THE CHALLENGE TO RICHARD CORDRAY NOT BEING DISCUSSED

The internets are alive with the sound of excitement over the appointment today by President Obama of Richard Cordray to be Director of the Consumer Finance Protection Bureau (CFPB). And, as Brian Buetler correctly points out, by doing it today, the first day of the new legislative session, Obama (assuming he gets re-elected) has provided Cordray with the longest term possible to serve as a recess appointee:

> By acting today, with session two of this Congress technically under way, Obama has given Cordray the rest of this session and the full next session of the Senate to run the bureau. Cordray could potentially serve through the end of 2013.
>
> The Congressional Research Service outlined this in a recent report (PDF) — and the White House and Senate leaders of both parties confirm the analysis.
>
> If Obama loses in 2012, that could shorten Cordray's tenure — and of course Cordray can leave early if he wants to. But this move makes it much more likely that the CFPB will truly take root.

Most of the banter so far has been on the viability of Obama's move to recess appoint in this manner. I have looked at this issue for years, going back to early in the Dawn Johnsen imbroglio, and find no reason to believe this was not a proper exercise of Presidential power and prerogative.

The long and short of it is, there is no restriction on timing of recess appointments by a President pursuant to Article II, Section 2 of

the Constitution. Both the “10 day rule”, which got narrowed to the “3 day rule” were practices and, at best were based on non-binding dicta from an early 90s DOJ memo; they are not now, nor have they ever been, binding law or rule. Legally, they are vapor. The issue was actually litigated in the 2004 11th Circuit case of *Evans v. Stephens*.

> And when the President is acting under the color of express authority of the United States Constitution, we start with a presumption that his acts are constitutional.2 See United States v. Allocco, 305 F.2d 704, 713 (2d Cir. 1962) (Recess Appointments Clause case); see also U.S. v. Nixon, 94 S.Ct. 3090, 3105 (1974) (observing “In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”).
> …….
> The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President’s appointment power under the Recess Appointments Clause. And we do not set the limit today.

And there you have it. There is no minimum time. Also, somewhat significant, is that Evans was decided by the full 11th Circuit, not a three judge panel, and SCOTUS considered a full cert application, and denied it, leaving the 11th Circuit decision standing as good law and citable precedent.

Oh, and if you wonder if SCOTUS has a real hard on for Presidential recess appointments, the answer would appear to be no. During the oral argument in *New Process Steel v. NLRB* last year, Chief Justice Roberts scoldingly asked Deputy Solicitor General Neal Katyal “And the recess

appointment power doesn't work why?" I am not sure the blustering Republicans like McConnell and Boehner will find quite as receptive an ear from the Roberts Court as they think.

Well, as Beutler notes, things should be all rosy and good to go for Cordray and CFPB, right? Not so fast, there is another issue not receiving any attention by the chattering classes.

The CFPB was promulgated by a pretty bizarre act – The Dodd Frank Act – bizarre, specifically, in how it structures and empowers the CFPB in its various duties. Notably, several of the key powers flow not necessarily through the agency, but through the "confirmed director" of CFPB. If there is no director, the bureau is run in the interim by the Treasury Secretary. Yep, good 'ole Turbo Tax Timmeh Geithner. Specifically, Section 1066 provides:

> The Secretary is authorized to perform the functions of the Bureau under this subtitle until the Director of the Bureau is confirmed by the Senate in accordance with section 1011. (emphasis added)

So, in all this meantime, and despite the White House trying to put the patina on that Liz Warren was running the CFPB, it has actually been Geithner. And the problem with this has been (remember I said the enabling language was bizarre??) that not all of the full powers of the CFPB vest, nor can they be exercised, until there is a director.

A director "confirmed by the Senate" according to the literal wording of the Dodd Frank Act.

If I were speculating on legal challenges to Cordray, rather than focusing solely on Obama's ability to so appoint him (which, again, I think stands up), I might be more concerned about the issue of whether Cordray has full powers to lead and operate CFPB because he is not "confirmed by the Senate". That should be a stupid argument

you would think, but the words “confirmed by the Senate” in the enabling act make it at least a very cognizable question.

Normally a confirmed appointee and a recess appointee have the same legal authority and powers but, to my knowledge, there is no other situation in which substantive power for an agency flows only through its specific “confirmed” director. If I were going to attack Cordray, I would certainly not restrict it to the propriety of Obama’s recess appointment, I would also attack his scope of authority since he was not “confirmed”. I would like to think such a challenge fails, but Congress sure left a potential hidden boobytrap here.

UPDATE ON THE SIGNING OF THE NDAA

Many people have been wondering what happened regarding the signing of the 2012 NDAA containing the critical, and much criticized, detention provisions. The House of Representatives passed the conference report of the bill on December 14th, with the Senate approving it by a 86 to 13 margin the following day, December 15th. Interest then turned to whether the President would veto it (he won’t) and when he will sign the legislation.

Most seemed to think that meant the bill must be signed by yesterday, which would have been the tenth day, excluding Sundays, after passage pursuant to Article I, Section 7 of the Constitution, which provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it,

> but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

But Obama has not yet signed the NDAA, so what gives? Presentment. A bill coming out of Congress must be formally presented to the President for signature. Sometimes, if the subject matter is deemed urgent, the presentment process is accelerated remarkably and happens on

an emergency basis quite quickly. But, normally, it is a time honored deliberate process also governed by statute. 1 USC 106 and 107 require an enrolled bill passed by both chambers of Congress be printed on parchment or paper “of suitable quality” and “sent” to the President; this is the “presentment” process. 1 USC 106 does allow for alternate accelerated means for a bill emanating during the last six days of a session, and the OLC, in a little known opinion from May 2011, has decreed that electronic transmission is even acceptable (basically, the thing can be emailed).

