

SENATE JUDICIARY COMMITTEE: CLOSING THE BARN DOOR AFTER THE BARN'S BEEN FORECLOSED

Sometime this week, the long-awaited terms for the foreclosure settlement will be released, giving banks immunity for much of the fraud and forgery they committed in the course of taking homeowners' houses.

Which makes the timing of this hearing the Senate Judiciary Committee just announced beyond absurd.

"Examining Lending Discrimination Practices and Foreclosure Abuses"

Senate Judiciary Committee
Full Committee

DATE: March 7, 2012

A better time for such a hearing might have been December 2010, just as the full extent of the robo-signing was being exposed. In fact, that's the second-to-last hearing John Conyers had before Dems lost their House majority. Since that time, he has been imploring the Administration and the Attorneys General to do something substantive about foreclosure problems, even asking MI's AG not to sign onto the settlement.

But next week!?!?! Just as the settlement will be enacted, making many of these issues (though reportedly not civil rights issues) moot?!?! Really?!?!?

I mean, if the **Judiciary Committee** is going to hold a hearing in the immediate future, it'd be far better to hold a hearing considering what impact it will have on justice in this country to assign a \$2,000 price tag to fabricating forged documents or engaging in other fraudulent activities before a court. Will judges ever be able to trust corporations in their courtrooms again? Will private citizens have access to this \$2,000 Get Out of Jail Free card, or only Too Big to Fail institutions?

Alternately, act like the bankster-owned body the Senate is, and simply call a hearing to discuss whether having pension funds pay to buy immunity for the banks hurts corporations.

And then there's the witness list: right now, just Civil Rights Division head Thomas Perez will testify. I'm all in favor of Thomas Perez in most any role—his work at Civil Rights has easily been the best part of DOJ under Obama. But aren't there other people who might better address foreclosure abuses, even if the hearing just focuses on lending discrimination?

I mean, I'm all in favor of someone finally conducting oversight over the fraud going on in this country. But this hearing couldn't be more badly timed.

JAKE TAPPER
FLUMMOXES JAY

CARNEY ON WHITE HOUSE PRESS POLICY HYPOCRISY

We take broadside shots at the press fairly regularly, both directly and as a vehicle for explaining ills and issues surrounding the government and, at least in my case, law. And there have been plenty of said shots aimed at the White House press over the years (stenographers!) and, pretty much, well earned. But fair is fair, and when there is good work done, it should be pointed out every now and then too. Today is a day for that.

At today's White House press briefing, Jake Tapper of ABC News bored straight into WH Press Secretary Jay Carney, and it was a thing of beauty. The briefing opened with Carney evincing praise for the two journalists who died last night covering the Syrian popular uprising and resultant government crackdown and oppression, Marie Colvin and Rémi Ochlik as well as the New York Times' recently deceased, Anthony Shadid. There is little doubt but that Carney, and the White House, have genuine sadness over the deaths. But Carney, on behalf of the White House, was taking it further and using them as shaded vehicle for political posturing and Tapper flat out called him on it. The exchange transcript, from Jake and ABC News:

TAPPER: The White House keeps praising these journalists who are – who've been killed –

CARNEY: I don't know about "keep" – I think –

TAPPER: You've done it, Vice President Biden did it in a statement. How does that square with the fact that this administration has been so aggressively trying to stop aggressive journalism in the United States by using the Espionage Act to take whistleblowers to court?

You're – currently I think that you've invoked it the sixth time, and before the Obama administration, it had only been used three times in history. You're – this is the sixth time you're suing a CIA officer for allegedly providing information in 2009 about CIA torture. Certainly that's something that's in the public interest of the United States. The administration is taking this person to court. There just seems to be disconnect here. You want aggressive journalism abroad; you just don't want it in the United States.

CARNEY: Well, I would hesitate to speak to any particular case, for obvious reasons, and I would refer you to the Department of Justice for more on that. I think we absolutely honor and praise the bravery of reporters who are placing themselves in extremely dangerous situations in order to bring a story of oppression and brutality to the world. I think that is commendable, and it's certainly worth noting by us. And as somebody who knew both Anthony and Marie, I particularly appreciate what they did to bring that story to the American people.

I – as for other cases, again, without addressing any specific case, I think that there are issues here that involve highly sensitive classified information, and I think that, you know, those are – divulging or to – divulging that kind of information is a serious issue, and it always has been.

TAPPER: So the truth should come out abroad; it shouldn't come out here?

CARNEY: Well, that's not at all what I'm saying, Jake, and you know it's not. Again, I can't – specific –

TAPPER: That's what the Justice Department's doing.

CARNEY: Well, you're making a judgment about a broad array of cases, and I can't address those specifically.

TAPPER: It's also the judgment that a lot of whistleblowers' organizations and good government groups are making as well.

CARNEY: Not one that I'm going to make.

That is good work. Clearly Carney was not ready for such a pointed line of questioning, and tried to shine it on by going back and trying to hide behind the fallen reporters. But Jake Tapper was having none of it and kept boring in. It was an example of not needing to get an answer to make a solid point. Frankly, I think it would be a very good thing if there was a *lot more* of this done in the face of the pablum shoved out daily by government spokesmen, of which the White House Press Shop is merely the most public, and glaring, example.

