

# THE INSPECTORS GENERAL BRING OUT THE SPACE HEROES TO DEFEND FULL ACCESS

A few weeks back, I noted that Office of Legal Counsel had finally released its opinion on whether DOJ had to share everything its Inspector General requested, or could hold



things (and investigations) up until the Deputy Attorney General decided such disclosure would be in the interest of DOJ.

OLC ruled against the Inspector General, finding that rules limiting dissemination of wiretap, grand jury, and financial data required DOJ's preferred arrangement, even given Congress' recent appropriations instructions to give Inspectors General what they need.

Senators Chuck Grassley and Ron Johnson and Congressmen Bob Goodlatte and John Conyers expressed concern about the opinion when it was released. Grassley now has a hearing – titled “‘All’ Means All: The Justice Department's Failure to Comply with Its Legal Obligation to Ensure Inspector General Access to All Records Needed for Independent Oversight” – tomorrow to address the issue.

In anticipation of that hearing, the Inspectors General have brought out the big guns.

First, retired Senator and space hero wrote a

letter, reminding that the intent when he and others in Congress passed the Inspector General act in 1978, they intended IGs to get access to everything.

The success of the IG Act is rooted in the principles on which the Act is grounded—*independence, direct reporting to Congress, dedicated staff and resources, unrestricted access to agency records, subpoena power, special protections for agency employees who cooperate with the IG, and the ability to refer criminal matters to the Department of Justice without clearing such referrals through the agency. We considered these safeguards to be vital when we developed the Act and they remain essential today.*

In addition, yesterday the Council of the Inspectors General on Integrity and Efficiency sent a letter to Ron Johnson, Tom Carper, Jason Chaffetz, and Elijah Cummings asking for immediate legislation to fix the problem created by the OLC memo. In addition to expressing concern about the impact of the memo for DOJ's Inspector General (that IG, Michael Horowitz, is Chair of CIGIE, so that's sort of him reiterating his concerns), the other agency IG's worried that the memo might affect their ability to conduct their own work, as well.

The OLC opinion's restrictive reading of the IG Act represents a potentially serious challenge to the authority of every Inspector General and our collective ability to conduct our work thoroughly, independently, and in a timely manner. Our concern is that, as a result of the OLC opinion, agencies other than DOJ may likewise withhold crucial records from their Inspectors General, adversely impacting their work. Even absent this opinion, agencies such as the Peace Corps and the U.S. Chemical Safety and Hazard Investigation Board

(CSB) have restricted or denied their OIGs access to agency records on claims of common law privileges or assertions that other laws prohibit access.

[snip]

Uncertainty about the legal authority of Inspectors General to access all information in an agency's possession could also negatively affect interactions between the staffs of the Offices of Inspector General and the agencies they oversee. Prior to this opinion, agency personnel could be confident, given the clear language of Section 6(a) of the IG Act, that they were required to and should share information openly with Inspector General staff, and typically they did so without reservation or delay. This led to increased candor during interviews, greater efficiency of investigations and other reviews, and earlier and more effective detection and resolution of waste, fraud, and abuse within Federal agencies. We are concerned that witnesses and other agency personnel, faced with uncertainty regarding the applicability of the OLC opinion to other records and situations, may now be less forthcoming and fearful of being accused of improperly divulging information. Such a shift in mindset also could deter whistleblowers from directly providing information about waste, fraud, abuse, or mismanagement to Inspectors General because of concern that the agency may later claim that the disclosure was improper and use that decision to retaliate against the whistleblower.

Neither FBI Director Jim Comey nor Deputy Attorney General Sally Yates are appearing at tomorrow's hearing. FBI Associate Deputy Director Kevin Perkins and Associate Deputy

Attorney General Carlos Uriarte have pulled the unpleasant duty of appearing on a panel with Horowitz. But I imagine Grassley intends tomorrow's hearing to be rather aggressive.

---

## **OLC UNDERMINES DOJ INSPECTOR GENERAL INDEPENDENCE**

For over a year, DOJ's Inspector General has been trying to ensure it got ready access to things like grand jury materials (this has been pertinent in the Fast and Furious investigation and how DEA and FBI use the latter's dragnet, among other things). As part of this effort, the IG asked OLC to weigh in on whether it should be able to access this information, or whether it needed to ask nicely, as it has been forced to do.