In the case of the critical 2012 NDAA, however, Congress (one would assume with the blessing of the White House) apparently made no attempt to accelerate the schedule as often occurs for end of session matters, and the NDAA was not formally presented to President Obama until December 21st. So, excluding intervening Sundays, the tenth day is, in fact, Monday January 2, 2012.

Why, then, is the White House and President stringing out the signing of the NDAA? Well, we know AG Eric Holder has indicated Obama would be attaching a signing statement to the executed NDAA. Although unconfirmed officially, the word I am hearing from DOJ, who was working with the White House on the signing statement, was that they were done late last week.

So, it is not clear why Obama has still not yet signed the NDAA. Maybe he and the White House optics shop realized what a sour pill it would be to sign such a perceived toxic hit on civil liberties right before Christmas? The better question might be whether they are planning on slipping this little gem in the end of the week pre New Years trash dump.

ALL SIDES AGREE THERE IS EXCESSIVE SECRECY SURROUNDING TARGETING OF US CITIZENS

The targeted execution of Anwar al-Awlaki struck different people along the political spectrum in the United States in many different ways, but it has been heartening most all have recognized it as a seminal moment worthy of dissection and contemplation. Despite all the discussion afforded the execution of Awlaki in the last few days, it cannot be emphasized enough how impossible it is to have a completely meaningful discussion on the topic due to the relentless blanket of secrecy imposed by the United States government. Before I get into the substantive policy and legal issues surrounding the targeting and assassination of American citizens, which I will come back to in a separate post, a few words about said secrecy are in order.

The first to note, and complain of, the strange secrecy surrounding not just the kill listing of Awlaki, but the entire drone assassination program, was Marcy right here in Emptywheel. Within a couple of hours of the news of the Awlaki strike, she called for the release of the evidence and information serving as the Administration’s foundation for the extrajudicial execution of an American citizen

and within a couple of hours of that, noted the ironic inanity of the pattern and practice of the one hand of the Obama Administration, through such officials as Bob Gates, James Clapper and Panetta trotting out “state secrets” to claim drone actions cannot even be mentioned while the other hand, through mouthpieces such as John Brennan are out blabbing all kinds of details in order to buck up Administration policy.

Now, you would expect us here at Emptywheel to vociferously complain about the rampant secrecy and hypocritical application of it by the Executive Branch, what has been refreshing, however, is how broad the spectrum of commentators voicing the same concerns has been. Glenn Greenwald was, as expected, on the cause from the start, but so too have voices on the other side of the traditional spectrum such as the Brookings Institute’s Benjamin Wittes, to former Gang of Eight member and noted hawk Jane Harman, and current Senate Armed Services Chairman Carl Levin and Daphne Eviatar of Human Rights First.

But if there were any doubt that it was just left leaning voices calling for release of targeting and legal foundation information, or only sources such as Emptywheel or the New York Times pointing out the hypocrisy and duplicity with which the Administration handles their precious “state secret”, then take a gander at what former Bush OLC chief Jack Goldsmith had to say Monday, after a weekend of contemplation of the issues surrounding the take out of Awlaki:

> I agree that the administration should release a redacted version of the opinion, or should extract the legal analysis and place it in another document that can be released consistent with restrictions on classified information.
>
> I have no doubt that Obama administration lawyers did a thorough and careful job of analyzing the legal

> issues surrounding the al-Aulaqi killing. The case for disclosing the analysis is easy. The killing of a U.S. citizen in this context is unusual and in some quarters controversial. A thorough public explanation of the legal basis for the killing (and for targeted killings generally) would allow experts in the press, the academy, and Congress to scrutinize and criticize it, and would, as Harman says, permit a much more informed public debate. Such public scrutiny is especially appropriate since, as Judge Bates's ruling last year shows, courts are unlikely to review executive action in this context. In a real sense, legal accountability for the practice of targeted killings depends on a thorough public legal explanation by the administration.

Jack has hit the nail precisely on the head here, the courts to date have found no avenue of interjection, and even should they in the future, the matter is almost surely to be one of political nature. And accountability of our politicians depends on the public havin sufficient knowledge and information with which to make at least the basic fundamental decisions on propriety and scope. But Mr. Goldsmith, admirably, did not stop there and continued on to note the very hypocrisy and duplicity Marcy did last Friday:

> We know the government can provide a public legal analysis of this sort because presidential counterterrorism advisor John Brennan and State Department Legal Advisor Harold Koh have given such legal explanations in speeches, albeit in limited and conclusory terms. These speeches show that there is no bar in principle to a public disclosure of a more robust legal analysis of targeted killings like al-Aulaqi's. So too do the administration's

> many leaks of legal conclusions (and operational details) about the al-Aulaqi killing.
>
> A full legal analysis, as opposed to conclusory explanations in government speeches and leaks, would permit a robust debate about targeted killings — especially of U.S. citizens — that is troubling to many people. Such an analysis could explain, for example, whether the government believed that al-Aulaqi possessed constitutional rights under the First, Fourth, Fifth or other amendments, and (assuming the government concluded that he possessed some such rights) why the rights were not implicated by the strike. It could also describe the limits of presidential power in this context.
>
> The Obama administration frequently trumpets its commitment to transparency and the rule of law. The President and many of his subordinates were critical of what they deemed to be unnecessarily secretive Bush administration legal opinions, and they disclosed an unprecedented number of them, including many classified ones. Now is the time for the administration to apply to itself a principle that it applied to its predecessor.

Again, exactly right. From Marcy Wheeler, to Gang of Eight members, to Jack Goldsmith, the voice is both clear and consistent: The Obama Administration needs to come clean with as much of the legal and factual underpinnings as humanly possible short of compromising "means and methods" that truly are still secret. That would be, by almost any account, a lot of information and law with which the American public, indeed the world, could not only know and understand, but use to gauge their votes and opinions on. Doing so would make the United States, and its actions, stronger and more

sound.

