

LANNY BREUER REWARDS DOJ LAWYERS FOR WINNING IMPUNITY FOR PROSECUTORIAL MISCONDUCT

I always like reading DOJ's various expressions of their investigative and prosecutorial priorities—because they usually show a disinterest in prosecuting banksters, a thorough waste of resources on entrapping young Muslims, and an ongoing fondness for Anna Chapman.

Lanny Breuer's choice of DOJ lawyers to recognize yesterday was, in some ways, an improvement over the trend. I'm happy to see prosecutors rewarded for taking down the "Lost Boy" website. Rather than fixating on Anna Chapman and entrapping young Muslims, Breuer recognized prosecutors who entrapped older Muslims who attempted to smuggle someone they believed to be a Taliban member into the US. And Breuer even celebrated the rare prosecution of a bankster, Lee Bentley Farkas.

And while Breuer's multiple awards to people seemingly making it easier to shut down the InterToobz in the guise of IP violations concerns me, it's this bit that I found disgusting.

The Assistant Attorney General's Award for Distinguished Service was presented to Kirby Heller and Deborah Watson of the Criminal Division's Appellate Section for their exceptional work in the successful appeal of sanctions imposed upon federal prosecutors in the case of Dr. Ali Shaygan.

Effectively, Lanny Breuer is rewarding two appellate section lawyers for winning an 11th Circuit Court decision overturning sanctions

imposed on DOJ for gross prosecutorial misconduct. Breuer's priorities, it seems, include ensuring that DOJ pays no price when it abuses its prosecutorial power.

The case goes back to February 2008, when Ali Shaygan was indicted for distributing controlled substances outside the scope of his medical practice; one charge tied that distribution to the death of one of Shaygan's patients. Shaygan ended up hiring a defense team that included one attorney who had had a run-in with the prosecutors in his case. In addition, the lead prosecutor, Sean Paul Cronin, was admittedly buddies with the lead DEA Agent, Chris Wells. After Shaygan's lawyers attempted (ultimately, successfully) to suppress a DEA interview with Shaygan on Miranda grounds, Cronin threatened the team.

AUSA Cronin warned David Markus, Shaygan's lead attorney, that pursuing the suppression motion would result in a "seismic shift" in the case because "his agent," Chris Wells, did not lie.

Nine months later, during the trial, one of the prosecution's witnesses alluded in cross-examination that he had tapes of conversations—failed attempts to bribe Shaygan's lawyer—at home.

During the cross-examination of Clendening on February 19, 2009, Shaygan's counsel, Markus, asked Clendening if he recalled a telephone conversation in which Clendening told Markus that he would have to pay him for his testimony, and Clendening responded, "No. I got it on a recording at my house."

This revelation led to exposure of the government's collateral, failed investigation of Markus for witness tampering, as well as a significant number of discovery violations. In

short, it became clear the government tried, unsuccessfully, to catch Markus bribing witnesses for favorable testimony and then hid all evidence they had tried. The prosecutor in the case was not properly firewalled from that investigation and even personally claimed to give authorization to tape the conversations. And in the days before the trial, the prosecutor checked in on the witness tampering investigation, apparently hoping to force Markus to withdraw from the case just as it went to trial. In the end, Shaygan was acquitted of all 141 charges against him.

After the trial, Miami District Court Judge Alan Gold held a sanctions hearing against the government for its gross misconduct. He held the government in violation of the Hyde Amendment. He had them pay all reasonable costs after a superseding indictment he judged was filed as part of the "seismic shift in strategy." And he publicly reprimanded the prosecutors involved in the case.

Now, the government admitted that it committed significant errors.

The United States acknowledges that it initiated a collateral investigation into witness tampering and authorized two witnesses, Carlos Vento and Trinity Clendening, to tape their discussions with members of the defense team in violation of United States Attorney's Office policy; that, although there were efforts made to erect a "taint wall," the wall was imperfect and was breached by the trial prosecutors, AUSA Sean Paul Cronin and Andrea Hoffman, at least in part, because the case agent, DEA Special Agent Christopher Wells, was initially on both sides of the wall; and that, because the United States violated its discovery obligations by not disclosing to the defense "(a) that witnesses Vento and Clendening were cooperating with the government by

recording their conversations with members of the defense team, and (b) Vento's and Clendening's recorded statements at the time of their trial testimony." Finally, the United States "acknowledges and regrets" that, "in complying with the Court's pre-trial order to produce all DEA-6 reports for in camera inspection on February 12, 2009 (Court Ex. 6), the government failed to provide the Court with the two DEA-6 reports regarding the collateral investigation, specifically Agent Wells' December 12, 2008 report (Court Ex. 2) and Agent Brown's January 16, 2009 report (Court Ex. 3)."

After the sanctions hearing, the government agreed to pay some legal fees associated with their misconduct. They just objected, and appealed, to the public reprimand and the requirement they pay for all fees after the superseding indictment.

But the appeals court not only **threw out the entire financial sanction**, it also vacated the public reprimands of the lawyers.

The Appeals Court opinion, written by William Pryor and joined by Rhesa Barksdale, read more like an attempt to override the jury's verdict than a recitation of the facts as determined by the District and Magistrate Judges. From their new interpretation of the facts, they effectively ruled the Hyde Amendment could not apply to prosecutorial misconduct undertaken after an initial objectively reasonable prosecution started.