Here's the opinion. Here's the key passage:

In particular, Title III permits Department officials to disclose to OIG the contents of intercepted communications when doing so could aid the disclosing official or OIG in the performance of their duties related to law enforcement, including duties related to Department leadership's supervision of law enforcement activities on a programmatic or policy basis. Rule 6(e) permits disclosure of grand jury materials to OIG if a qualifying attorney determines that such disclosure could assist her in the performance of her criminal law enforcement duties, including any supervisory law enforcement duties she may have. And FCRA permits the FBI to disclose to OIG consumer information

obtained pursuant to section 626 if such disclosure could assist in the approval or conduct of foreign counterintelligence investigations, including in the supervision of such investigations on a programmatic or policy basis. In our view, however, Title III and Rule 6(e) forbid disclosures that have either an attenuated or no connection with the conduct of the Department's criminal law enforcement programs or operations, and section 626 of FCRA forbids disclosures that have either an attenuated or no connection with the approval or conduct of foreign counterintelligence investigations.

And here's OIG's response.

Today's opinion by the OLC undermines the OIG's independence, which is a hallmark of the Inspector General system and is essential to carrying out the OIG's oversight responsibilities under the Inspector General Act. The OLC's opinion restricts the OIG's ability to independently access all records in the Justice Department's possession that are necessary for our audits, reviews, and investigations, and is contrary to the principles and express language set forth in the Inspector General Act.

The opinion also finds that, in adopting Section 218 of the Department of Justice's FY 2015 Appropriations Act, Congress' intent was not sufficiently clear to support independent OIG access to all records in the Department's possession. The OLC's opinion reaches this conclusion even though Congress passed Section 218 "to improve OIG access to Department documents and information" following the Department's failure to independently and timely provide all responsive records to the

OIG, and Section 218 explicitly provides that the Department may not use appropriated funds to withhold records from the OIG for reasons other than as expressly provided in the Inspector General Act.

As a result of the OLC's opinion, the OIG will now need to obtain Justice Department permission in order to get access to important information in the Department's files – putting the agency over which the OIG conducts oversight in the position of deciding whether to give the OIG access to the information necessary to conduct that oversight. The conflict with the principles enshrined in the Inspector General Act could not be clearer and, as a result, the OIG's work will be adversely impacted.

The OIG will immediately ask Congress to pass legislation ensuring that the OIG has independent access to the information it needs for its work. The Attorney General and the Deputy Attorney General have each expressed their commitment to join the OIG in this effort.

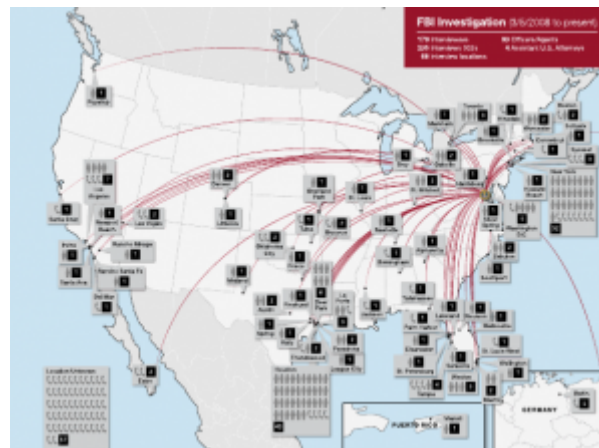
Inspector General Michael E. Horowitz stated:

"I strongly disagree with the OLC opinion. Congress meant what it said when it authorized Inspectors General to independently access 'all' documents necessary to conduct effective oversight. Without such access, our Office's ability to conduct its work will be significantly impaired, and it will be more difficult for us to detect and deter waste, fraud, and abuse, and to protect taxpayer dollars. We look forward to working with the Congress and the Justice Department to promptly remedy this serious situation."

[This post has been updated to add the opinion.]