In the second part of this series, which I should have done by tomorrow morning sometime, I will discuss what we know, and what we don't know, about the legal and factual underpinnings for targeted killing of US citizens, and sort through possible protocols that may be appropriate for placement of a citizen target and subsequent killing.

UPDATE: As MadDog noted in comments, Jack Goldsmith has penned a followup piece at Lawfare expounding on the need for release of the foundational underpinnings of how an American citizen such as Alawki came to be so targeted. Once again, it is spot on:

> First, it is wrong, as Ben notes, for the government to maintain technical covertness but then engage in continuous leaks, attributed to government officials, of many (self-serving) details about the covert operations and their legal justifications. It is wrong because it is illegal. It is wrong because it damages (though perhaps not destroys) the diplomatic and related goals of covertness. And it is wrong because the Executive branch seems to be trying to have its cake (not talking about the program openly in order to serve diplomatic interests and perhaps deflect scrutiny) and eat it too (leaking promiscuously to get credit for the operation and to portray it as lawful). I do not know if the leaks are authorized in some sense or not, or where in the executive branch they come from, or what if anything the government might be doing to try to stop them. But of course the president is ultimately responsible for the leaks. One might think – I am not there yet, but I understand why someone might be – that the double standard on discussing covert actions disqualifies the government from

> invoking technical covertness to avoid scrutiny.
>
> Second, there is no bar grounded in technical covertness, or in concerns about revealing means and methods of intelligence gathering, to revealing (either in a redacted opinion or in a separate document) the legal reasoning supporting a deadly strike on a U.S. citizen. John Brennan and Harold Koh have already talked about the legality of strikes outside Afghanistan in abstract terms, mostly focusing on international law. I don't think much more detail on the international law basis is necessary; nor do I think that more disclosure on international law would do much to change the minds of critics who believe the strikes violate international law. But there has been practically nothing said officially (as opposed through leaks and gestures and what is revealed in between the lines in briefs) about the executive branch processes that lie behind a strike on a U.S. citizen, or about what constitutional rights the U.S. citizen target possesses, or about the limitations and conditions on the president's power to target and kill a U.S. citizen. This information would, I think, matter to American audiences that generally support the president on the al-Aulaqi strike but want to be assured that it was done lawfully and with care. The government could easily reveal this more detailed legal basis for a strike on a U.S. citizen without reference to particular operations, or targets, or means of fire, or countries.

Listen, we may not always agree with Jack here, and both Marcy and I have laid into him plenty over the years where appropriate; but credit should be given where and when due. It is here.

And, while I am at it, I would like to recommend people read the Lawfare blog. All three principals there, Ben Wittes, Goldsmith and Bobby Chesney write intelligent and thoughtful pieces on national security and law of war issues. No, you will not always agree with them, nor they with you necessarily; that is okay, it is still informative and educational. If nothing else, you always want to know what the smart people on the other side are saying.

[Incredibly awesome graphic by the one and only Darkblack. If you are not familiar with his work, or have not seen it lately, please go peruse the masterpieces at his homebase. Seriously good artwork and incredible music there.]

OBAMA & HOLDER PUSH AZ USATTY BURKE OUT OVER ATF GUNRUNNER COCK-UP

Coming across the wire this morning was this stunning announcement by the Department of Justice:

> Statement of Attorney General Eric Holder on the Resignation of U.S. Attorney for the District of Arizona Dennis Burke 08/30/2011 01:01 PM EDT
>
> "United States Attorney Dennis Burke has demonstrated an unwavering commitment to the Department of Justice and the U.S. Attorney's office, first as a line prosecutor over a decade ago and more recently as United States Attorney," said Attorney General Holder.

Say what? Maybe I am not as plugged in as i used to be, but holy moly this came out of the blue. What is behind the sudden and "immediate" resignation of Dennis Burke, an extremely decent man who has also been a great manager of the Arizona US Attorney's Office through some of the most perilous times imaginable? The USA who has piloted the office in dealing with such high grade problems such as those stemming from SB1070, to traditional immigration issues, to the Giffords/Loughner shooting tragedy, the corruption and malfeasance of the Maricopa County Sheriff's Office to voting rights and redistricting controversies brought on by the ever crazy Arizona Legislature, has now resigned in the blink of an eye? Really?

Why?

The GunWalker mess. Also known as "Project GunRunner" and "Operation Fast and Furious" (yes, the idiots at ATF actually did call it that). From the Arizona Republic:

> Burke's resignation, effective immediately, is one of several personnel moves made in the wake of a federal gun-trafficking investigation that put hundreds of rifles and handguns from Arizona into the hands of criminals in Mexico. Burke's office provided legal guidance to the federal Bureau of Alcohol, Tobacco and Firearms on the flawed initiative called Operation Fast and Furious.
>
> The news comes on the same day as a new acting director was named to oversee the Bureau of Alcohol, Tobacco, Firearms and Explosives following congressional hearings into Fast and Furious, an operation that was aimed at major gun-trafficking networks in the Southwest.

Irrespective of the name attached to the program – I have always known it as the GunWalker operation, so i will stick with that – is has

been a first rate clusterfuck from the outset. And, unlike so many things bollixing up the government, it cannot be traced back to the Bush/Cheney Administration; this beauty was the product of the Obama and Holder Department of Justice. In fact, the entire effort was, believe it or not, a byproduct of the vaunted Obama Stimulus Package, known as the American Recovery and Reinvestment Act of 2009.

