prepared a Spoiler Foiler tool to filter Breaking Bad spoilers out your Twitter timeline.]

OPERATION BALLSACK LABOR DAY FOOTBALL TRASH TALK

Hello. Is there anybody in there? Just nod if you can hear me.

I am not sure how well the Trash Talk Machine is greased after such egregious neglect. But, we can only do what we do, and carry on. And those skilz have NOT been forgotten jack. So saddle up cowboys and cowgirls.

You would think being a blogger is an easy, Cheetos filled, lifestyle. Not the case. It is hard work, hard work I tell ya. I have suffered the indignation of Marcy and Jim yammering about wanting “trash this” and “trash that”.

Weeeeelllllll that is so much SPAM! So, as I said earlier, it's not easy, you know. I get no respect!

To make a quick comment on the title of this 2013 football season opening trash, shit is truly fucked up and bullshit. We have Mr. Constitutional Nobel Scholar President agitating to make unilateral bizarrely unnecessary war on Syria....apparently because he screwed up and drew a moronic “red line” in the sand and now has to prove he actually has bolas, in addition to stupidity and hubris. The man who when seeking votes to be elected in 2007-2008 claimed war without Congressional assent was wrong, and

whose Vice-President called such unsanctioned war bullshittery and an "impeachable offense", now insists without the UN, without the Brits, and with a coalition of effectively one (one who were previously described as "cheese eating surrender monkeys" not that long ago in American lore). But that is where we are now. Which is why the best name for this clusterfuck is "Operation Ballsack". Yes, it is all about Obama's balls, and his desperate need to prove he actually has a primordial pair.

Huh? Oh, wait! This was supposed to be football Trash Talk wasn't it?!?!

Yikes, better get to that then. Last night was a pretty exciting open to the NCAA 2013 schedule. The 'Ole Ball Coach Spurrier and the 'Cocks did not seem all that animated, but still clocked a fairly solid NC Tarheel team. Looked like Vady was gonna take a bite off the 'Ole Miss Rebels, but Ole Miss tailback Jeff Scott let loose with a 75 yard TD romp with 1:07 left, giving the Rebels a 39-35 last minute win. Good stuff. In other news, Lane Kiffin proves the question of why he has not been fired yet is still very salient by coaching a narrow win for Tommy Trojan over the Rainbows. Mighty Troy barely made it over the Rainbows. Yay. If that is all USC has, even the Sun Devils are going to wax them this year (a game I will be attending by the way). also, from Friday night, let me just say that Sparty has some VERY sticky fingered defenders. Look out BIG.

Well, what else is up I wonder? Hmmm, appears some fella named "Manziel" was suspended half a game for something. Guess it wasn't anything bad, cause Dez Bryant got suspended a whole season for eating dinner with Neon Deion Sanders. I sign my name on things a lot too. I get paid to do so. Not sure who would sign thousands of items for zip, nuthin, free. Apparently the crack investigators and accountability specialists at the NCAA found no problem though. And you KNOW how sane they are, cause they banned Penn State from all bowls for

four years without having any NCAA violation whatsoever present. Ugh.

Alright. Games. Real ones are being played this weekend. Battle manufactured where it should be. Naturally. By a nerd at ESPN instead of that fake Operation Obama Ballsack baloney.

The game of the weekend looks to be Georgia at Clemson. These are two top ten worthy teams, if not potential national championship contenders. Special players abound everywhere on both teams, including Sammy Watkins the super receiver for the Tigers, and Tajh Boyd his quarterback. For the Bulldogs, Aaron Murray may be the best QB in the conference, and that includes Johnny Football. Awesome game to have so early. Alabama hosting Virginia Tech is another unusual one to start off with. The Tide will roll them, but there could be a struggle. should be a way better game than the Tide expected.

Honorable mentions goes to TCU and LSU in neutral Texas, Boise State/Washington and Cal versus Northwestern. Tell us what you have and why!

The one other thing I want to address is the noggins of the NFL. As you may have heard, there was a settlement this week, and it heavily favored the NFL. The craven plantation owners admitted nothing, gave up no liability findings, and gave up a ridiculously cheap total sum as hard settlement. By the time lawyer's fees and mandatory testing etc. is deducted, it is criminal how little was gotten for a class of at risk humans. Down the road, if these class members live, they and their representatives will be screaming bloody murder. Here is an outrageously great article laying out the factors, and doing so with the tart and sarcastic truth it deserves

This long Labor Day weekend's music is from the one, the only, Ms. Linda Ronstadt. I have a real affinity for Linda, and have seen her numerous times including a couple of very special ones. If there has ever been a better pure female

vocal talent, I am not sure I have seen it. Pure, and with a range to die for. The singing voice may be silenced, but Linda is rocking on and fighting for the causes she believes in. And they are, and always have been, great, and the right, ones. Oh, also, in case you didn't notice, she had a backup band on the first video. Chuck Berry, Keith Richards, Robert Cray and some other chaps. The second is the band she normally toured with (including Waddy Wachtel – but with Mike Botts on drums instead of Russ Kunkel, who I always saw) and, trust me, they were absolutely killer, and very cool people to boot.

That's it for now. Let Willis, and one and all, rock this joint. We are Livin In The USA. All things considered, it is still pretty fucking grand. Enjoy the holiday weekend my friends.

THE 3 HOP SCOTCH OF CIVIL LIBERTIES AND PRIVACY

I was in court, so I didn't see it, but apparently there was a little hearing over at House Judiciary Committee this morning on "Oversight of the Administration's Use of FISA Authorities". There was an august roll of Administration authorities and private experts: Mr. James Cole, United States Department of Justice; Mr. John C. Inglis, National Security Agency; Mr. Robert S. Litt, ODNI; Ms. Stephanie Douglas, FBI National Security Branch; Mr. Stewart Baker; Mr. Steven G. Bradbury; Mr. Jameel Jaffer; and Ms. Kate Martin.

Hmmm, let's take a look and see if anything interesting occurred (as reported by Pete Yost of AP). Uh, well, there was THIS:

For the first time, NSA deputy director John C. Inglis disclosed Wednesday that the agency sometimes conducts what's known as three-hop analysis. That means the government can look at the phone data of a suspect terrorist, plus the data of all of his contacts, then all of those people's contacts, and finally, all of those people's contacts.

If the average person calls 40 unique people, three-hop analysis could allow the government to mine the records of 2.5 million Americans when investigating one suspected terrorist.

....

The government says it stores everybody's phone records for five years. Cole explained that because the phone companies don't keep records that long, the NSA had to build its own database.

Go read all of Yost's report, there is quite a bit in there that is stunning in the blithe attitude the Administration takes on this hoovering of data and personal information. Also clear: Congress has no real grasp or control of the government's actions. The Article I brakes are out and the Article II car is accelerating and careening down the road.