Lastly, and this is not a criticism in the least, because I think it is fairly clear Jake tapped Carney out about as far as he could in the exchange today, but I would like to see him, or another reporter, go back at Carney on not just the Obama Administration's attack on leakers, but the pernicious and chilling attacks on the press themselves. It is an easy out for Carney to say he cannot talk about defendants and cases, but he can sure be questioned about the consistent policy of chilling reporters such as Jim Risen and Siobhan Gorman.

If you really want to show the hypocrisy, there is the story that is not emphasized enough. The Bush DOJ had subpoenaed Risen in the Sterling matter for the grand jury phase, but dropped it when he moved to quash. The Obama Administration, once again going to extremes even the much maligned Bush/Cheney one would not, reinstated the effort to haul Risen in front of a grand jury on Sterling and break his source protection. Judge Leonie Brinkema quashed

the effort rather sharply.

But the DOJ has now gone after Risen a third time in their effort to squelch the ability of reporters to interact with sources, and protect the relationship. Even after Brinkema granted limited questioning of Risen at trial, that was not enough, the DOJ has appealed to get more. The thing is, the government does not need more from Risen to try Jeffrey Sterling, and that finding was made and supported well by Judge Brinkema. It is gratuitous and meant to chill the press, not just leakers. It is not just me saying that, it is a coalition of 29 news organizations, including ABC News.

Jake Tapper clearly flummoxed Carney on the White House press reporters hypocrisy, even if just a bit. A followup round further pointing out the even deeper underlying hypocrisy in the direct attacks on the press would be even better. Thanks to Jake for today, how about a rematch for Round Two?

ELENA KAGAN VOTES WITH ALITO AND THOMAS TO UNDERMINE MIRANDA

When Elena Kagan was nominated, there were very few of us voicing strenuous objection, one of the primary reasons I did was her complete lack of experience in the adversarial system, especially with her total lack of knowledge and interest in criminal process issues, which would be critical in the face of the Obama DOJ's determination to further gut *Miranda*.

The feared Kagan chickens have come home to roost. The Supreme Court just announced its decision in *Howes v. Fields*, and the decision is

a significant further erosion of the critical Constitutional protections embodied in *Miranda*. The ruling specifically holds that police are not automatically required to tell prisoners of their legal right to remain silent and have an attorney present when being questioned in prison about another crime.

Ruth Bader Ginsburg, joined by Justices Sonia Sotomayor and Stephen Breyer dissented. Noting that Fields was only incarcerated for disorderly conduct in the first place, Ginsburg stated:

For the reasons stated, I would hold that the “incommunicado interrogation [of Fields] in a police-dominated atmosphere,” *id.*, at 445, without informing him of his rights, dishonored the Fifth Amendment privilege *Miranda* was designed to safeguard.

Notice who did NOT side with her fellow “liberal bloc” Justices to honor and protect *Miranda*? Elena Kagan. No, Kagan instead sided completely with Clarence Thomas, Samuel Alito and the rest of the conservative bloc.

No democratic appointee to Supreme Court should ever vote to further erode *Miranda*, and this case did exactly that in a fundamental way. But Barack Obama gave us the authoritarian Elena Kagan who, predictably, did just that. As a prediction: you will be seeing a lot more of Elena Kagan voting with Alito, Scalia and Thomas on crucial law and order/criminal process, not to mention evidentiary, issues. Get used to it.

Oh, and as a reminder, Obama may soon enough have the opportunity to further shove the ideological spectrum of the Supreme Court substantially to the right, just as he did when he replaced John Paul Stevens with Kagan. If Obama replaces the liberal stalwart Ruth Bader Ginsburg with another mushy authoritarian and/or corporatist centrist, like he did in replacing Stevens, liberals will regret it for decades.

Judicial policy matters.

[updated slightly to reflect authoritarian as a descriptor for Kagan, which, as EW points out, is more germane to this discussion on *Howes*]

WILLIAM WELCH PROBABLY NOT ONE OF THE ATTORNEYS WHO ENGAGED IN GROSS PROSECUTORIAL MISCONDUCT IN STEVENS CASE

As Ryan Reilly reported, Judge Emmet Sullivan is moving forward with his plan to release the scathing report on the Ted Stevens prosecution showing the prosecution was “permeated by the systematic concealment of significant exculpatory evidence.”

Back when descriptions of this report first surfaced, I asked, “Why Is William Welch, Whose Team Is Accused of Intentional Prosecutorial Misconduct, Still at DOJ?”

Given Sullivan’s latest order, I think the answer must be that Welch is not one of the four DOJ lawyers most badly implicated in the report. That’s because DOJ, which after all still employs Welch to prosecute whistleblowers, had no objection to the report being released on March 15.

