

AARON SWARTZ, PLEA LEVERAGING & THE BORDENKIRCHER PROBLEM



As Netroots
Nation 2013
begins, I want
to emphasize one
of the best
panels (If I do
say so) of the
event. It is
titled: *Beyond
Aaron's Law:
Reining in
Prosecutorial*

Overreach, and will be hosted by Marcy Wheeler. Joining Marcy will be Aaron Swartz's attorney, Elliot R. Peters, of Keker & Van Nest LLP in San Francisco, Shayana Kadidal of the Center for Constitutional Rights in New York, and Professor Jonathan Simon of Boalt Hall at Berkeley. The panel goes off at 3:00 pm Saturday June 22.

As a lead in to the panel discussion, I want to address a topic that struck me from the first moment of the tragic loss of Aaron Swartz, the pernicious effect of the late 70's Supreme Court case of *Bordenkircher v. Hayes*.

Paul Hayes was a defendant on a rather minor (involved \$88.30), but still felonious, bad check charge in Kentucky. But Hayes had a bad prior criminal history with two felony priors. The prosecutor offered Hayes a stipulated five year plea, but flat out threatened Hayes that if he didn't accept the offer, the prosecution would charge and prosecute under Kentucky's habitual criminal (three strike) law. Hayes balked, went to trial and was subsequently convicted and sentenced to life in prison under the habitual offender enhancement charge. It was a prosecutorial blackmail threat to coerce a

plea, and the prosecutor delivered on his threat.

Hayes appealed to every court imaginable on the theory of “vindictive prosecution” with the prosecutorial blackmail as the underlying premise. Effectively, the argument was if overly harsh charging and punishment is the penalty for a defendant exercising his right to trial, then such constitutes prosecutorial vindictiveness and degrades, if not guts, the defendant’s constitutionally protected right to trial.

Every appellate court along the way declined Hayes’ appeal until the 6th Circuit. The 6th, however, came up with a surprising decision, granting Hayes relief, but under a slightly different theory. The 6th held that if the prosecutor had originally charged Hayes with the habitual offender charge, and then offered to drop it if Hayes pled guilty, that would have been perfectly acceptable; but using it like a bludgeon in plea negotiations once the case was charged was impermissibly vindictive, and therefore unconstitutional.

Then, from the 6th Circuit, the case finally made its way to the Supreme Court of the United States. By that time, Hayes had long been in prison and the prison warden, Bordenkircher, was the nominal appellee in the caption of the case. The Supreme Court, distinguishing another seminal vindictive prosecution case, *Blackledge v. Perry*, reversed the 6th Circuit and reinstated Hayes’ life sentence.

Blackledge v. Perry is a famous case known in criminal defense circles as the “upping the ante case”. Blackledge was convicted of a misdemeanor and appealed, which in North Carolina at the time meant he would get a new trial in a higher court. The state retaliated by filing the charge as a felony in the higher court, thus “upping the ante”. The Supreme Court in *Blackledge* held that to be impermissibly vindictive.

A prosecutor clearly has a considerable stake in discouraging convicted

misdemeanants from appealing and thus obtaining a [new trial] in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources. . . . And, if the prosecutor has the means readily at hand to discourage such appeals – by “upping the ante” through a felony indictment whenever a convicted misdemeanor pursues his statutory appellate remedy – the State can insure that only the most hardy defendants will brave the hazards of a [new] trial.

. . . A person convicted of an offense is entitled to pursue his statutory right to a trial . . ., without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Alas, the Supreme Court in *Bordenkircher v. Hayes* did not think the same logic in *Blackledge* controlled the day. In a 5-4 decision, Potter Stewart held that the practice engaged in by the Hayes prosecutor was just fine. In distinguishing *Blackledge*, Justice Stewart wrote:

In those cases the Court was dealing with the State’s unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction – a situation “very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.”

By now, it should go without saying that Justice Stewart’s view of a criminal defendant having “relatively equal bargaining power” with the

prosecution is a sick and demented joke. Nothing could be further from the truth. But, from that time on, the power of prosecutors to add charges as a bludgeon against criminal defendants has been unfettered and increasingly problematic.