What this ill fated venture accomplished instead was to stimulate deadly gun possession and crimes of violence in Mexico. Again, from the Arizona Republic:

> Questions about the Fast and Furious program began to emerge in the spring as a member of Congress began pressing ATF officials for answers about an operation that was designed to track small-time gun buyers until the guns reached the hands of major weapons traffickers along the southwestern border.
>
> Instead, ATF agents ended up arresting low-level suspects and nearly 2,000 of the weapons were unaccounted for, with nearly two-thirds of those guns likely in Mexico, according to testimony federal firearms investigators gave to a House committee in June.
>
> Investigators also confirmed that two of the weapons connected to the ATF operations were found at the scene of a December gunbattle near Rio Rico, Ariz., that left Border Patrol Agent Brian Terry dead.
>
> Terry's slaying effectively ended the operation.
>
> Dozens of so-called straw buyers have been arrested, and more than 10,000 guns confiscated. However, the ATF came in for criticism from the Justice Department's Office of Inspector General last year because Project Gun Runner was catching only the straw buyers – small

> fish in the smuggling business.
>
> At a news conference in February, the ATF in Phoenix announced that 34 suspects had been indicted and that U.S. agents had seized 375 weapons as part of Operation Fast and Furious. None of those arrested was a significant cartel figure.

In short, it is, and has been, a cock-up of epic proportions. Who has paid the accountability price for this operational disaster? Well, two weeks ago, on August 16, the Los Angeles Times had this to report:

> The ATF has promoted three key supervisors of a controversial sting operation that allowed firearms to be illegally trafficked across the U.S. border into Mexico.
>
> All three have been heavily criticized for pushing the program forward even as it became apparent that it was out of control. At least 2,000 guns were lost and many turned up at crime scenes in Mexico and two at the killing of a U.S. Border Patrol agent in Arizona.
>
> The three supervisors have been given new management positions at the agency's headquarters in Washington. They are William G. McMahon, who was the ATF's deputy director of operations in the West, where the illegal trafficking program was focused, and William D. Newell and David Voth, both field supervisors who oversaw the program out of the agency's Phoenix office.

Now, to be fair, the ATF complained about the LAT report, and the paper has issued a correction as follows: "The ATF said in a statement Aug. 17 that the three supervisors were "laterally transferred" from operational duties into administrative roles, and were not

promoted."

So McMahon, Newell and Voth were "laterally transferred" instead of being promoted. well, that's convincing. The three men most responsible for the operational program still have cushy federal jobs at their regular status and pay grade, and Dennis Burke and the acting head of ATF are going to take the fall for it all. How nice.

Now, to be fair, as the sitting US Attorney for Arizona, Dennis Burke would have had to provide some legal guidance for the project and, perhaps, sign off on related warrant applications; but that is a far cry from being the one who designed the program and ran it operationally which, by all appearances, was done straight out of ATF and DOJ Main. Burke appears to be a convenient fall guy for an Obama Administration too craven to stand up for its own mistakes in DC. Former high level prosecutor and US Senator Dennis Deconcini had this to say:

> If his resignation is tied to Fast and Furious, it's ridiculous. It would be absolutely outrageous for 'Justice Main' to take it out on Dennis and make him the fall guy," DeConcini said. "It's just typical Washington cronyism. It just shows you how incompetent government can be to save themselves. It appears they screwed up, based on congressional hearings.

Without downplaying that the Arizona US Attorney's Office would have had some involvement in the Gunwalker fiasco, it is extremely hard to see how Deconcini is off the mark with his assessment.

Why is the Obama Administration selling out a man like Dennis Burke? Because the Gunwalker fiasco is really that big of a total cock-up, they own every ounce of it, and would rather paint a scapegoat than own up to it. The mess has not gotten more play in the news and

political discourse because the Obama Administration and Holder Department of Justice have done everything within their power to tamp down any investigation and/or discussion of the case because it really is that ugly.

Shamefully, the only sources of dedicated inquiry to date have come from Darrell Issa at House Oversight and Chuck Grassley at Senate Judiciary.

> Sen. Charles Grassley, R-Iowa, ranking minority member of the Senate Judiciary Committee, has pressed the ATF for two months to disclose details of Project Gun Runner and to justify a policy that allowed weapons into a nation where there were more than 36,000 drug-related murders in four years.
>
> Last month, William McMahon, the head of ATF's Western region, testified that the agency had good intentions when it launched Operation Fast and Furious in 2009. But looking back, there are things ATF would have done differently, he said.
>
> Appearing before the House Oversight and Government Reform Committee, McMahon said he was committed to dismantling criminal networks on both sides of the border and that "in our zeal to do so, and in the heat of battle, mistakes were made. And for that I apologize."

Say what you will, Darrell Issa and Chuck Grassley are right to be asking questions on the GunWalker affair, and others, including our fine Democrats, should be too. The Obama Administration should quit obfuscating, and trying to divert attention by sacrificing scapegoats, and make a full accounting for a failed program. Dennis Burke is owed that.

THE UNSTATED CONSTITUTIONAL PROBLEMS WITH OBAMA "USING THE 14TH"

As about everyone knows by now, the great debate is still ongoing on the issue of the debt ceiling. The frustration of those on the left with the intransigence of the Republican Tea Party, coupled with the neutered Democratic Congress, has led many to call for President Obama to immediately "invoke the 14th". The common rallying cry is that legal scholars (usually Jack Balkin is cited), Paul Krugman and various members of Congress have said it is the way to go. But neither Krugman nor the criers in Congress are lawyers, or to the extent they are have no Constitutional background. And Balkin's discussion is relentlessly misrepresented as to what he really has said. "Using the 14th" is a bad meme and here is why.

The Founders, in creating and nurturing our system of governance by and through the Constitution provided separate and distinct branches of government, the Legislative, Executive and Judicial and, further, provided for intentional, established and delineated checks and balances so that power was balanced and not able to be usurped by any one branch tyrannically against the interest of the citizenry. It is summarized by James Madison in

Federalist 51 thusly:

> First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments.
> ….
> We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

which must be read in conjunction with Madison in Federalist 47:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.

This is the essence of the separation of powers and checks and balances thereon that is the very root foundation of our American governance. It may be an abstract thing, but it is very real and critical significance. And it is exactly what is at stake when people blithely clamor to "Use the 14th!".