The Department of Justice’s Notice advised the Court that it “does not intend to file a motion regarding Mr. Schuelke’s report” and that “[t]he government does not contend that there is any legal prohibition on the

disclosure of any references in Mr. Schuelke's report to grand jury material, court authorized interceptions of wire communications, or any sealed pleadings or transcripts that have now been unsealed." Notice of Dep't of Justice Regarding Materials Referenced in Mr. Schuelke's Report, at 1-2 ("DOJ Notice"). In addition, the Department of Justice informed the Court that it was not asserting any deliberative process or attorney-work product privilege with respect to the information contained in Mr. Schuelke's Report.

Criminal Division head Lanny Breuer has already proven himself more than willing to hide the misconduct of his prosecutors; I have no doubt he'd do so here if it badly implicated any of his current attorneys.

So I'm guessing—though that is a guess—that Welch is not one of the four fighting to prevent this release.

THE OLC OPINION ON OBAMA'S RECESS APPOINTMENTS

Out of the blue this morning, the Obama Administration has released the OLC opinion it relied on in making last weeks recess appointments of Richard Cordray to the CFPB and others to the NLRB. Several legal analysts and pundits have lobbied publicly and privately for the memo, which almost certainly existed, to be released, maybe the most cogent of the public pleas being made by Jack Goldsmith at Lawfare. Honestly, I agreed fully with Jack, but since the White House was reticent to admit it even

existed, and since (as Josh Gerstein pointed out) a 2nd Circuit opinion from 2005 likely meant it was not subject to FOIA, I was not sure how soon it would meet public eyes.

Well, here it is in all its glory.

While some had suggested the reason the White House would not discuss whether there even was an opinion, much less release it, was that the OLC did not support the President's ability to so recess appoint. I never particularly gave this much credit, even though Obama clearly is not above acting contrary to OLC advice, he did exactly that regarding the Libya war action. And, indeed, here the OLC did support his action in their 23 page opinion.

Although the Senate will have held pro forma sessions regularly from January 3 through January 23, in our judgment, those sessions do not interrupt the intrasession recess in a manner that would preclude the President from determining that the Senate remains unavailable throughout to “receive communications from the President or participate as a body in making appointments.” Intrasession Recess Appointments, 13 Op. O.L.C. 271, 272 (1989) (quoting Executive Power—Recess Appointments, 33 Op. Att’y Gen. 20, 24 (1921) (“Daugherty Opinion”)). Thus, the President has the authority under the Recess Appointments Clause to make appointments during this period. The Senate could remove the basis for the President’s exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations, but it cannot do so by providing for pro forma sessions at which no business is to be conducted.

As I previously have noted, the entire “block” of the President’s recess appointment power is

predicated upon the Article I, Section 5 provision in the Constitution that “[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days”. And, so upon what exactly does the OLC hang their hat on that the three day periods do not prevent a “recess” within the meaning of a President’s Article II, Section 2, Clause 3 recess appointment power? Mostly some reasonably thin quotes from GOP Senators that were not directly on point, and some spare language culled from an otherwise non-definitive webpage at the Senate site:

Public statements by some Members of the Senate reveal that they do not consider these pro forma sessions to interrupt a recess. See, e.g., 157 Cong. Rec. S6826 (daily ed. Oct. 20, 2011) (statement of Sen. Inhofe) (referring to the upcoming “1-week recess”); *id.* at S5035 (daily ed. July 29, 2011) (statement of Sen. Thune) (calling on the Administration to send trade agreements to Congress “before the August recess” even though “[w]e are not going to be able to consider these agreements until September”); *id.* at S4182 (daily ed. June 29, 2011) (statement of Sen. Sessions) (“Now the Senate is scheduled to take a week off, to go into recess to celebrate the Fourth of July”); 156 Cong. Rec. at S8116-17 (daily ed. Nov. 19, 2010) (statement of Sen. Leahy) (referring to the period when “the Senate recessed for the elections” as the “October recess”); 154 Cong. Rec. S7984 (daily ed. Aug. 1, 2008) (statement of Sen. Hatch) (referring to upcoming “5-week recess”); *id.* at S7999 (daily ed. Aug. 1, 2008) (statement of Sen. Dodd) (noting that Senate would be in “adjournment or recess until the first week in September”); *id.* at S7713 (daily ed. July 30, 2008) (statement of Sen. Cornyn) (referring to the upcoming “month- long recess”); see also *id.* at

S2193 (daily ed. Mar. 13, 2008)
(statement of Sen. Leahy) (referring to
the upcoming "2-week Easter recess").

Likewise, the Senate as a body does not
uniformly appear to consider its recess
broken by pre-set pro forma sessions.
The Senate's web page on the sessions of
Congress, which defines a recess as "a
break in House or Senate proceedings of
three days or more, excluding Sundays,"
treats such a period of recess as
unitary, rather than breaking it into
three-day segments.

Nice argument, marginally compelling, but
certainly not authoritative. There are numerous
pages devoted to a discussion of the historical
use and practice of recess appointments during
which the OLC concludes that a recess of twenty
(20) days is indeed a sufficient recess to
permit recess appointments. That is all well and
good, but nobody really would have disputed
that, as it was nearly universally agreed by
this point in history that any recess of ten or
more days sufficed; the only questions were did
the 3 day ruse interrupt a longer recess and, if
so, could a President appoint in gaps less than
three days.