## DOJ IS BACK ON THE BASEBALL BEAT; IS THEIR PAST PROLOGUE?

While it is not quite as exciting as Trump! - mania, the other



news this morning is that DOJ is getting back into the baseball game. Having brought responsibility to the financial sector, sent the Wall Street scourges all to prison, and accountability to out of control warrior cops, DOJ is now focused like a laser on computer hacking by the St. Louis Cardinals. From the New York Times:

The F.B.I. and Justice Department prosecutors are investigating whether front-office officials for the St. Louis Cardinals, one of the most successful teams in baseball over the past two decades, hacked into internal networks of a rival team to steal closely guarded information about player personnel.

Investigators have uncovered evidence that Cardinals officials broke into a network of the Houston Astros that housed special databases the team had built, according to law enforcement

officials. Internal discussions about trades, proprietary statistics and scouting reports were compromised, the officials said.

The officials did not say which employees were the focus of the investigation or whether the team's highest-ranking officials were aware of the hacking or authorized it. The investigation is being led by the F.B.I.'s Houston field office and has progressed to the point that subpoenas have been served on the Cardinals and Major League Baseball for electronic correspondence.

The attack would represent the first known case of corporate espionage in which a professional sports team hacked the network of another team. Illegal intrusions into companies' networks have become commonplace, but it is generally conducted by hackers operating in foreign countries, like Russia and China, who steal large tranches of data or trade secrets for military equipment and electronics.

Ay caramba, so the, arguably consistently best organization in MLB, the Cardinals, was hacking the consistently worst, or close thereto, team the Astros, in an effort to get ahead? Who is running the Cardinals these days, Bill Belichick? This is almost too stupid to be true, but there it is, in glaring black and white. Hard not to smell a full blown Congressional hearing inquest coming too, because that is just how they roll on The Hill. Maybe after their summer vacation.

But, all kidding aside, while the US government does not have a reputation for securing their own networks, it is scary to think what resources may be spent on what is effectively a civil matter between two baseball teams. It is always instructive to remember the ridiculous



amount of time and money DOJ expended fruitlessly pursuing Roger Clemens. If you had forgotten my report on the DOJ Clemens absurdity, in its full graphical clarity, from almost exactly three years ago, click on and embiggen the graphic above, which is an official DOJ creation by the way, and recall all its sickening glory.

This is without even getting into the idiotic, and humiliatingly losing, pursuit DOJ made of Barry Bonds. It is hard to tell where DOJ is going, or how far it will go, with this excursion into a pissing match between two professional sports franchises, but if past is prologue, count on DOJ wasting an absolute ton of your and my tax money.

So, when the Department of Justice and Executive Branch come hat in hand screaming for more “cyber” resources and funding, remember just what it is they are doing with that money and those resources to date. And remember just how terminally stupid this case, and DOJ investigation into it, really is.

---

## **LORETTA LYNCH IS A DUBIOUS NOMINEE FOR ATTORNEY GENERAL**

Loretta Lynch is an excellent nominee for Attorney General, and her prior actions in whitewashing the blatant and rampant criminality of HSBC should not



be held against  
her, because she didn't know that at the time  
she last whitewashed that criminal enterprise,  
right?

No. Nothing could be further from the truth.

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

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

And that is only scratching the real surface of  
my objections to Lynch. There are many other  
areas where Lynch has proven herself to be a  
dedicated, dyed in the wool "law and order  
adherent" and, as Marcy Wheeler artfully coined,  
"executive maximalist". Lynch's ridiculous  
contortion, and expansion, of extraterritorial  
jurisdiction to suit the convenient whims of the  
Obama Administration's unparalleled assault on  
the Rule of Law in the war on terror is  
incredibly troubling. Though, to be fair, EDNY  
is the landing point of JFK International and a  
frequent jurisdiction by designation. Some of  
these same questions could have been asked of  
Preet Bharara (see, e.g. *U.S. v. Warsame*)

Loretta Lynch has every bit the same, if not indeed more, skin in the game as Bharara, whether by choice or chance.

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

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

And the same willingness to go along to get along with contortion of the Rule of Law in that regard seems beyond certain to extend to her treatment of surveillance issues and warrant applications, state secrets, over-classification, attack on the press and, critically, separation of powers issues. Those types of concerns, along with how the Civil Rights Division is utilized to rein in out of control militarized cops and voting rights issues, how the OLC stands up to Executive overreach, whether OPR is allowed to continue to shield disgraceful and unethical AUSAs, and whether she has the balls to stand up to the infamously insulated inner Obama circle in the White House. Do you really think Loretta Lynch would have backed up Carolyn Krass and OLC in telling Obama no on the Libyan War Powers

Resolution issue?