Specifically, one of the most fundamental powers given by the Founders to the Article I branch, Congress, was the "power of the purse". That was accomplished via Article I, Section 8, which provides:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States…
>
> and
>
> To borrow money on the credit of the United States;

The call to “Use the 14th” is a demand that the President, the embodiment of the Article II Executive Branch, usurp the assigned power of the Article I Congress in relation to “borrow money on the credit of the United States”. This power is what lays behind the debt ceiling law to begin with, and why it is presumptively Constitutional. It is Congress’ power, not the President’s, and “invoking the 14th” means usurping that power. Due to “case and controversy” and “standing” limitations, which would require another treatise to discuss fully, there is literally likely no party that could effectively challenge such a usurpation of power by the Executive Branch and an irretrievable standard set for the future. The fundamental separation and balance of powers between the branches will be altered with a significant shift of power to the Executive Branch.

This is not something to be done lightly or if there is any possible alternative available. Indeed, the only instance in which it could be rationally considered would be if all alternatives were exhausted. That does NOT mean because the GOPTeaers are being mean and selfish. It does NOT mean because you are worried about some etherial interest rate or stock market fluctuation that may, or may not, substantially occur. It does NOT mean because your party’s President and Congressional leadership are terminally lame. That, folks, is just not good enough to carve into the heart of Constitutional Separation of Powers. Sorry.

And for those that are thinking about throwing

“experts” such as Jack Balkin in the face of what I have argued, go read them, notably Jack himself, who said before invoking the 14th, first the President would have to prioritize what was paid by existent resources, those that could be liberated and revenues that did still come in:

> …certainly payments for future services — would not count and would have to be sacrificed. This might include, for example, Social Security payments.
> ….
> Assume, however, that even a prolonged government shutdown does not move Congress to act. Eventually paying only interest and vested obligations will prove unsustainable — first because tax revenues will decrease as the economy sours, and second, because holders of government debt will conclude that a government that cannot act in a crisis is not trustworthy.
>
> If the president reasonably believes that the public debt will be put in question for either reason, Section 4 comes into play once again. His predicament is caused by the combination of statutes that authorize and limit what he can do: He must pay appropriated monies, but he may not print new currency and he may not float new debt. If this combination of contradictory commands would cause him to violate Section 4, then he has a constitutional duty to treat at least one of the laws as unconstitutional as applied to the current circumstances.

So, contrary to those shouting and clamoring for Obama to “Use the 14th”, it is fraught with peril for long term government stability and function, and is not appropriate to consider until much further down the rabbit hole. It is NOT a quick fix panacea to the fact we, as citizens, have negligently, recklessly and

wantonly elected blithering corrupt idiots to represent us. There is no such thing as a free lunch; and the “14th option” is not what you think it is.

As a parting thought for consideration, remember when invasion of privacy and civil liberties by the Executive Branch was just a “necessary and temporary response to emergency” to 9/11? Have you gotten any of your privacies and civil liberties back? Well have ya?

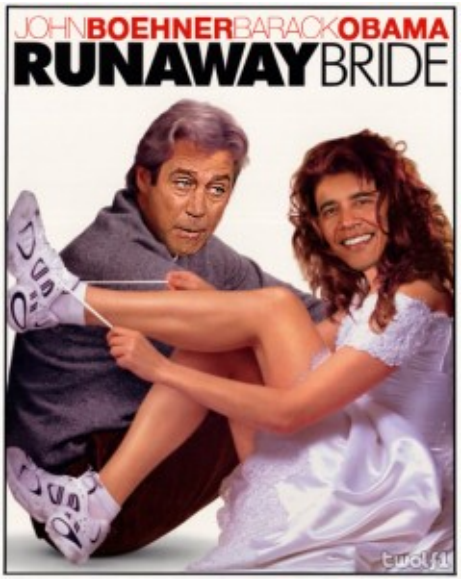
UPDATE: Joberly added this in comments, and a quick perusal of legislative intent materials and the limited case interpretation seems to indicate it is spot on:

> Thanks to Bmaz for his post and for his Comments # 3 and # 34. I’m no lawyer, just a history teacher who has taught Civil War & Reconstruction for some time. This is not the time and place for a history essay on the context of Section 4 (“validity of the public debt” clause) of the 14th amendment; instead, let me just point to the so-far-ignored Section 5 of the amendment: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” None of the first dozen amendments to the Constitution had anything like this clause; for the most part, the first dozen limited Congress in what it could enact (think “Congress shall make no law…”). The 13th Amendment, passed by Congress in March 1865 was the first to affirm that Congress had the power to enforce a constitutional right. The 14th amendment repeated that. In short, Section 5 put Congress specifically in charge of making sure of the “validity of the public debt,” and definitely not the president. That was no accident. The Congress that passed the 14th Amendment had zero confidence in the president (Andrew Johnson) in carrying out

> congressional policy. The last thing they wanted over the winter of 1865-66 was to give Pres. Johnson any more power that he could abuse. But abuse he did and the next House, elected in 1866, impeached him. I'm with Bmaz on this one.

[Note: I actually did this post at the request of our good friend Howie Klein at his blog Down With Tyranny and it is cross posted there as well]

THE UGLY TRUTH ON WHAT WAS REALLY "LEFT AT THE ALTAR"



Graphic by @TWolf10

I was away during the dueling banjos press conferences of Barack Obama and John Boehner this afternoon. Apparently it was quite the show. Despite stating repeatedly how he was "left at the

altar" by his Orange Glo golfing chum Boehner, President Obama seemed to get surprisingly effusive praise from pundits on the left for his speech.

Indicative of the praise is this tweet from Keith Olbermann:

> You know my criticisms of this POTUS. In this news conference he has been absolutely effing kickass, and properly pissed off.

David Corn of Mother Jones tweeted:

> O was as passionate and as close to angry as he gets. #debtageddon

And Corn is now on Lawrence O'Donnell's show on MSNBC, where Lawrence the "Eleventy Dimensional Chess Scold" himself just said of Obama's presser:

"It was a brilliantly effective appearance for his reelection."