The key statement, as it pertains to how certain
the OLC (or anybody else for that matter) is on
this issue is this:

Due to this limited judicial authority,
we cannot predict with certainty how
courts will react to challenges of
appointments made during intrasession
recesses, particularly short ones.

Interestingly, in making this conclusion, the
OLC cites *Evans v. Stephens*, which I have long
pointed out stands for the proposition that
there does not currently exist any defined limit
as to what is "too short of a recess".

The second half of the OLC memo explores in more

detail whether the 3 day ruse is sufficient and effective to block a President from the making of recess appointments. Quite frankly, it is mostly a pretty rambling and self serving discussion at that point, and does little to add to the cause. The one interesting part is a cite to the Federalist Papers, which I always find interesting and instructive:

The Clause was adopted at the Constitutional Convention without debate. See 2 The Records of the Federal Convention of 1787, at 533, 540 (Max Farrand ed., rev. ed. 1966).¹⁴ Alexander Hamilton described the Clause in The Federalist as providing a “supplement” to the President’s appointment power, establishing an “auxiliary method of appointment, in cases to which the general method was inadequate.” The Federalist No. 67, at 409 (Clinton Rossiter ed., 1961). The Clause was necessary because “it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers,” and it “might be necessary for the public service to fill [vacancies] without delay.” *Id.* at 410.

The one other semi-notable area of support comes on page 17, and delineates the only other interesting case authority other than *Evans*:

There is also some judicial authority recognizing the need to protect the President’s recess appointment authority from congressional incursion. See *McCalpin v. Dana*, No. 82-542, at 14 (D.D.C. Oct. 5, 1982) (“The system of checks and balances crafted by the Framers . . . strongly supports the retention of the President’s power to make recess appointments.”), vacated as moot, 766 F.2d 535 (D.C. Cir. 1985); *id.* at 14 (explaining that the “President’s recess appointment power” and “the

Senate's power to subject nominees to the confirmation process" are both "important tool[s]" and "the presence of both powers in the Constitution demonstrates that the Framers . . . concluded that these powers should co-exist"); *Staebler v. Carter*, 464 F. Supp. 585, 597 (D.D.C. 1979) ("it is . . . not appropriate to assume that this Clause has a species of subordinate standing in the constitutional scheme"); *id.* at 598 ("It follows that a construction of [a statute] which would preclude the President from making a recess appointment in this situation—i.e., during a Senate recess and after the statutory term of the incumbent [official] has expired—would seriously impair his constitutional authority and should be avoided [if it] is possible to do so."); see also *Swan v. Clinton*, 100 F.3d 973, 987 (D.C. Cir. 1996) (rejecting an argument that "rests on the assumption that a recess appointment is somehow a constitutionally inferior procedure"). But see *Wilkinson v. Legal Servs. Corp.*, 865 F. Supp. 891, 900 (D.D.C. 1994) (concluding, contrary to *McCalpin* and *Staebler*, that a holdover provision could preclude a recess appointment), *rev'd on other grounds*, 80 F.3d 535 (D.C. Cir. 1996); *Mackie v. Clinton*, 827 F. Supp. 56, 57-58 (D.D.C. 1993) (same), *vacated as moot*, Nos. 93-5287, 93-5289, 1994 WL 163761 (D.C. Cir. Mar. 9, 1994).

Really, that is about the long and short of the substantive portion of the opinion. As stated above, even by the OLC itself, there is thin precedent and law guiding the question, and it is nearly impossible to know where courts, much less the Supreme Court, will come down on this.

Also the issue of what the relative power of Mr. Cordray's position of Director really vests, as

discussed in this post, is not at issue or discussion in this OLC memo. Both the issue of propriety of the recess appointment as performed by President Obama, and what power it gives to the CFPB and Cordray even if legal, are still extremely cognizable issues for court challenge. Expect just that.

One interesting, and previously unknown (as far as I can discern or am aware of) fact is that the *Bush Administration* briefed this issue literally days before leaving office:

We draw on the analysis developed by this Office when it first considered the issue. See Memorandum to File, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic "Pro Forma Sessions" (Jan. 9, 2009).

So, the Bush/Cheney regime was actively briefing and filing memoranda on the lawfulness of a President making recess appointments in the face of the 3 day Congressional ruse, eleven days before they left office.

You would think it hard to believe the Bush Administration just wanted to leave a "how to manual" for Barack Obama to make recess appointments in the face of the 3 day ruse. Even though Obama was entering with huge majorities in both chambers of Congress, you would think they would assume they could get at least one of the chambers back (which they certainly did in 2010).