The starting point for a potential award of attorney's fees and costs under the Hyde Amendment is an objectively wrongful prosecution: that is, a prosecution that either is baseless or exceeds constitutional constraints. If the prosecution is objectively reasonable, as was the case here, then a

district court has no discretion to award a prevailing defendant attorney's fees and costs under the Hyde Amendment.

In addition, in the name of "separation of powers," the Circuit effectively abdicated its role in policing prosecutorial misconduct.

Respect for the separation of powers also informs our understanding that the Hyde Amendment provides an objective standard for bad faith. "In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607, 105 S. Ct. 1524, 1530 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11, 102 S. Ct. 2485, 2492 n.11 (1982)). The Attorney General and United States Attorneys "have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *Armstrong*, 517 U.S. at 464, 116 S. Ct. at 1486 (quoting U.S. Const. art. II, § 3). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607, 105 S. Ct. at 1530. "It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function." *Armstrong*, 517 U.S. at 465, 116 S. Ct. at 1486. In the light of this constitutional framework, we cannot read the Hyde Amendment to license judicial second-guessing of prosecutions that are objectively reasonable.

As James Edmondson noted in his dissent, the government didn't even ask the Circuit to weigh in on this as a separation of powers issue.

I disagree with the idea that, if the Department of Justice and its lawyers are under the supervision, in some way, of federal judges – when the Department of Justice and its lawyers are actively engaged in litigating a case before a United States Court – a violation of the separation of powers is looming. I am inclined to think just the opposite. For me, it is the instances of the treating of the Department of Justice and its prosecutors differently from – and better than – other litigants that threaten the separation of powers between the Judicial Branch and the Executive Branch.

[snip]

By the way, the phrase “the separation of powers” never appears in the Department of Justice’s brief, and the Department has never argued anything about that kind of issue.

He goes on to note that Judge Gold was just following a statute passed by Congress.

But in William Pryor’s opinion, asking the government to avoid gross misconduct when it’s prosecuting people against whom it has legitimate evidence is too much to ask of the Executive Branch.

No wonder Lanny Breuer celebrated this result. A hack Republican judge just gave Breuer’s prosecutors wide latitude to engage in prosecutorial misconduct in the 11th Circuit! To hell with due process!

Now, as Gold noted in his ruling, this gross misconduct was exposed in the wake of DOJ’s gross misconduct in the Ted Stevens case. This kind of misconduct is in no way isolated. Breuer’s prosecutors—including, potentially, the high profile William Welch, whom Breuer backs unquestioningly, are still on the hook for such misconduct in the DC Circuit.

But preventing such behavior seems not to be Breuer's plan. Rather, he's going to reward DOJ members who successfully protect their own.

Sort of like the mafia.

THE COORDINATED LEAKY DRIPS IN THE WHITE HOUSE

As I've noted previously, there has been a hue and cry against the critical and untenable use, and abuse, of secrecy by the United States government. There has always been some abuse of the government's classified evidence for political gain by various administrations operating the Executive Branch, but the antics of the Obama administration have taken the disingenuous ploy to a new art form.

Today, via Politico's old fawning Washington DC gluehorse, Roger Simon, comes an unadulterated (sometimes x-rated) and stunningly tin eared and arrogant admission of what the Obama White House is all about, straight from the lips of Obama consigliere Bill Daley:

Rahm was famous for calling reporters, do you call reporters? I ask.

"I call; I'm not as aggressive leaking and stroking," Daley says. "I'm not reflecting on Rahm, but I'm not angling for something else, you know? Rahm is a lot younger [Emmanuel is 51], and he knew he was going to be doing something else in two years or four years or eight years, and I'm in a different stage. I'm not going to become the leaker in chief."

You've got others for that, I say.

"Yeah, and hopefully in some organized leaking fashion," Daley says, laughing. "I'm all for leaking when it's organized."

Oh, ha ha ha, isn't that just hilarious? Bill Daley, and the White House he runs, are all for leaking, history bears out even the most highly classified government secrets, and doing so in an organized pre-planned fashion, when it serves their little self-centric petty political interests. But god help an honest citizen like Thomas Drake who, after exhausting all other avenues of pursuit within the government, leaks only the bare minimum information necessary to expose giant government waste, fraud and illegality because he feels it his duty as a citizen.

For citizens like Tom Drake, the "most transparent administration in history" will come down on his head like a ton of nuclear bricks even when they embarrass themselves in so doing. But they are more than willing to exploit and leak to self serve their own interests. What is good for the king is not appropriate for the commoner.

In this regard, I wish to amplify point that Glenn Greenwald has previously made about the pernicious affect of this duplicitous use of classified information. Glenn said:

But the problem is much worse than mere excessive secrecy. Anyone who purports concern over the harmful leaking of classified information should look first to the Obama administration, which uses secrecy powers as a manipulative tool to propagandize the citizenry: trumpeting information that makes the leader and his government look good while suppressing anything with the force of criminal law that does the opposite. Using secrecy powers to propagandize the citizenry this way is infinitely more harmful than any of the leaks the Obama

administration has so aggressively prosecuted.