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

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

The fact that Loretta Lynch is celebrated as a great nominee by not just Democrats in general, but the so called progressives in specific, is embarrassing. She is absolutely horrible. If Bush had put her up for nomination, people of the progressive ilk, far and wide, would be screaming bloody murder. Well, she is the same person, and she is a terrible nominee. And that does not bode well for the Rule of Law over the remainder of the Obama Administration.

And this post has not even touched on more mundane, day to day, criminal law and procedure issues on which Lynch is terrible. And horrible regression from Eric Holder. Say for instance pot. Decriminalization, indeed legalization, of marijuana is one of the backbone elements of reducing both the jail and prison incarceration

rate, especially in relation to minorities. Loretta Lynch is unconscionably against that (See, e.g., p. 49 (of pdf) et. seq.). Lynch appears no more enlightened on other sentencing and prison reform, indeed, she seems to be of a standard hard core prosecutorial wind up law and order lock em up mentality. Lynch's positions on relentless Brady violations by the DOJ were equally milquetoast, if not pathetic (See, e.g. p. 203 (of pdf) et. seq.). This discussion could go on and on, but Loretta Lynch will never come out to be a better nominee for Attorney General.

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

---

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

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

There are too many instances in the SSCI Torture Report to catalogue individually, but let's be perfectly clear, the failure to prosecute the guilty in this cock up is NOT restricted to what

is still far too euphemistically referred to as “torture”.

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

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

18 U.S.C. §1001 False Statements

18 U.S.C. §1621 Perjury

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

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

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

---

**SSCI TORTURE REPORT  
KEY: THEY KNEW IT WAS  
TORTURE, KNEW IT WAS**

# ILLEGAL

Okay, here are  
the critical  
working  
documents:



The SSCI Torture Report

The Minority Response to SSCI Torture  
Report

Dianne Feinstein's Statement

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

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

...drafted a letter to Attorney General  
John Ashcroft asking the Department of  
Justice for "a formal declination of  
prosecution, in advance, for any  
employees of the United States, as well  
as any other personnel acting on behalf  
of the United States, who may employ

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

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

---

## **FERGUSON/WILSON GRAND JURY RETURN THOUGHTS AND WORKING MATERIALS**

Last night was quite a night in the greater St. Louis Missouri area, especially the towns of Ferguson and Clayton, where the St. Louis County seat and courthouse is located.





First, at the insanely reckless, and inexplicably late hour of 8:00 pm, St. Louis prosecutor Bob McCulloch held one of the most surreal and disingenuous press conferences I have ever seen by a prosecutor in my life. Correction, not one of the most, but THE MOST. Here is the video and an uncorrected transcript from CSPAN.

The content is simply stunning. Prosecutor McCulloch basically gives a closing summation from the perspective of Darren Wilson's personal defense attorney. Which makes sense, as that has been the clear and unmistakable posture of McCulloch from the outset of this charade. He glowingly recounts cherry picked aspects of Wilson's testimony to support the officer's narrative, and then attacks the numerous civilian, and mostly black, witnesses that support the Brown side of things as all being either mistaken, liars or not even there. Just amazing.

But, as I alluded to, it was not just the content, but the timing of McCulloch's press conference as well. It was a consummately reckless and hideous thing to do to wait until well into the night and darkness to incite the tinderbox of emotion and protest. Here is Jeff Toobin at CNN:

Here's the thing about that time of night: it's dark. Anyone – anyone! – should have known that the decision in the Brown case would have been controversial. A decision not to indict, which was always possible, even likely, would have been sure to attract protests, even violence. Crowd control is always more difficult in the dark.

The grand jury's deliberations concluded around lunchtime on Monday. It would have been simple to make the announcement while it was still daytime. Still, McCulloch said that he would not announce the grand jury's decision until 8 p.m. CT.

...

The predictable reaction ensued. Protests began, some of them violent. Police responded with tear gas. Fires burned. Cars were destroyed. Gunshots were heard. The full scale of the damage was difficult to assess last night.

The ultimate verdict on the grand jury's decision is up to history at this point. But the verdict on McCulloch opting to announce the decision at night is clear – and devastating.