And there is the problem isn't it? Obama really was, and is, worried more about his reelection than he is the welfare of the country and the entirety of its citizens who are not members of his cherished moneyed elite and financial sector magnates.

The details seemed to ebb and flow over the last few days, but this from Bloomberg sums up the basics of what Obama was willing to pull the trigger on:

> Two congressional officials said the White House told Democratic leaders it was pursuing a deal to cut spending, including on Social Security and Medicare, and a tax overhaul that could raise $1 trillion. That provoked an angry reaction yesterday from Senate Democrats, who said they feared they might be asked to swallow steep

> reductions in programs and trims to entitlement benefits with no assurance of higher tax revenue.

Right. What Obama was caterwauling about being "left at the altar" was his willingness, nee burning desire, to make huge cuts in spending and social safety net programs, in return for the *possibility* of a tax reform later.

And, make no mistake, Mr. Obama is absolutely desperate to make that deal in order to get the debt ceiling issue off the table until sometime after his reelection campaign. His "Grand Bargain" is shit for the economy, shit for almost all Americans safety net now and in the future; it is only good for the howling idiots in the Tea Party sphere and, of course, the reelection campaign of Barack Obama.

So THAT is what was "left at the altar", and why Barack Obama was suddenly so apoplectically passionate about it. And, yes, it must be stated Boehner, Cantor and the Tea GOP are even more craven and lame than Obama here, but that is pretty weak tea to hang your hat on if you are a sentient being. And that, folks, was the way it was on the day the debt ceiling fell to the floor.

But, fear not trepidatious Americans, Mr. Obama is going to try to save your future and his "grand bargain" again tomorrow! Gee, what dedication.

UPDATE: Paul Krugman understands the ugly truth here, having issued an article today entitled "What Obama Was Willing To Give Away". Exactly.

[The wonderful and appropos graphic is by the one and only @TWolf10]

REGGIE WALTON UNLEASHES THE ROCKET'S RED GLARE

graphic by mopupduty.com

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Well well well. who couldda knowd?? Acute prosecutorial foul play has ended the big Roger Clemens perjury trial at it's gestation. From ESPN:

> The judge presiding over Roger Clemens' perjury trial declared a mistrial over inadmissible evidence shown to jurors.
>
> U.S. District Judge Reggie Walton said Clemens could not be assured a fair trial after prosecutors showed jurors evidence against his orders in the second day of testimony.
>
> He will hear a motion on whether a new trial would be considered double jeopardy.

Whooo boy, Judge Walton must have been a little upset. Why yes, yes, he was:

.

> "I don't see how I un-ring the bell," he said
>
> Walton interrupted the prosecution's playing of a video from Clemens' 2008 testimony before Congress and had the jury removed from the courtroom. Clemens is accused of lying during that testimony when he said he never used performance-enhancing drugs during his 24-season career in the major leagues.
>
> One of the chief pieces of evidence

> against Clemens is testimony from his former teammate and close friend, Andy Pettitte, who says Clemens told him in 1999 or 2000 that he used human growth hormone. Clemens has said that Pettitte misheard him. Pettitte also says he told his wife, Laura, about the conversation the same day it happened.
>
> Prosecutors had wanted to call Laura Pettitte as a witness to back up her husband's account, but Walton had said he wasn't inclined to have her testify since she didn't speak directly to Clemens.
>
> Walton was angered that in the video prosecutors showed the jury, Rep. Elijah Cummings, D-Md., referred to Pettitte's conversation with his wife.
>
> "I think that a first-year law student would know that you can't bolster the credibility of one witness with clearly inadmissible evidence," Walton said.

Well, yes, Reggie Walton is exactly right. It was not only an inappropriate attempt at backdoor admission of what was, at the time, hearsay but, much, much, more importantly flew directly in the face of a direct and specific previous order of the court on this EXACT issue. You just do *not* do that, and if you do you cannot whine when the court spanks your ass. You got said ass whuppin the old fashioned way, you earned it.

So, now the germane question is where do we go from here; i.e. what about a new trial. Well, that depends on a fair amount of pretty complicated things that are not going to be self evident to those not more than intimately experienced in the nuances of technical trial law are going to understand. I will get into that in detail, and discuss the legal implications and situation, when the pleadings are filed. Judge Walton has scheduled a Sept. 2

hearing on whether to hold a new trial, or dismiss the case permanently due to double jeopardy. clemens' defense team will have until July 29 to file the motion to dismiss with prejudice and the prosecution has until Aug. 2 to respond.

A lot of judges would have tried to paper over this bogosity by the prosecution. Reggie Walton is PISSED. He may well say they are done based on double jeopardy. Those are gonna be fun briefs, and a *very* interesting oral argument.

One further thing, despite the incredibly short tenure of this jury trial – literally really in the first day of evidentiary presentation – today's antics were NOT the first instance of prosecutorial misconduct. Oh no, the government was acting maliciously and unethically from the get go in the opening statements.

> [Judge Walton] said it was the second time that prosecutors had gone against his orders – the other being an incident that happened during opening arguments Wednesday when assistant U.S. attorney Steven Durham said that Pettite and two other of Clemens' New York teammates, Chuck Knoblauch and Mike Stanton, had used human growth hormone.
>
> Walton said in pre-trial hearings that such testimony could lead jurors to consider Clemens guilty by association. Clemens' defense attorney objected when Durham made the statement and Walton told jurors to disregard Durham's comments about other players.

Yes, boy howdy, that is precisely right.

I think that the Laura Pettite bit, coupled with the improper attempt at prohibited guilt by association in the openings makes a fast pattern to malicious prosecution. If Reggie wants, he can dismiss and ground it upon both mistrial and sanction for malicious.

I've been telling people for years that it was NOT just former IRS goon come FDA stoolie agent Jeff Novitsky (although it *all* starts with him) that was malfeasant in the BALCO cases, including the Mitchell report kerfuffle, it was the AUSAs too.