Well, you would be wrong. I spoke to the author of said memo to the file (which is not an "official OLC Memo") at the Bush OLC, John P. Elwood, and he assured, no, nothing nefarious. It turns out that it was just a memo that had been worked on at some point, and he was cleaning up his office and desk in getting ready to leave office, and filed it officially "in

case the next guys might need it". I have to commend Mr. Elwood for so doing, and his consistency on the issue can be seen in this Washington Post Op-Ed from October of 2010 and this article at the Volokh Conspiracy last week when Obama used his theory and actually pulled the trigger on the recess appointments. Good show Mr. Elwood.

But, the fact that the Obama OLC went to such lengths to cite informal memoranda to the file, and statements by GOP senators of questionable context, exposes quite clearly how desperate they are both for foundation for their argument and support for the proposition it is a non-controversial bi-partisan position. That is, shall we say, a pretty thin raft. The litigation will be coming and it will be hotly contested.

ASSOCIATE ATTORNEY GENERAL THOMAS PERRELLI TO LEAVE DOJ IN MARCH

The guy in charge of—among other things—the elusive foreclosure fraud settlement with the banksters just told NPR's Carrie Johnson he'll be leaving in March.

Associate Attorney General Tom Perrelli will leave the third highest-ranking post at the Justice Department in March after nearly three years managing a bustling portfolio that has run the gamut from mortgage abuses and the oil spill in the Gulf of Mexico to stamping out domestic violence in Indian country.

Perrelli, 45, says that he'll take several months off to spend with his growing family. He and his wife have a

five-year-old, a two-year-old, and a pair of twins due in May. "This is the best job I'll ever have," Perrelli tells us, "you really couldn't ask for better." But, long hours spent overseeing Justice Department units that handle tax, civil rights, environment, antitrust, civil cases and billions of dollars in federal grant programs has taken "an enormous amount of energy and commitment and sacrifice."

As Johnson points out, Perrelli has had his fingers in a number of contentious issues: the Cobell settlement and the BP investigation. But I suspect it also sets a finite deadline for the foreclosure fraud settlement, rumored to be imminent for about a year.

One of his biggest efforts has yet to come to fruition. For more than a year, the Justice Department and state attorneys general have been hammering out a settlement with the country's largest mortgage servicing companies over faulty paperwork and foreclosure abuses known as "robo signing" that helped push people out of their homes. The process has been complicated and sometimes fractious, as top lawyers for the state of California and New York criticized the process as going too soft on the banks.

And then, of course, there's the question of a replacement—because there's no way Republicans are going to confirm anyone for a functional post at a Department of Justice they like to claim is responsible for sending guns to Mexican drug cartels.

Just what this country needs, a DOJ even more hampered by missing key operational executives.

NOW THAT DOJ HAS REVISED RAPE STATS, WILL THEY FINALLY DO SOMETHING ABOUT PRISON RAPE?

DOJ has rolled out a new definition of rape today, designed to reflect both that men can be raped and that people of both sexes get raped at times they are unable to consent.

Attorney General Eric Holder today announced revisions to the Uniform Crime Report's (UCR) definition of rape, which will lead to a more comprehensive statistical reporting of rape nationwide. The new definition is more inclusive, better reflects state criminal codes and focuses on the various forms of sexual penetration understood to be rape. **The new definition of rape is: "The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."** The definition is used by the FBI to collect information from local law enforcement agencies about reported rapes.

[snip]

The revised definition includes any gender of victim or perpetrator, and includes instances in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity, including due to the influence of drugs or alcohol or because of age. The ability of the

victim to give consent must be determined in accordance with state statute. Physical resistance from the victim is not required to demonstrate lack of consent. The new definition does not change federal or state criminal codes or impact charging and prosecution on the local level.

"The revised definition of rape sends an important message to the broad range of rape victims that they are supported and to perpetrators that they will be held accountable," said Justice Department Director of the Office on Violence Against Women Susan B. Carbon. "We are grateful for the dedicated work of all those involved in making and implementing the changes that reflect more accurately the devastating crime of rape."

The longstanding, narrow definition of forcible rape, first established in 1927, is "the carnal knowledge of a female, forcibly and against her will." It thus included only forcible male penile penetration of a female vagina and **excluded oral and anal penetration; rape of males; penetration of the vagina and anus with an object or body part other than the penis; rape of females by females; and non-forcible rape.** [my emphasis]

Kudos to DOJ for making this long overdue change. It's an important step, both for the administration tracking that relies on it, and for victims who have before now been legally called something else.

But there's one more thing that is also long overdue: guidelines and auditing techniques that will address the long-standing problem of prison rape—guidelines that were mandated by Congress in 2003. As I understand it, those guidelines will finally be implemented in the coming weeks

(though it sounds like months, not weeks). But one outstanding issue pertains to whether immigration deportation detainees will get the same protections that those actually convicted of crime will get.

DOJ has stalled on this issue—and watered down independently derived guidelines—to save money. And DHS has balked at adhering to the same rules as corrections facilities will implement.

But now that FBI has updated its definition of rape, isn't it time to treat the rape that happens in US government custody as the rape it is?

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.