That is spot on. Insane is a word that I have been using a lot in respect to this case, but it certainly applies to McCulloch's dog and pony show timing.

Next is the actual grand jury materials and content, and what they mean to the injustice that has occurred in this matter. That one is going to take a lot longer to suss through and put together. I have read a few bits and pieces, notably much of Darren Wilson's grand jury testimony, but there are thousands of pages of material, and it will take me days to get through it properly. More will come, but for now, I want to give a couple of links to the full set of materials put together by others.

Here is the New York Times version. I think it is the best formatted and easiest to navigate so far.

Here is the NPR version from the St. Louis affiliate.

Here is the Guardian version.

They are all fine links from which to navigate and I link all three because they went to great trouble to do a public service in a short amount of time. They are owed thanks. The one substantive comment I will make for now is the way the standing prosecutors, Kathi Alizadeh and Sheila Whirley, spoon fed the witnesses, and especially Darren Wilson, and otherwise slanted

everything imaginable, to support the exoneration of Wilson is just disgusting. I have read countless grand jury transcripts over the years, and I have NEVER seen anything that remotely resembles this kind of biased, *for the defendant*, dog and pony show. Again, it is simply insane and unheard of.

Okay, this entire grand jury was a farce, a charade, and a lie. It was a cravenly engineered whitewash by Bob McCulloch from start to the criminally reckless end with Ferguson in flames last night. And do not, like so many on social media seem to be doing, think the DOJ is going to bail the situation out by indicting Darren Wilson on federal charges. Even DOJ veterans say it is unlikely. I say there is not a chance in hell of an indictment against Wilson personally.

In closing, a few words by my friend Scott Greenfield from his excellent criminal defense blog Simple Justice:

Americans may be a smart, educated people, but we are lazy and ignorant. It's too much effort for our delicate sensibilities to gain a deeper understanding of how our nation functions. This is why the Ferguson Lie happened. This is why the Ferguson Lie works.

That the grand jury did not indict Ferguson Police Officer Darren Wilson was a foregone conclusion. To those of us who don't have to look up a study or read a law review article to understand how indictments happen in the real world, the outcome was clear when St. Louis County District Attorney Bob McCulloch announced that he would present all the evidence to the grand jury. Wachtler's "ham sandwich" has grown trite in this discussion.

The Ferguson Lie is an appeal to our sense of fairness and transparency. We were played. McCulloch's lengthy spiel

before announcing “no true bill” was to spread the lie. To the ear of the media, McCulloch’s pitch was appealing; the grand jury heard all the evidence. The grand jury transcript will be disclosed to provide complete transparency.

Witnesses lied to the media, but the grand jury heard the truth. The grand jury saw the hard evidence. Nine whites and three blacks, so no one would think that the grand jury was denied the voice of people of color, sat on the grand jury, which met for 25 sessions and more than 70 hours of testimony.

The grand jury did the dirty work that America needed done. The grand jury has spoken.

This is the lie.

Go read all of Scott’s piece, it is superb and exactly how I feel too.

For now though, I have to get off to court. There will be much more, but I am not sure when given the time to cull through the materials and the holidays. Until then, happy hunting in the treasure trove of documents, and post your findings and discussion in comments.

---

## **ARE NEW SEALED FILINGS IN BARRY BONDS APPEAL MORE DIRTY TRICKS BY DOJ? UPDATE: YES!**

The handling of the BALCO series of investigations, both by lead investigator Jeff

Novitsky and the US Attorneys office, has been relentlessly aggressive and marked by dubious, at best, tactics. Considering that the DOJ, during the entire time period, could not find the resources to prosecute the banksters who brought down the entire economy, BALCO was one of the most hideous wastes of taxpayer money imaginable.