This mendaciousness is just bogus and deplorable. Congratulations to Judge Reggie Walton for fingering it for what it is. Now dismiss this bunk forever please.

THE UN-PATRIOT ACTS OF HARRY REID

When the government, through its executive and compliant Congress, wants to cut surveillance and privacy corners out of laziness and control greed, and otherwise crush the soul of the Constitution and the 4th Amendment, demagoguery and fake exigencies are the order of the day. And so they are again. Oh, and of course they want to get out of town on their vacation. And that is what has happened today.

GOODWIN LIU TO GET SENATE FLOOR VOTE ON CLOTURE THURSDAY

Goodwin Liu will finally get a vote Thursday on cloture for his nomination to the 9th Circuit Court of Appeals. It will be a tough road, but Liu is worth the fight.

THE WEAKNESS OF THE BARRY BONDS OBSTRUCTION VERDICT

Yesterday the Barry Bonds trial ended with a single conviction for obstruction of justice and a mistrial declared due to a hung jury on the other three remaining counts. There were originally five counts in the indictment, but count four was dismissed prior to the case being given to the jury. The case was in front of Judge Susan Illston in the Northern District of California (NDCA) District Court.

Of the four counts given to the jury, the three mistried were for what is commonly referred to as perjury, but formally described as false declaration before a grand jury or court under 18 USC 1623(a). The jury votes on those three counts now dismissed via mistrial were 9-3 acquit (HGH use), 8-4 acquit (steroid use) and 11-1 convict (the injection count). As always, I strongly suggest that reading very much into such numbers on hung counts is foolish; the dynamics behind such numbers are never simple, and never what you think they are. Most media types covering the trial have, almost universally, stated they do not expect a retrial on the three hung counts. I think such a statement is premature, and somewhat ill advised, under the circumstances as the likelihood of a retrial will be dependent on what Judge Illston does with the coming motion to set aside the verdict and, assuming that is denied, the sentencing of Bonds.

The fascinating question right now, however, is exactly how firm is the obstruction conviction? The answer is maybe not so firm at all. When I first heard there was a partial verdict, I thought – as did several others around me – that it was likely a conviction and hung jury on the

other counts. Well, that was exactly right, however I assumed the conviction would be on the injection count; never contemplated for a second that the jury would not convict on any of the substantive predicate counts but still convict on the catch-all obstruction count. So, let's take a look at that count, and the conviction thereon, because there are some serious issues involved that tend to undermine its strength above and beyond the fact there were no convictions on the underlying counts.

The obstruction count is charged under 18 USC 1503, which reads:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense

> shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

Now the astute reader will note there is no materiality requirement in the direct language of 18 USC 1503. However, a prior case in the 9th Circuit, *US v. Thomas*, has held that materiality of the obstructive conduct is indeed a necessary element for a conviction under 18 USC 1503.

> In light of Ryan and Rasheed, we conclude that although not expressly included in the text of § 1503, materiality is a requisite element of a conviction under that statute. Our conclusion does not, however, mandate a reversal of Thomas's obstruction conviction, because it is clear that the jury found the requisite element of materiality in convicting Thomas on count six. The jury unanimously returned a special verdict on Thomas's § 1503(a) charge indicating that the false statements alleged in counts one and three of Thomas's indictment obstructed justice, and the jury in turn had found Thomas guilty of making material false statements with respect to counts one and three. By convicting Thomas of perjury on counts one and three, the jury necessarily found the statements in those counts to be material. And by indicating in a special verdict form that these statements obstructed jus- tice, the jury necessarily found that Thomas's obstruction conviction was based on two material statements.

Several things are interesting here. First off, the *Thomas* decision was authored by the infamous torture memo author Jay Bybee. More importantly, however, *Thomas* was yet another in the long line of BALCO persecutions propagated by the rabid IRS investigator Jeffrey Novitsky. Lastly, the

judge in the Bonds case, Susan Illston, knows the *Thomas* case well; she was judge on that case also. Illston has a wealth of experience in the BALCO cases and, by my understanding, has no great love for the affair as a whole or the antics of lead investigator Novitsky.

Which brings us back to the Bonds obstruction conviction and materiality. In the aftermath of the verdict, I engaged in a Twitter discussion with Adam Bonin on the issue. My initial take was the conviction would hold up; but, after diving into this, and seeing the actual verdict form, I am far less convinced.

The jury instruction on the obstruction charge read as follows:

> OBSTRUCTION OF JUSTICE
>
> (18 U.S.C. § 1503)
>
> The defendant is charged in Count Five with obstruction of justice in violation of 18 U.S.C. § 1503. In order for the defendant to be found guilty of Count 5, the government must prove each of the following elements beyond a reasonable doubt:
>
> 1. The defendant corruptly, that is, for the purpose of obstructing justice,
>
> 2. obstructed, influenced, or impeded, or endeavored to obstruct, influence, or impede the grand jury proceeding in which defendant testified,
>
> 3. by knowingly giving material testimony that was intentionally evasive, false, or misleading.
>
> A statement was material if it had a natural tendency to influence, or was capable of influencing, the decision of the grand jury.
>
> The government alleges that the underlined portion of the following statements constitute material testimony

> that was intentionally evasive, false or misleading. In order for the defendant to be found guilty of Count 5, you must all agree that one or more of the following statements was material and intentionally evasive, false or misleading, with all of you unanimously agreeing as to which statement or statements so qualify:
>
> 1. The Statement Contained in Count One
>
> 2. The Statement Contained in Count Two
>
> 3. The Statement Contained in Count Three
>
> 4. Statement A:
>
> Q: Let me move on to a different topic. And I think you've testified to this. But I want to make
>
> sure it's crystal clear. Every time you got the flax seed oil and the cream, did you get it in person
>
> from Greg?
>
> A: Yes.
>
> Q: Is that fair?
>
> A: Yes.
>
> Q: And where would you typically get it? Where would you guys be when he would hand it to you generally?
>
> A In front of my locker, sitting in my chair.
>
> Q: Did he ever come to your home and give it to you?
>
> A: Oh, no, no, no. It was always at the ballpark.
>
> 5. Statement B:
>
> Q: …Do you remember how often he recommended to you about, approximately,

that you take this cream, this lotion?