That is exactly right. It is not just that the government keeps unnecessary secrets from the public on information that is critical to their duties and responsibilities as citizens, it is that the self-serving selective leaking creates an intentionally fraudulent paradigm for the citizenry. It is not only manipulative, is fundamentally dishonest and duplicitous.

When the leaking is so selective and self-serving it is not just the people who are deceived, is the press they rely on as a neutral information conduit from which to make their opinions and determinations. The press then becomes little more than a hollow funnel for opportunistic and dishonest spin. We saw the effects of this in the case of Anwar Awlaki's extrajudicial assassination, and have seen it again in the Scary Iranian Terrorist Murder ruse.

The last bastions against this pernicious practice are the press and courts. Until both start admitting how they are relentlessly gamed and played by the White House, there is little hope for change. And make no mistake, the press ratifies this pernicious conduct by lazily accepting such leaks and reporting without properly noting just how malignant the process is. It is all a joke to Bill Daley and Barack Obama, and the joke is on us.

PS: For a little more on the joy that is White House Chief of Staff Bill Daley, see Digby today. And a fine dissertation of why Daley should be fired on the spot by Joan Walsh in Salon. I would only note that it is not just Rahm and Daley, it is the man who consistently brings this Chicago style heavy handed belligerence to the White House. Mr. Obama's two Chiefs of Staff do not operate apart from him, they ARE him and his Presidency. The buck for this stops at the top.

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

The targeted execution of Anwar al-Awlaki struck different people along the political spectrum in the United States in many different ways, but it has been heartening most all have recognized it as a seminal moment worthy of dissection and



contemplation. Despite all the discussion afforded the execution of Awlaki in the last few days, it cannot be emphasized enough how impossible it is to have a completely meaningful discussion on the topic due to the relentless blanket of secrecy imposed by the United States government. Before I get into the substantive policy and legal issues surrounding the targeting and assassination of American citizens, which I will come back to in a separate post, a few words about said secrecy are in order.

The first to note, and complain of, the strange secrecy surrounding not just the kill listing of Awlaki, but the entire drone assassination program, was Marcy right here in Emptywheel. Within a couple of hours of the news of the Awlaki strike, she called for the release of the

evidence and information serving as the Administration's foundation for the extrajudicial execution of an American citizen and within a couple of hours of that, noted the ironic inanity of the pattern and practice of the one hand of the Obama Administration, through such officials as Bob Gates, James Clapper and Panetta trotting out "state secrets" to claim drone actions cannot even be mentioned while the other hand, through mouthpieces such as John Brennan are out blabbing all kinds of details in order to buck up Administration policy.

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

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

I agree that the administration should release a redacted version of the opinion, or should extract the legal analysis and place it in another document that can be released consistent with restrictions on classified information.

I have no doubt that Obama administration lawyers did a thorough and careful job of analyzing the legal issues surrounding the al-Aulaqi killing. The case for disclosing the analysis is easy. The killing of a U.S. citizen in this context is unusual and in some quarters controversial. A thorough public explanation of the legal basis for the killing (and for targeted killings generally) would allow experts in the press, the academy, and Congress to scrutinize and criticize it, and would, as Harman says, permit a much more informed public debate. Such public scrutiny is especially appropriate since, as Judge Bates's ruling last year shows, courts are unlikely to review executive action in this context. In a real sense, legal accountability for the practice of targeted killings depends on a thorough public legal explanation by the administration.

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

We know the government can provide a public legal analysis of this sort because presidential counterterrorism advisor John Brennan and State Department Legal Advisor Harold Koh have given such legal explanations in speeches, albeit in limited and conclusory terms. These speeches show that there is no bar in principle to a

public disclosure of a more robust legal analysis of targeted killings like al-Aulaqi's. So too do the administration's many leaks of legal conclusions (and operational details) about the al-Aulaqi killing.

A full legal analysis, as opposed to conclusory explanations in government speeches and leaks, would permit a robust debate about targeted killings – especially of U.S. citizens – that is troubling to many people. Such an analysis could explain, for example, whether the government believed that al-Aulaqi possessed constitutional rights under the First, Fourth, Fifth or other amendments, and (assuming the government concluded that he possessed some such rights) why the rights were not implicated by the strike. It could also describe the limits of presidential power in this context.

The Obama administration frequently trumpets its commitment to transparency and the rule of law. The President and many of his subordinates were critical of what they deemed to be unnecessarily secretive Bush administration legal opinions, and they disclosed an unprecedented number of them, including many classified ones. Now is the time for the administration to apply to itself a principle that it applied to its predecessor.

Again, exactly right. From Marcy Wheeler, to Gang of Eight members, to Jack Goldsmith, the voice is both clear and consistent: The Obama Administration needs to come clean with as much of the legal and factual underpinnings as humanly possible short of compromising “means and methods” that truly are still secret. That would be, by almost any account, a lot of information and law with which the American public, indeed the world, could not only know

and understand, but use to gauge their votes and opinions on. Doing so would make the United States, and its actions, stronger and more sound.

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

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

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

understand why someone might be – that the double standard on discussing covert actions disqualifies the government from invoking technical covertness to avoid scrutiny.