THE MATERIAL SUPPORT OF HILLARY CLINTON AND TAREK MEHANNA

18 USC 2339(A) and 18 USC 2339(B) proscribe the material support of terrorism and designated foreign terrorist organizations. In short, it is the “material support” law:

the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

During oral argument on the now seminal defining case as to the astounding reach of this statute, *Holder v. HLP*, now Supreme Court Justice Elena Kagan argued, as Solicitor General, that even humanitarian lawyers could be charged and convicted under the wide ranging provisions:

JUSTICE KENNEDY: Do you stick with the argument made below that it’s unlawful to file an amicus brief?

GENERAL KAGAN: Justice Kennedy –

JUSTICE KENNEDY: I think I’m right in saying it that that was the argument below.

GENERAL KAGAN: Yes, I think that would be a service. In other words, not an amicus brief just to make sure that we understand each other. The Petitioners can file amicus briefs in a case that

might involve the PKK or the LTTE for themselves, but to the extent that a lawyer drafts an amicus brief for the PKK or for the LTTE, that that's the amicus party, then that indeed would be prohibited.

Kagan argued for an interpretation so broad that even the filing of an amicus brief would be violative of the material support prohibitions and the Supreme Court so held.

So, surely, the DOJ is going to heed the words and intent of the right honorable Justice Kagan over this report then, right?

The Iraqi government has promised to shutter Camp Ashraf – the home of the Iranian dissident group Mujahedeen e-Khalq (MEK) – by Dec. 31. Now, the United Nations and **the State Department** are scrambling to **move the MEK** to another location inside Iraq, which just may be a **former U.S. military base**.

The saga puts the United Nations and President Barack Obama's administration in the middle of a struggle between the Iraqi government, a new and fragile ally, and the MEK, a persecuted group that is also on the State Department's list of foreign terrorist organizations.

The Marxist-Islamist group, which was formed in 1965, was used by Saddam Hussein to attack the Iranian government during the Iran-Iraq war of the 1980s, and has been implicated in the deaths of U.S. military personnel and civilians.

The new Iraqi government has been trying to evict them from Camp Ashraf since the United States toppled Saddam in 2003. The U.S. military guarded the outside of the camp until handing over external security to the Iraqis in 2009. The Iraqi Army has since tried twice to enter Camp Ashraf, resulting in bloody

clashes with the MEK both times.
(emphasis added)

Well, no, there will be no prosecution for aiding and abetting *these* terrorists. Now, in all seriousness and fairness, Secretary of State Clinton is probably exempted under 18 USC 2339(B)(j) which provides:

No person may be prosecuted under this section in connection with the term "personnel", "training", or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

Still, the point being the hypocrisy of the US Government who on one hand is willing to prosecute even attorneys trying to give humanitarian legal assistance to alleged terrorist organizations to help reform them, but is on the other hand willing to actively and affirmatively work to provide a former US military base and accoutrements to shelter a known and designated violent terrorist group, one that has a history of killing Americans, both military and civilian.

While there may be an exemption for the State Department itself, there certainly is not for other US citizens and officials who have, for years, directly aided and abetted the MEK within the definition of "material support. Again, from Josh Rogin's report in FP's *The Cable* linked above:

As part of its multi-million dollar lobbying effort, the MEK has paid dozens

of top U.S. officials and former officials to speak on its behalf, sometimes at rallies on the State Department's doorstep. MEK supporters have been stationed outside the State Department non-stop for months now, and are even showing up at Congressional hearings.

Their list of advocates, most who have admitted being paid, includes Congressman John Lewis (D-GA), former Pennsylvania Gov. Ed Rendell, former FBI Director Louis Freeh, former Sen. Robert Torricelli, Rep. Patrick Kennedy, former CIA Deputy Director of Clandestine Operations John Sano, former National Security Advisor James Jones, former Vermont Gov. Howard Dean, former New York Mayor Rudolph Giuliani, former Joint Chiefs Chairman Gen. Richard Myers, former White House Chief of Staff Andy Card, Gen. Wesley Clark, former Rep. Lee Hamilton, former CIA Director Porter Goss, senior advisor to the Romney campaign Mitchell Reiss, Gen. Anthony Zinni, former Pennsylvania Gov. Tom Ridge, former Sen. Evan Bayh, and many others.

The Department of Justice has just convicted a man, Tarek Mehanna, in Massachusetts for, in significant part, material support in the form of posting videos on the internet. Adam Serwer has a nice description of the parameters of the Mehanna case at Mother Jones that includes this analysis:

"This case is being used by the government to really narrow First Amendment activity in dangerous new ways," says Nancy Murray of the Massachusetts branch of the American Civil Liberties Union. "It might be speech that horrifies people, but it's the nature of the First Amendment to protect that speech, unless it's leading

to imminent lawless action.”

Civil liberties advocates say the case represents a slippery slope. In the 2010 case *Holder v. Humanitarian Law Project*, which decided whether or not providing nonviolent aid (such as legal advice) to terrorist groups constitutes material support for terrorism, the Supreme Court ruled that even protected speech can be a criminal act if it occurs at the direction of a terrorist organization. Based on that ruling, you could be convicted of materially supporting terrorism merely for translating a document or putting an extremist video online, depending on your intentions.