A: I can't recall. I don't – I wish I could. I just can't . . . I just know it wasn't often. I just think it was more when I was exhausted or tired than like a regular regimen. You know, it was like if I was really sore or something, really tired…that's – that's – that's all I can remember about that.

Q: … would you say it was more or less often or about the same as the amount of times you took the liquid, the flax seed oil, the thing you understood to be flax seed oil?

A: I don't know. I never kept track of that stuff. I'm sorry. I didn't sit there and monitor that stuff.

6. Statement C:

Q: Did Greg ever give you anything that required a syringe to inject yourself with?

A: I've only had one doctor touch me. And that's my only personal doctor. Greg, like I said, we don't get into each others' personal lives. We're friends, but I don't – we don't sit around and talk baseball, because he knows I don't want – don't come to my house talking baseball. If you want to come to my house and talk about fishing, some other stuff, we'll be good friends, you come around talking about baseball, you go on. I don't talk about his business. You know what I mean? …

Q: Right.

A: That's what keeps our friendship. You know, I am sorry, but that – you know, that – I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other

> people's business because of my father's situation, you see…
>
> 7. Statement D:
>
> Q: Did Greg ever give you testosterone in injectable form for you to take?
>
> A: No.
>
> Q: Would you have taken it if he gave it to you?
>
> A: He wouldn't jeopardize our friendship that way.
>
> Q: And why would that – you're very clear that that would jeopardize your friendship. Why would that jeopardize your friendship?
>
> A: Greg is a good guy. You know, this kid is a great kid. He has a child.
>
> Q: Mm-hmm.
>
> A: Greg is – Greg has nothing, man. You know what I mean? Guy lives in his car half the time, he lives with his girlfriend, rents a room so he can be with his kid, you know? His ex takes his kid away from him every single five minutes. He's not that type of person. This is the same guy that goes over to our friend's mom's house and massages her leg because she has cancer and she swells up every night for months. Spends time next to my dad rubbing his feet every night. Our friendship is a little bit different.

Out of all those bases for determining that Bonds obstructed justice, the jury picked one single base. They did NOT find any of the substantive bases applicable from any of the the substantive perjury counts in items 1-3. They did NOT find any of the more damning statements in Statements A, B or D applicable. No, the jury, as their sole basis for conviction of

Bonds for obstruction, premised their finding on the weakest and lamest possible choice, in isolation, Statement C. Here is the official verdict form from the court evidencing just this fact, signed sealed and dated by the jury foreman.

It is really hard to see, in isolation, how this meandering statement by Bonds is materially obstructive. First, the question at the GJ was whether Bonds' trainer, friend since childhood Greg Anderson, had given Bonds "anything that required a syringe to inject yourself with". Bonds gave a semi-responsive answer that the only person that ever touched him (presumably referring to injection) was his doctor, and then meandered off that such was not the nature of his friendship with Anderson. Was it mostly unresponsive rambling at that point? Sure. But calling that – isolated from any of the substantive perjury/false statement allegations, not to mention more germane statements – materially obstructive, in and of itself, of the whole steroid investigation seems weak. At best.

The statement is not particularly material to the investigation; it does not directly mislead, it simply meanders a little. There is no indication the questioning prosecutor attending to the grand jury particularly even cared enough to say the answer was unresponsive or follow up with a another and/or more specific question. There is not evidence it had any significant impact whatsoever.

Now, the fact is, Bonds' defense team moved for a directed verdict of acquittal based on insufficiency of the evidence at the close of the prosecution case, as is standard practice in the criminal defense community. As is standard in the court community, that motion was denied and the case allowed to go to the jury.

So, these exact arguments will now be made by Bonds' defense team, and indeed that indication has already been preliminarily given and such motion will be considered at a court date already set by Judge Illston for this and other

issues on May 20th. The specific motion is a motion for directed verdict of acquittal despite the jury's finding, and is controlled by Rule 29(c) of the Federal Rules of Criminal Procedure (FRCrP). These motions are a staple of a good criminal defense lawyer, but they are very rarely successful. As in almost never.

Does such a motion, which is made in the trial court *before* sentencing and any appeal therefrom, stand any chance in the case of Barry Lamar Bonds? Maybe. As stated previously, Judge Illston is not crazy about the prosecution and investigation antics in the BALCO cases in general, and for very good reason. And, remember, Illston has the experience directly on point with the *Thomas* case and 9th Circuit decision thereon. While Bybee and the 9th upheld the analogous *Thomas* verdict on obstruction, keep in mind that it specifically relied on the fact Thomas was also found guilty on the substantive perjury counts in her indictment. Barry Bonds was not, there is nothing substantive behind the so-called obstruction in Bonds.

So, we shall see on May 20th if the conviction of Barry Bonds actually holds up or not. My guess is there will be written briefing fleshing all this out between now and then. But, suffice it to say, this is a LOT closer call than the claimed "experts" on teevee are blathering about. Yes, Lester Munson of ESPN, I am talking about you; just shut up. In fairness to ESPN, their other legal analyst, Roger Cossack, I almost always find to be informed and sober in his assessments, and I do with his comments on the Bonds verdict as well.

Oh, and one last parting shot. Can someone, anyone, explain to me just how the hell Barry Bonds is prosecuted for false statements, but Lloyd Blankfein is not? Seriously, what kind of two faced double standard is going on over at the Department of Justice? Not to mention that Blankfein may be one of the few humans in the world that makes Barry Bonds look likable in

comparison. Come on DOJ, honor your oath and prosecute the real criminals.