Remarkably, the questionable tactics by DOJ may well be raising their ugly head yet again. Bonds' appeal in the 9th Circuit is a somewhat mundane legal issue that has been fully briefed on the *en banc* petition for the better part of a year. The *en banc* hearing, before KOZINSKI, Chief Judge; and REINHARDT, O'SCANNLAIN, GRABER, WARDLAW, W. FLETCHER, RAWLINSON, CALLAHAN, N.R. SMITH, NGUYEN and FRIEDLAND, Circuit Judges is set for 2:00 pm tomorrow, Thursday September 18, 2014

Yet, less than 48 hours before the *en banc* rehearing is scheduled to commence, the DOJ has suddenly, and mysteriously, lodged sealed filings at 8:00 pm last night. These are Docket Numbers 64 and 65 respectively:

Filed UNDER SEAL Appellee USA motion to file a letter to the court under seal (PANEL). Deficiencies: None. Served on 09/16/2014. [9242886] (JFF)

Filed UNDER SEAL Appellee USA letter dated 09/16/2014 re: constructive amendment argument. (PANEL) Paper filing deficiency: None. [9242910] (JFF)

Here is Bonds' Petition for Rehearing En Banc. Here is the previous panel decision in the 9th Circuit. If you don't want to bother with the full pleadings, this article from the Orange County Breeze gives a nice synopsis of the scope of the *en banc* proceeding for Bonds.

As can quickly be discerned, the appeal centers really on common statutory interpretation as applied to the facts in the public trial record. The issue is whether there was sufficient

evidence to convict Bonds because his statement describing his life as a celebrity child – in response to a question asking whether his trainer ever gave him any self-injectable substances – was evasive, misleading, and capable of influencing the grand jury to minimize the trainer's role in the distribution of performance enhancing drugs, and whether, under the law, that can properly constitute obstruction. I wrote an extensive piece arguing the weakness and infirmities of the verdict at the time it was handed down by the jury. Which is when the jury also acquitted Bonds of all the substantive underlying perjury counts.

Yes, the appeal is really that simple. So why, pray tell, does the DOJ need to be interjecting last minute sealed documents? What possible need could there be for anything to be sealed for this mundane criminal appeal? There may be a valid explanation, but it is nearly impossible to fathom what it could be.

I am willing to bet Bonds' attorneys, Allen Ruby and Dennis Riordan, must be apoplectic.

**UPDATE:** Well well, I am sitting in Alice Cooperstown having lunch, waiting for my preliminary hearing to reconvene, and Josh Gerstein just sent me the answer to the question of this post. YES! Indeed the sealed filings are a slimy last minute trick pulled by the DOJ. DOJ was trying to insert grand jury testimony from the aforementioned government BALCO investigator, Jeff Novitsky, into the appeal when it has never, at any point of the proceedings, whether in the trial court or 9th Circuit, been part of the record or indictment.

Here is the responsive pleading just filed by Bonds' attorney Dennis Riordan. Here is the pertinent part:

The grand jury transcripts referred to in the government's motion and letter are not part of the record on appeal. Had they been before the district court in any form, the proper method of adding

them to the appellate record would have been by means of a timely motion to correct or modify the record under Rule 10(e) of the Federal Rules of Appellate Procedure. The transcripts which are the subject of the government's motion, however, were never placed before the district court in either pretrial, trial, or post-trial proceedings. Notably, the declaration of AUSA Merry Jean Chan which accompanies the government's motion makes no claim that the transcripts were filed with the district court. "Papers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal." *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) (citing, *inter alia*, *United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir.1979)).

Should the Court nonetheless wish to consider the transcripts in question, they fully support Mr. Bonds's argument that the district court constructively amended the indictment by instructing on "Statement C" as a basis for conviction on the Count Five obstruction count, although that statement was not contained in the indictment. In his testimony, in discussing Statement C, then labeled "Statement F" before the grand jury, Novitsky admitted that Mr. Bonds had responded to the pending question—"Did Greg ever give you anything that required a syringe to inject yourself with?"—with a "denial" before veering off into a digression about "being a celebrity child." (RT of February 3, 2011, at 110.) Novitsky's admission that the prosecutor's question was in fact answered by Mr. Bonds constituted a good reason why the grand jury would not have relied on Statement C in indicting on the obstruction

charge. The only manner of accurately ascertaining whether a grand jury relied on an act in indicting is by the inclusion of that act in the indictment itself. Here, Statement C was expressly excised from the indictment by the use of asterisks. See Appellant Bonds's Petition for Rehearing En Banc, at 16.

Hilarious. DOJ tries a patently inappropriate punk move and Dennis Riordan turns it around to bite them in the butt. Quite well deserved. You have to hand it to the DOJ in the BALCO cases, they are nothing if not consistently ethically dubious.