Adam’s article is worth a full read to gain a glimpse of the fine line in material support cases.

Well, it is a fine line in some cases, not so much if it concerns *our* terrorists. You know, the *good terrorists* the US Government favors. Tarek Mehanna may think this a pretty inconsistent posture.

DRONE WAR SECRECY AND KILL OR CAPTURE

As we stand on the
doorstep of
President Obama
signing into law
the new NDAA and
its dreaded
controversial
provisions, there
are two new
articles out of
interest this
morning. The first
is an incredibly
useful, and pretty
thorough, synopsis



at Lawfare of the new NDAA entitled “NDAA FAQ: A Guide for the Perplexed”. It is co-written by Ben Wittes and Bobby Chesney and, though I may differ slightly in a couple of areas, it is not by much and their primer is extremely useful. I suggest it highly, and it has condensed a lot of material into an easily digestible blog length post.

The second is a long read from the Washington Post on how secrecy defines Obama’s drone wars:

The administration has said that its covert, targeted killings with remote-controlled aircraft in Pakistan, Yemen, Somalia and potentially beyond are proper under both domestic and international law. It has said that the targets are chosen under strict criteria, with rigorous internal oversight.

...

“They’ve based it on the personal legitimacy of [President] Obama – the ‘trust me’ concept,” Anderson said. “That’s not a viable concept for a president going forward.”

The article goes on to state how the CIA, and the majority of voices in the White House, are fighting tooth and nail for continued utmost secrecy lest any of our enemies somehow discover

we are blowing them to bits with our drones. This is, of course, entirely predictable, especially now that the former head of the CIA leads the military and the former military chief for the greater Af/Pak theater which has long been ground zero for the drone kill program, Petraeus, is the head of the CIA.

But then the Post piece brings up our old friend, the OLC:

The Justice Department's Office of Legal Counsel has opposed the declassification of any portion of its opinion justifying the targeted killing of U.S. citizen Anwar al-Awlaki in Yemen this year. Awlaki, a propagandist for the Yemen-based al-Qaeda affiliate whom Obama identified as its "external operations" chief, was the first American known to have been the main target of a drone strike. While officials say they did not require special permission to kill him, the administration apparently felt it would be prudent to spell out its legal rationale.

...

Under domestic law, the administration considers all three to be covered by the Authorization for Use of Military Force that Congress passed days after the Sept. 11, 2001, attacks. In two key sentences that have no expiration date, the AUMF gives the president sole power to use "all necessary and appropriate force" against nations, groups or persons who committed or aided the attacks, and to prevent future attacks.

The CIA has separate legal authority to conduct counterterrorism operations under a secret presidential order, or finding, first signed by President Ronald Reagan more than two decades ago. In 1998, President Bill Clinton signed an amendment, called a Memorandum of Notification, overriding a long-standing

ban on CIA assassinations overseas and allowing “lethal” counterterrorism actions against a short list of named targets, including Osama bin Laden and his top lieutenants. Killing was approved only if capture was not deemed “feasible.”

A week after the Sept. 11 attacks, the Bush administration amended the finding again, dropping the list of named targets and the caveat on “feasible” capture.

“All of that conditional language was not included,” said a former Bush administration official involved in those decisions. “This was straight-out legal authority. . . . By design, it was written as broadly as possible.”

This brings us back to the notable October 8, 2011 article by the New York Times’ Charlie Savage on his viewing of the Awlaki targeting memo relied on by the Obama White House for the extrajudicial execution of Anwar al-Awlaki. Marcy, at the time discussed the incongruity of the collateral damage issue and the fact Samir Khan was also a kill in the targeted Awlaki strike.

I would like to delve into a second, and equally misleading, meme that has been created by the self serving and inconsistent secret law Obama has geometrically expanded from the already deplorable Bush/Cheney policy set: the false dichotomy in the kill or capture element of the Awlaki kill targeting.

It has become an article of faith that Awlaki could neither have been brought to justice in Yemen nor, more importantly, captured in Yemen and brought to justice in an appropriate forum by the United States. It has been a central point made in the press; here is the New York Time’s Scott Shane in early October:

The administration's legal argument in the case of Mr. Awlaki appeared to have three elements. First, he posed an imminent threat to the lives of Americans, having participated in plots to blow up a Detroit-bound airliner in 2009 and to bomb two cargo planes last year. Second, he was fighting alongside the enemy in the armed conflict with Al Qaeda. **And finally, in the chaos of Yemen, there was no feasible way to arrest him.** (emphasis added)

Shane was relying on Bobby Chesney, a University of Texas law professor, and granted an expert in the field who also is a principal at Lawfare Blog. It is the same meme propounded by not only other reporters, but by other leading experts. Here is Ben Wittes in Lawfare stating the assumption as a given fact. Here is Jack Goldsmith (also of Lawfare) espousing the same in a widely read Times Editorial. Here is Peter Finn and the venerable Washington Post doing the same.