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

Listen, we may not always agree with Jack here,

and both Marcy and I have laid into him plenty over the years where appropriate; but credit should be given where and when due. It is here. And, while I am at it, I would like to recommend people read the Lawfare blog. All three principals there, Ben Wittes, Goldsmith and Bobby Chesney write intelligent and thoughtful pieces on national security and law of war issues. No, you will not always agree with them, nor they with you necessarily; that is okay, it is still informative and educational. If nothing else, you always want to know what the smart people on the other side are saying.

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

CNN CARRIES DOJ WATER IN REPEATING WEAK AMERITHRAX ACCUSATIONS AGAINST IVINS

In an article published on CNN.com on Saturday and a program aired Sunday evening, CNN does their best to lend credence to DOJ's shoddy work that resulted in the unsupported conclusion that Bruce Ivins acted alone in the anthrax attacks of 2001. Remarkably, in their effort to shore up DOJ's weak evidence, CNN chose to emphasize one of the weakest links used to tie Ivins to the attacks.

The article and program center on Ivins' apparent fixation on the Kappa Kappa Gamma

sorority. One former object of Ivins' attentions, researcher Nancy Haigwood, is relied upon almost exclusively for making the leap from Ivins' obsession with the sorority to his role in the anthrax attacks. The article relates the early interactions between Haigwood and Ivins:

Haigwood had met Bruce Ivins in the mid-1970s during graduate school at the University of North Carolina at Chapel Hill. She recalled his incessant questions about her sorority, Kappa Kappa Gamma.

Having joined the sorority as an undergraduate, Haigwood stayed involved as the adult adviser at the UNC chapter. Ivins, she says, always asked her for information about Kappa Kappa Gamma.

"Every time I talked to him, nearly, he would mention it," says Haigwood. "And finally I said, 'You know, Bruce, that's enough!'"

As time went on, Ivins continued to contact Haigwood and apparently submitted a false letter to the editor of a newspaper under her name and vandalized her car. Haigwood began to suspect Ivins in the attacks because of an email he sent to her and others in November, 2001 highlighting his work with the anthrax isolated from the attacks. In one a photo in the email, he is handling culture plates without gloves, a break of containment protocol for working with such dangerous material. Haigwood felt that by sending out this photo, Ivins was emphasizing his immunity to anthrax because he had been vaccinated.

In January of 2002, the FBI emailed members of the American Society of Microbiology, asking for help in identifying suspects in the attack.

Only Haigwood replied to this request and she submitted Ivins' name.

Once the FBI finally got around to concentrating on Ivins as their primary suspect, they had to

undergo some very significant contortions in order to incorporate the Kappa Kappa Gamma obsession into the “evidence” of Ivins’ guilt:

Prosecutors were convinced they had solved a crucial aspect of the mystery: why the anthrax letters were mailed from Princeton, New Jersey. The nondescript but heavily contaminated drop box was on Nassau Street – across from Princeton University.

It had taken several years from the time Nancy Haigwood first contacted the FBI about Bruce Ivins for investigators to make what they believe to be the critical connection:

The mailbox on Nassau Street was just a few doors from a building that leased office space to a sorority: Kappa Kappa Gamma.

That’s it: according to the FBI, Ivins has to be the guilty party and his Kappa Kappa Gamma obsession led him to drive about three and a half hours from where he lived and worked, in order to mail the anthrax letters from a mailbox a few doors away from an office space rented by the sorority.

But this shaky claim already has been thoroughly destroyed. In this post from August, 2008, Marcy showed that Ivins’ work records—from data released by the FBI—indicate that it would not have been possible for him to make the round trip to Princeton and put the letters in the mailbox with them getting the appropriate postmark:

It would not be possible for Ivins to have mailed the anthrax. According to my calculations above, the window during which Ivins could have put the letter in the mailbox on September 17 was from 10:25 to 1:35. But here’s what the FBI itself says about the window in which the letter was mailed:

The investigation examined Dr. Ivins's laboratory activity immediately before and after the window of opportunity for the mailing of the Post and Brokaw letters to New York which **began at 5:00 p.m. Monday, September 17, 2001** and ended at noon on Tuesday, September 18, 2001. [my emphasis]

In other words, had he mailed the anthrax when they're arguing he did, the letter would have been picked up at the 5:00 PM pick-up (if not an earlier one—often boxes have a mid-day pick-up as well), and post-marked on September 17, not on September 18.

When DOJ adjusted their claims on the mailing slightly, Marcy was able to point out that adjustment also was faulty.

Also not explained by DOJ or CNN is why Ivins chose to go all the way to Princeton and use a mailbox near an office (where there likely would have been employees of the sorority but few if any undergraduate members) when there are other Kappa Kappa Gamma chapters closer to where Ivins lived:

All of which ought to raise the stakes on the FBI's really dubious explanation for why Ivins purportedly mailed the anthrax in Princeton. After all, there are Kappa Kappa Gamma chapters at George Washington in DC, at Johns Hopkins in Baltimore, and Washington and Lee in Lexington, VA—all much closer to Ft. Detrick than Princeton. So what's the explanation for driving to Princeton (twice), when Ivins could have associated the anthrax mailing with KKG which much less effort if he had mailed it from any of a number of other schools.