---

## **GOV. NIXON SHOULD REMOVE PROSECUTOR MCCULLOCH TOO**

What a difference a day makes. After several days of police wilding in the streets of Ferguson, Missouri Governor Jay Nixon removed local and county control of policing and ordered the head of the Missouri State Patrol to take over. The change in tone was immediate, instead of making war on the citizens of Ferguson, last night the police walked side by side with the protesters and engaged them as actual citizens. Suddenly things were better and hope returned to the town.

The move pretty clearly should have been made a couple of days earlier, but Gov. Nixon was right to make it and made a strong and unifying statement when he announced the move.

But governor Nixon's work is not done. It is not just the local police that displayed impropriety and lack of fitness for the job in relation to the aftermath of the Michael Brown killing...so to



has the local prosecutor, Robert McCulloch.

Late yesterday, McCulloch said this to local reporter Paul Hampel:

#MikeMike STL County prosecutor Bob McCulloch called me. Said Nixon replacing Chief Belmar with HWP Capt Johnson was illegal, disgraceful.  
— paul hampel (@phampel) August 15, 2014

#MikeMike "Nixon denigrated the men and women of the County Police Department and what they've done." —McCulloch  
— paul hampel (@phampel) August 15, 2014

First off, McCulloch's statements displayed a remarkably tone deaf and tin ear, not to mention an affinity for the local police that is directly at odds with the duty of prosecuting the officer who killed Michael Brown. And make no mistake, the killing is shaping up as a straight up execution of Brown by the soon to be named officer. Yet another eyewitness came forward last night (in some superb work by MSNBC and Chris Hayes) reinforcing and corroborating the description previously given by Dorian Johnson, the youth who had been with Brown.

So, the statements of prosecutor McCulloch, who as the elected prosecutor for St. Louis County, would have presumptive jurisdiction of any prosecution, already place him in a position of potential bias.

But there is more in McCulloch's background that makes him inappropriate for this case. As described in a Reuters background article on McCulloch:

As St. Louis County prosecuting attorney, McCulloch is responsible for deciding whether to pursue criminal charges against the police officer who fatally shot 18-year-old Mike Brown on

Saturday outside a low-income apartment complex in Ferguson, Missouri.

The shooting of the unarmed black teenager sparked days of rioting and protests in Ferguson and surrounding communities and some residents say the mostly white ranks of local and county law enforcement officials are not objectively investigating the case.

McCulloch, 63, has held the top county prosecutor's job for 23 years and has promised an impartial investigation of Brown's death. But protesters say McCulloch, whose police officer father was killed in the line of duty when McCulloch was a child, should be removed from the case.

"I don't trust Bob McCulloch," community activist Anthony Shahid said as he helped lead a march by roughly 100 people at the St. Louis County Justice Center this week. "His father was killed by a black man."

Should that history disqualify a prosecutor in a normal situation? No, probably not. But this case is not at all a normal case. The eyes of the world are now on Ferguson, and the town is still distrustful of the local authorities and frayed at the emotional seams.

The investigation and charging determination have to be beyond reproach. It has to be done right and the citizens and victim's family must trust justice is being fairly done. At this point McCulloch cannot be the man who leads that effort. Not now.

And there is a clear path for Governor Jay Nixon to remedy the situation. Chapter 27 of the Missouri Revised Statutes, specifically §27.030, provides:

When directed by the governor, the attorney general, or one of his

assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, and when so directed by the trial court, he may sign indictments in lieu of the prosecuting attorney.

Governor Nixon has the clear authority to order Missouri Attorney General Chris Koster to aid this prosecution and guide the grand jury investigation. In order to give the community confidence a fair process and justice is being delivered, that is exactly what the Governor should do.

[**PS Note:** While the post title talks of “removal”, and there may or may not be a separate path for that available to Nixon under “emergency powers”, §27.030 only provides a path to have the AG, or his designee, be effectively a co-leader of the prosecution, both in the grand jury and in the trial court. This would be a substantial move, in and of itself, in that a more neutral party than McCulloch would be involved along side him, with full rights to participate in proceedings.]