Just how does this meme set in and become the common wisdom and fact of such wise men (and I mean that term literally; these are smart people)? Because, of course, that is what the US government tells them, as well as us. With nothing but the self-serving, selective dribble leaking by the Administration of supposedly classified information, there is no specific factual basis from which to dissect the truth. And that is the way the Administration likes it; it always gets messy when citizens actually *know* what their government is doing in their name.

On the Awlaki targeted execution, it was not only desirable for people to believe the government's stated basis, it was critical. Because the house of cards falls otherwise without the necessity element, and it becomes no more than a convenience kill wherein Mr. Obama was too lazy and hamstrung by his own political considerations to do otherwise. Here is how Charlie Savage describes the predicate element

in the Awlaki OLC memo in his, so far, seminal report:

The Obama administration's secret legal memorandum that opened the door to the killing of Anwar al-Awlaki, the American-born radical Muslim cleric hiding in Yemen, found that it would be lawful only if it were not feasible to take him alive, according to people who have read the document.

...

The [OLC] lawyers were also told that capturing him alive among hostile armed allies might not be feasible if and when he were located. (emphasis added)

In fairness to Mr. Savage, he more than touches on the import of the issue by including a question from Samir Khan's father:

"Was this style of execution the only solution?" the Khan family asked in its statement. "Why couldn't there have been a capture and trial?"

And Charlie himself posits the following:

The memorandum is said to declare that in the case of a citizen, it is legally required to capture the militant if feasible – raising a question: was capturing Mr. Awlaki in fact feasible?

It is possible that officials decided last month that it was not feasible to attempt to capture him because of factors like the risk it could pose to American commandos and the diplomatic problems that could arise from putting ground forces on Yemeni soil. Still, the raid on Osama bin Laden's compound in Pakistan demonstrates that officials have deemed such operations feasible at times.

So Obama Administration "officials decided last month that it was not feasible to attempt to capture" Awlaki. Most everybody has taken that on faith, but should they? The US had had Awlaki under intense surveillance for quite some time. The US also claims to be strong strategic partners with Pakistan. It is doubtful Yemen really cared all that much about Awlaki, as he was a noisy American. Who says there was no way between the combined capabilities of the US and Yemen Awlaki could not at least be attempted to be captured?

Now, I am not saying it is clear Awlaki could have been captured and brought to trial, just that it is not a given that it was impossible. Who makes those decisions, and on what exact basis and criteria? Anwar Awlaki, for everything you want to say about him, had *never* been charged with a crime, much less convicted of one, and he retained Fourth, Fifth and Sixth Amendment rights as a US citizen. If the precedent for extrajudicial execution of American citizens is being set at the whim of the President, then American citizens should know how and why.

So, hats off to Charlie Savage for having raised the critical question on necessity; problem is, however, it was only a question. There was, and is, no more specific information for him, or us, to go on from the Administration. Which leaves the remainder of the citizenry and chattering classes effectively working off of the glittering generalities and assumptions propounded by the government. And, in case you did not notice, there was effectively no discussion of the kill or capture paradigm in all the hubbub of the recent NDAA discussion. So, we are no further along in this regard than we were when Awlaki was terminated with prejudice. I will likely come back to the kill or capture paradigm at a later date, because it is a fascinating discussion in terms of history and protocols.

Which brings us back to where we started here.

These are life and death matters for those, like Awlaki (and Samir Khan too, as it is quite likely the US had reason to know he was in Awlaki's "collateral damage" radius), that are placed on the President's kill list and, to the rest of us, are of rude foundational importance to the very existence of American rule of law and constitutional governance. For all the sturm and drang surrounding the release of the torture memos, the resulting discussion has been sober, intelligent, and important. The publication of the torture memos has provided a template not only showing how it can be done, but proving that it can and should be done.

The same as was the case with the OLC torture memos holds true in regards to the OLC kill list targeting memo for Anwar al-Alawki and the related memos the Obama Administration is relying on. The documents should be released by the Obama administration with no more than the absolute minimal redaction necessary to truly protect means and methods.

If the Obama administration insists on hiding such critical knowledge and information necessary for the knowing exercise of democracy within the United States, then Mr. Obama and his administration should have the intellectual consistency and honesty to investigate and prosecute those within his administration responsible for the serious leaks to Charlie Savage and the New York Times of classified information that has previously been deemed in court and under oath to be "state secrets". If you can prosecute Bradley Manning, surely there should be some effort to bring Savage's leaker to justice. Except there will be none of that, because it was almost certainly ordered by the White House as a selective propaganda ploy to bolster their extrajudicial killing program.

As hard as it is to believe, I, at the time, contacted the Obama Department of Justice and they officially stated "no comment" when these questions were propounded. In light of the fact the leak almost certainly came from extremely

high up within the Obama administration, and was done with the express knowledge and consent of Mr. Obama himself to crow and take political advantage of his kill, it is hard to say that this is shocking. And, again, this is exactly the problem when the United States government plays self-serving games with its own classified information – the people, and the democracy they are tasked with guiding, all lose.

[The forever classic Emptywheel “Killer Drone” graphic is, of course by the one and only Darkblack]