It's a real mystery why CNN chose to try to shore up DOJ's weak case against Ivins. In their defense, they do include these two paragraphs in the online story:

Ivins denied having anything to do with the anthrax letters. And investigators had no direct evidence linking Ivins to the crime: no DNA on the letters, no fingerprints, no eyewitness.

"How [the anthrax] was made, how it was prepared, where it was done, over what period of time – there's a total void of evidence," Ivins' attorney, Paul Kemp, said in a recent CNN interview.

Those weaknesses, however, were simply brushed aside by CNN as they happily joined DOJ in making the leap from Ivins' harassment of Haigwood to making the Kappa Kappa Gamma obsession a central part of their "proof" Ivins carried out the anthrax attacks entirely on his own.

Because DOJ has officially closed the Amerithrax investigation, it is highly unlikely that the true culprit or culprits in this attack will ever be known. CNN, however, is doing its part to make sure the DOJ's unsupported conclusion is cemented in the minds of the low information public.

**EXTRAJUDICIAL
EXECUTION OF SAMIR
KHAN ARGUABLY MORE
SIGNIFICANT THAN**

AWLAKI

By this time in the day, the early morning report of the killing of Anwar Awlaki is old news. From ABC News:

Senior administration officials say that the U.S. has been targeting Awlaki for months, though in recent weeks officials were able to pin down his location.

"They were waiting for the right opportunity to get him away from any civilians," a senior administration official tells ABC News.

And today they got him. Awlaki was killed by a drone delivered Hellfire missile, via a joint CIA and JSOC operation, in the town of Kashef, in Yemen's Jawf province, approximately 140 kilometres east of Sanaa, Yemen's capital. But not only Awlaki was killed, at least three others, including yet another American citizen, Samir Khan, were killed in the strike.

That's right, not just one, *but two*, Americans were summarily and extrajudicially executed by their own government today, at the direct order of the President of the United States. No trial, no verdict, just off with their heads. Heck, there were not even charges filed against either Awlaki or Khan. And it is not that the government did not try either, there was a grand jury convened on Khan, but no charges. Awlaki too was investigated for charges at least twice by the DOJ, but none were found.

But at least Awlaki was on Barrack Obama's "Americans That Are Cool to Kill List". Not so with Samir Khan. Not only is there no evidence whatsoever Khan is on the classified list for killing (actually two different lists) my survey of people knowledgeable in the field today revealed not one who believed Khan was on any such list, either by DOD or CIA.

So, the US has been tracking scrupulously Awlaki

for an extended period and knew with certainty where he was and when, and knew with certainty immediately they had killed Awlaki and Khan. This means the US also knew, with certainty, they were going to execute Samir Khan.

How did the US then make the kill order knowing they were executing a US citizen, not only extrajudicially, but not even with the patina of being on the designated kill list (which would at least presuppose some consideration and Yoo-like pseudo-legal cover)?

Did Barack Obama magically auto-pixie dust Khan onto the list with a wave of his wand on the spot? Even under the various law of war theories, which are not particularly compelling justification to start with as we are not at war with Yemen and it is not a "battlefield", the taking of Khan would appear clearly prohibited under both American and International law. As Mary Ellen O'Connell, vice chairman of the American Society of International Law, relates, via Spencer Ackerman at Wired's Dangerroom:

"The United States is not involved in any armed conflict in Yemen," O'Connell tells Danger Room, "so to use military force to carry out these killings violates international law."

O'Connell's argument turns on the question of whether the U.S. is legally at war in Yemen. And for the administration, that's a dicey proposition. The Obama administration relies on the vague Authorization to Use Military Force, passed in the days after 9/11, to justify its Shadow Wars against terrorists. Under its broad definition, the Authorization's writ makes Planet Earth a battlefield, legally speaking.

But the Authorization authorizes war against "nations, organizations, or persons [the president] determines planned, authorized, committed, or aided the terrorist attacks that occurred on

September 11, 2001." It's a stretch to apply that to al-Qaida's Yemen affiliate, which didn't exist on 9/11. But when House Republicans tried to re-up the Authorization to explicitly bless the new contours of the war against al-Qaida, the Obama administration balked, fearing the GOP was actually tying its hands on the separate question of terrorist detentions.

"It is only during the intense fighting of an armed conflict that international law permits the taking of human life on a basis other than the immediate need to save life," O'Connell continues. "In armed conflict, a privileged belligerent may use lethal force on the basis of reasonable necessity. Outside armed conflict, the relevant standard is absolute necessity."

So did al-Awlaki represent an "absolute" danger to the United States? President Obama, in acknowledging Awlaki's death on Friday morning, didn't present any evidence that he did.

And therein lies the reason the US killing of Samir Khan may be even more troubling than the already troubling killing of al-Awlaki. There is no satisfactory legal basis for either one, but as to Khan there was NO process whatsoever, even the joke "listing" process utilized for Awlaki. The US says it took care to not harm "civilians", apparently that would mean Yemeni civilians. American citizens are fair game for Mr. Obama, list or no list, crime or no crime, charges or no charges. Off with their heads!

People should not just be evaluating today's fresh kills as to Awlaki, Samir Khan should be at the tip of the discussion spear too.