---

## FBI WILL NOW VIDEOTAPE IN CUSTODY INTERROGATIONS

[Significant Update Below]

My hometown paper, the Arizona Republic, broke some critically important news a few minutes ago. The story by Dennis Wagner, a superb reporter at the Republic for a very long time, tells of a monumental shift in the policy of DOJ agencies in relation to interrogations and confessions of those in custody.

There was no news release or press conference to announce the radical shift. But a DOJ memorandum –obtained by The Arizona Republic – spells out the changes to begin July 11.

“This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA) the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody,” says the memo to all federal prosecutors and criminal chiefs from James M. Cole, deputy attorney general.

“This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply,” such as in the questioning of witnesses.

This has been a long time coming and is notable in that it covers not just the FBI, but DEA, ATF and US Marshals. Calling it a monumental shift may be, in fact, a bit of an understatement. In the course of a series of false confession cases in the 90’s, attempts to get this instated as policy in the District of Arizona were fought by the DOJ tooth and nail. As other local agencies saw the usefulness of audio and/or video taping, DOJ authorities fought the notion like wounded and cornered dogs. That was not just their position in the 90’s, it has always been thus:

Since the FBI began under President Theodore Roosevelt in 1908, agents have not only shunned the use of tape recorders, they’ve been prohibited by policy from making audio and video records of statements by criminal suspects without special approval.

Now, after more than a century, the U.S. Department of Justice has quietly reversed that directive by issuing orders May 12 that video recording is presumptively required for interrogations of suspects in custody, with some exceptions.

What has historically occurred is an agent (usually in pairs) did interviews and then recounted what occurred in what is called a "302" report based on their memories, recollections and handwritten notes (which were then usually destroyed). This created the opportunity not just for inaccuracy, but outright fabrication by overly aggressive agents. Many defendants have been wrongfully convicted, and some who were guilty got off because competent defense attorneys made fools of agents, and their bogus process, in court.

In short, presumptive taping is smart for both sides, and absolutely in the interests of justice. It still remains inexplicable why the DOJ maintained this intransigence so long when every competent police procedures expert in the world has been saying for decades that taping should be the presumption.

Now it should be noted that the policy will only apply to "in custody" interrogations and not ones where there has been no formal arrest which is, of course, a gaping hole considering how DOJ agents blithely work suspects over under the ruse they are not yet in custody. There will also clearly be an exigent circumstances/public safety exception which are also more and more frequently abused by DOJ (See: [here](#), [here](#) and [here](#) for example).

So, we will have to wait to see the formal written guidance, and how it is stated in the relevant operation manuals for agents and US Attorneys, to get a full bead on the scope of change. And, obviously, see how the written policies are implemented, and what exceptions are claimed, in the field.

But the shift in interrogation policy today is monumental and is a VERY good and positive step. Today is a day Eric Holder should be proud of, and it was far too long in arriving.

**UPDATE:** When I first posted this I did not see the actual memo attached to Dennis Wagner's story in the Arizona Republic; since that time I have been sent the actual memo by another source, and it is also available as a link in the Republic story that broke this news. Here are a couple of critical points out of the actual memo dated May 12, 2014:

The policy establishes a presumption in favor of electronically recording custodial interviews, with certain exceptions, and encourages agents and prosecutors to consider taping outside of custodial interrogations. The policy will go into effect on Friday, July 11, 2014.

By my information, the gap in implementation is because DOJ wanted to do some top down discussion and orientation on the new policy, which makes some sense given the quantum nature of this shift. My understanding is that this is already ongoing, so DOJ seems to be serious about implementation.

But, more important is the news about non-custodial situations. That was a huge question left unanswered initially, as I indicated in the original part of this post. That agents and attendant prosecutors will be encouraged to record these instances as well is, well, encouraging!

The exceptions, which are outlined in Section II of the memo are pretty much exactly as I indicated should be expected above.

Notable in the Presumptions contained in Section I of the memo is that the rule applies to ALL federal crimes. No exceptions, even for terrorism. Also, the recording may be either overt or covert, which is not different from

that which I have seen in many other agencies that have long recorded interrogations. Section III specifically excludes extraterritorial situations from the rule. Frankly, I am not sure why that is necessary, the ability to record is pretty ubiquitous these days, extraterritorial should be no problem for presumptive recording.

Those are the highlights of the memo. It is short and worth a read on your own.