WILLIAM WELCH & DOJ'S DISHONEST INTELLIGENCE WITNESS AGAINST JEFF STERLING

In a comment to Marcy's *The Narratology of Leaking: Risen and Sterling* post yesterday, MadDog related this nugget regarding the Sterling case from a Steve Aftergood article in Privacy News:

I know EW's post's focus was on Sterling's defense team's strategy, but I'd be remiss in not commenting on this tidbit from Steven Aftergood's post:

"...In addition, a former intelligence official now tells prosecutors that portions of his testimony before a grand jury concerning certain conversations with Mr. Risen about Mr. Sterling were "a mistake on his part." As a result, prosecutors said (8 page PDF), Mr. Risen himself is "the only source for the information the government seeks to present to the jury."..."

I wondered just what this paragraph meant. Did it mean, as I assumed, that one of the prosecution's key witnesses, a former intelligence official, had in fact recanted the former intelligence official's grand jury testimony?

Here is just what the prosecution blithely said on the matter from page 5 of their supplement (8 page PDF):

"...Fifth, the testimony of the "former intelligence official" referenced in the Court's Opinion has changed. The former official will now only say that on one

occasion, Mr. Risen spoke with him about the defendant and stated that the defendant had complained about not being sufficiently recognized for his role in Classified Program No. 1 and in his recruitment of a human asset relating to Classified Program No. 1, and that on a separate occasion, Mr. Risen asked him generic questions about whether the CIA would engage in general activity similar to Classified Program No. 1. This former official, however, cannot say that Mr. Risen linked the second conversation with the defendant, although both conversations occurred within several months of each other. The former official termed his grand jury testimony, which linked the two conversations together, as a mistake on his part. In addition, the former official further modified his testimony to say that although Mr. Risen had acknowledged visiting the defendant in his hometown, Mr. Risen's trip to see the defendant was not the main purpose of his travel, but rather a side trip.

The testimony of this former official had been cited by the Court as providing "exactly what the government seeks to obtain from its subpoena [to Mr. Risen]: an admission that Sterling was Risen's source for the classified information in Chapter Nine." Memorandum Opinion (Dkt No.148) at 24. The former official's testimony will not now provide such a direct admission, further underscoring the government's contention that for the reasons discuss in its Motion, Mr. Risen is the only source for the information the government seeks to present to the jury..."

So, that got me thinking, what is the status of the "former intelligence officer" in question? Is he still on the witness list? Who is it, and

why is he “former”? Has he been charged with false statements to a government officer under 18 USC 1001? Has he been charged with perjury under 18 USC 1623? Is there a criminal investigation regarding the duplicity underway? What is being done?

Because, giving the government’s prosecutors the benefit of the doubt that they did not misrepresent or puff the “former intelligence officer’s” statements and testimony to start with, which is a pretty sizable grant for a William Welch run show, then it seems pretty clear that the “former intelligence official” is now saying that he either testified to things he did not, in fact know at the time, or he embellished/lied to the grand jury and the attending prosecutors.

The problem with the above is, the “former intelligence official is not entitled to any protection or benefit of the doubt for a “recantation” under 18 USC 1963(d). Here is the relevant portion on this subject from the US Attorney’s Office Criminal Resource Manual:

Recantation was never a defense to perjury in the common law, and is not a complete defense in a Section 1621 prosecution. *United States v. Norris*, 300 U.S. 564, 573-74 (1937). Recantation in such cases is relevant only as to whether the defendant intended to make a willfully false statement. *Id.*

Section 1623(d), however, makes recantation a bar to a perjury prosecution in certain cases that meet either three or four requirements. First, the recantation must be made “in the same continuous court or grand jury proceeding” in which the original false declaration was made. Second, the recantation must unambiguously admit that the prior statement was false. A request to clarify or supplement testimony is not enough to satisfy the statutory requirement. Finally,

recantation bars prosecution only if the admission occurs at a time when the false declaration has “not substantially affected the proceedings, and it has not become manifest that such falsity has been or will be exposed.” *United States v. Fornaro*, 894 F.2d 508, 511 (2d Cir. 1990); *United States v. Scivola*, 766 F.2d 37, 45 (1st Cir. 1985); *United States v. Moore*, 613 F.2d 1029, 1039 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980). Thus, if the witness has knowledge that the false testimony “has been or will be exposed,” no effective recantation can thereafter be made. *United States v. Denison*, 663 F.2d 611, 615 (5th Cir. 1981). Similarly, if the grand jury has acted in reliance upon the false testimony, no recantation is possible. The United States Court of Appeals for the Eighth Circuit, however, viewed the last two requirements in the disjunctive when it allowed a defendant an opportunity to show either that the proceedings were not substantially affected or that the falsity will be exposed. *United States v. Smith*, 35 F.3d 344, 347 (8th Cir. 1994). Because recantation is a jurisdictional bar to prosecution, Fed.R.Crim.P. 12(b)(2) requires that it be shown before trial. *United States v. Fornaro*, 894 F.2d 508, 511 (2d Cir. 1990).

There are two problems here. First, there is no evidence from the government’s description in its motion that the “former intelligence officer” made a clear admission his/her testimony was false or did anything other than hemming, hawing and modifying. Secondly, and most importantly, it is simply impossible to say that the false testimony of the “former intelligence official” “has not substantially affected the proceedings”. Remember, even the prosecutors, in their motion, stated unequivocally:

The testimony of this former official had been cited by the Court as providing “exactly what the government seeks to obtain from its subpoena [to Mr. Risen]: an admission that Sterling was Risen’s source for the classified information in Chapter Nine.”

It is pretty amazing that here is the Obama DOJ prosecution team, persecuting yet another clearcut whistleblower, whom they ought to be protecting, and doing so with such inconsistent and malignant gimmicks. Welch and DOJ have accused Mr. Sterling of egregious crimes of dishonesty and betrayal, and put up a dishonest unidentified “former intelligence officer” in front of the grand jury to get the indictment. And now Welch and the DOJ not only want to continue their wrongheaded prosecution, but want to invade the sanctity of the press, Jim Risen, which has already been noted by Judge Leonie Brinkema, to bail their sorry behinds out of their predicament.

So, what is going on with the investigation and/or prosecution of this vaunted “former intelligence officer”? Because, save for there being some meaningful activity in that regard, it just looks like another case of a contrived, manipulated and contorted prosecution by a team led by a man, William Welch, famous for just that.

Oh, and as a late arriving parting shot, it turns out that William Welch, who was rather unceremoniously removed from his post at DOJ’s Public Integrity Section (PIN) in the aftermath of the Ted Stevens disaster and court ordered investigation into his conduct, as a news release, pointed out by Shane Harris, about a public official being sentenced in Massachusetts, contains this little plum in its last paragraph:

The case was investigated by the FBI, with assistance from the Massachusetts Inspector General’s Office and the

Lowell Police Department. It is being prosecuted by Senior Litigation Counsel William M. Welch II and Kevin Driscoll of the Criminal Division's Public Integrity Section, with assistance from the U.S. Attorney's Office, Public Corruption Unit.

What were once vices in the Department of Justice are now just unending bad habits under the Administration of Barack Obama and Eric Holder. Nothing has changed.

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

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

Statement of Attorney General Eric Holder on the Resignation of U.S. Attorney for the District of Arizona Dennis Burke 08/30/2011 01:01 PM EDT

"United States Attorney Dennis Burke has demonstrated an unwavering commitment to the Department of Justice and the U.S. Attorney's office, first as a line prosecutor over a decade ago and more recently as United States Attorney," said Attorney General Holder.

Say what? Maybe I am not as plugged in as i used to be, but holy moly this came out of the blue. What is behind the sudden and "immediate" resignation of Dennis Burke, an extremely decent

man who has also been a great manager of the Arizona US Attorney's Office through some of the most perilous times imaginable? The USA who has piloted the office in dealing with such high grade problems such as those stemming from SB1070, to traditional immigration issues, to the Giffords/Loughner shooting tragedy, the corruption and malfeasance of the Maricopa County Sheriff's Office to voting rights and redistricting controversies brought on by the ever crazy Arizona Legislature, has now resigned in the blink of an eye? Really?

Why?

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

Burke's resignation, effective immediately, is one of several personnel moves made in the wake of a federal gun-trafficking investigation that put hundreds of rifles and handguns from Arizona into the hands of criminals in Mexico. Burke's office provided legal guidance to the federal Bureau of Alcohol, Tobacco and Firearms on the flawed initiative called Operation Fast and Furious.

The news comes on the same day as a new acting director was named to oversee the Bureau of Alcohol, Tobacco, Firearms and Explosives following congressional hearings into Fast and Furious, an operation that was aimed at major gun-trafficking networks in the Southwest.

Irrespective of the name attached to the program – I have always known it as the GunWalker operation, so i will stick with that – is has been a first rate clusterfuck from the outset. And, unlike so many things bollixing up the government, it cannot be traced back to the Bush/Cheney Administration; this beauty was the

product of the Obama and Holder Department of Justice. In fact, the entire effort was, believe it or not, a byproduct of the vaunted Obama Stimulus Package, known as the American Recovery and Reinvestment Act of 2009.

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

Questions about the Fast and Furious program began to emerge in the spring as a member of Congress began pressing ATF officials for answers about an operation that was designed to track small-time gun buyers until the guns reached the hands of major weapons traffickers along the southwestern border.

Instead, ATF agents ended up arresting low-level suspects and nearly 2,000 of the weapons were unaccounted for, with nearly two-thirds of those guns likely in Mexico, according to testimony federal firearms investigators gave to a House committee in June.

Investigators also confirmed that two of the weapons connected to the ATF operations were found at the scene of a December gunbattle near Rio Rico, Ariz., that left Border Patrol Agent Brian Terry dead.

Terry's slaying effectively ended the operation.

Dozens of so-called straw buyers have been arrested, and more than 10,000 guns confiscated. However, the ATF came in for criticism from the Justice Department's Office of Inspector General last year because Project Gun Runner was catching only the straw buyers – small fish in the smuggling business.

At a news conference in February, the ATF in Phoenix announced that 34

suspects had been indicted and that U.S. agents had seized 375 weapons as part of Operation Fast and Furious. None of those arrested was a significant cartel figure.

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

The ATF has promoted three key supervisors of a controversial sting operation that allowed firearms to be illegally trafficked across the U.S. border into Mexico.

All three have been heavily criticized for pushing the program forward even as it became apparent that it was out of control. At least 2,000 guns were lost and many turned up at crime scenes in Mexico and two at the killing of a U.S. Border Patrol agent in Arizona.

The three supervisors have been given new management positions at the agency's headquarters in Washington. They are William G. McMahon, who was the ATF's deputy director of operations in the West, where the illegal trafficking program was focused, and William D. Newell and David Voth, both field supervisors who oversaw the program out of the agency's Phoenix office.

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

So McMahon, Newell and Voth were "laterally transferred" instead of being promoted. well,

that's convincing. The three men most responsible for the operational program still have cushy federal jobs at their regular status and pay grade, and Dennis Burke and the acting head of ATF are going to take the fall for it all. How nice.

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

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

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

Why is the Obama Administration selling out a man like Dennis Burke? Because the Gunwalker fiasco is really that big of a total cock-up, they own every ounce of it, and would rather paint a scapegoat than own up to it. The mess has not gotten more play in the news and political discourse because the Obama Administration and Holder Department of Justice have done everything within their power to tamp down any investigation and/or discussion of the

case because it really is that ugly.

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

Sen. Charles Grassley, R-Iowa, ranking minority member of the Senate Judiciary Committee, has pressed the ATF for two months to disclose details of Project Gun Runner and to justify a policy that allowed weapons into a nation where there were more than 36,000 drug-related murders in four years.

Last month, William McMahon, the head of ATF's Western region, testified that the agency had good intentions when it launched Operation Fast and Furious in 2009. But looking back, there are things ATF would have done differently, he said.

Appearing before the House Oversight and Government Reform Committee, McMahon said he was committed to dismantling criminal networks on both sides of the border and that "in our zeal to do so, and in the heat of battle, mistakes were made. And for that I apologize."

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

REGGIE WALTON UNLEASHES THE ROCKET'S RED GLARE

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

The judge presiding over Roger Clemens' perjury trial declared a mistrial over inadmissible evidence shown to jurors.

U.S. District Judge Reggie Walton said Clemens could not be assured a fair trial after prosecutors showed jurors evidence against his orders in the second day of testimony.

He will hear a motion on whether a new trial would be considered double jeopardy.

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

.
"I don't see how I un-ring the bell," he said

Walton interrupted the prosecution's playing of a video from Clemens' 2008 testimony before Congress and had the jury removed from the courtroom. Clemens is accused of lying during that testimony when he said he never used performance-enhancing drugs during his 24-season career in the major leagues.

One of the chief pieces of evidence against Clemens is testimony from his former teammate and close friend, Andy Pettitte, who says Clemens told him in 1999 or 2000 that he used human growth

hormone. Clemens has said that Pettitte misheard him. Pettitte also says he told his wife, Laura, about the conversation the same day it happened.

Prosecutors had wanted to call Laura Pettitte as a witness to back up her husband's account, but Walton had said he wasn't inclined to have her testify since she didn't speak directly to Clemens.

Walton was angered that in the video prosecutors showed the jury, Rep. Elijah Cummings, D-Md., referred to Pettitte's conversation with his wife.

"I think that a first-year law student would know that you can't bolster the credibility of one witness with clearly inadmissible evidence," Walton said.

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

So, now the germane question is where do we go from here; i.e. what about a new trial. Well, that depends on a fair amount of pretty complicated things that are not going to be self evident to those not more than intimately experienced in the nuances of technical trial law are going to understand. I will get into that in detail, and discuss the legal implications and situation, when the pleadings are filed. Judge Walton has scheduled a Sept. 2 hearing on whether to hold a new trial, or dismiss the case permanently due to double jeopardy. clemens' defense team will have until July 29 to file the motion to dismiss with

prejudice and the prosecution has until Aug. 2 to respond.

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

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

[Judge Walton] said it was the second time that prosecutors had gone against his orders – the other being an incident that happened during opening arguments Wednesday when assistant U.S. attorney Steven Durham said that Pettite and two other of Clemens' New York teammates, Chuck Knoblauch and Mike Stanton, had used human growth hormone.

Walton said in pre-trial hearings that such testimony could lead jurors to consider Clemens guilty by association. Clemens' defense attorney objected when Durham made the statement and Walton told jurors to disregard Durham's comments about other players.

Yes, boy howdy, that is precisely right.

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

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

including the Mitchell report kerfuffle, it was the AUSAs too.

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

IS ANWAR AL-AWLAKI THE UNNAMED “NATIONAL OF THE UNITED STATES” IN WARSAME INDICTMENT?

So, is it truly the case that Awlaki is indeed the unnamed “national of the United States” here in the Warsame indictment? I don’t know for certain, but it sure as heck fits the facts as we know them and the depraved refusal of the American government to talk about or let the public know its basis for impunity in marking an American citizen for extrajudicial termination with prejudice.

OBAMA’S “EVOLUTION” ACCELERATES: DOJ FORMALLY DECLARES DOMA UNCONSTITUTIONAL

In a late filing in the Northern District of California (NDCA) case of Golinski v. US

Department of Personnel Management, the
Department of Justice has formally stated that
the Defense of Marriage Act (DOMA) is
unconstitutional.