And so we come to the unfortunate case of Aaron Swartz. You can probably already see the *Bordenkircher* problem in the Swartz case. There is, however, another related problem in Swartz – overcharging. Overcharging is the initial charging by a prosecutor of multiple counts where only one charge is called for, or tacking on extra charges that are beyond what the evidence calls for, all in an effort to coerce the defendant to quickly accept a plea. It is a corollary, but distinct, practice that goes hand in hand with *Bordenkircher* leveraging of charges. Both are excessive and vindictive leveraging of criminal defendants to force a plea (or cooperation as a snitch), and both are present in spades in the prosecution of Aaron Swartz by Carmen Ortiz and the US Attorney's Office for the District of Massachusetts.

Initially, upon arrest at MIT, Aaron Swartz was first charged in the local Middlesex/Cambridge state court. Which was somewhat notable and interesting since the arresting officer was actually Special Agent Michael Pickett of the United States Secret Service, who was working with the Boston area located New England Electronic Crimes Task Force. The Task Force had a well established reputation for working with the D-Mass US Attorney's Office and FBI. So, despite an arrest by a federal agent, working a federal task force, the charge was in local court. That was January 7, 2011.

Then came the first significant upping of the ante against Aaron Swartz with the filing of the initial federal indictment on four counts with a request for forfeiture of property on July 14, 2011, over six months after his arrest and filing of local charges. What did Aaron Swartz do in the time between his arrest and initial charges to the federal indictment to earn the

increase in seriousness of the charges against him? Nothing, he simply failed to roll over.

You would think the United States Department of Justice might have exercised enough vindictiveness against the 26 year old Swartz. But, no, there was more in the offing. Much more. Again, Aaron Swartz did not roll over. Swartz had a benefit that very few caught up in the American justice system do, he had money and he had powerful friends and supporters. He wouldn't roll.

Aaron Swartz and his lawyers relentlessly tried to negotiate a fair plea – probation and no incarceration – for the piddly level of conduct that was actually involved, and they were relentlessly rebuffed by the DOJ. What happened next? The US Attorney's Office for the District of Massachusetts, led by Carmen Ortiz (with undoubtedly some help from DOJ Main), decided to really put the thumb on Mr. Swartz.

A superseding indictment to further terrify Swartz was filed on September 12, 2012 charging an outrageously puffed up thirteen felony counts, along with the forfeiture demand. Four months later Aaron Swartz was gone.

Aaron Swartz was overcharged right out of the gate in the first federal indictment, which also constituted upping the ante from the state charges. Then the overcharging and upping of the ante went nuclear in the superseding indictment. It was unnecessary, oppressive and unreasonable. It was, and is, the mark of a Department of Justice, and justice system, run amok. Both a *Bordenkircher* and an overcharging nightmare writ large and public.

Aaron Swartz is tragically gone far too young, but he left us so much in his time. And one of those things is the public exposure this case has brought, and the manner in which it has exposed the ugly underbelly of the American criminal justice system and its reliance on an oppressive and unbalanced system of plea negotiation.

Kevin Cullen, in a Boston Globe op-ed, in quoting Mr. Swartz's lawyer Elliot Peters, put it succinctly:

Elliot Peters, the San Francisco lawyer who took the case over from Weinberg last fall, could not persuade prosecutors to drop their demand that Swartz plead guilty to 13 felonies and spend six months in prison. Peters was preparing to go to trial and was confident of prevailing.

But the prospects weighed heavily on Swartz.

"There was such rigidity with the people we were dealing with," Peters said. "I couldn't find anyone in that office to talk about proportionality and humanity. It was driven by a desire to turn this into a significant case, so that some prosecutor could put it in his portfolio."

Proportionality and humanity are excellent words that are part and parcel of what is supposed to be "prosecutorial discretion". As the courts in *Bordenkircher* and *Blackledge* noted, the criminal justice system, from local to federal, runs on plea bargaining. But contrary to what Potter Stewart said in *Bordenkircher*, the power of the defendant is NOT "relatively equal" to that of the prosecution.

The system, and the wielding of power by the government is out of balance, and out of control, as even prominent former federal judges are noting. There are any number of reasons prosecutors so abuse their power. Sometimes it is the desire to notch the big win, always it is a self desire to maintain their personal "conviction record" necessary for promotion, and sometimes it is to force a defendant into cooperation and snitching on other potential defendants and cases. All can be appropriate concerns for a prosecutor, but not without

proportionality, humanity and discretion.

Radley Balko penned an excellent discussion of many of the different facets of the immense power, and abuse of power, of the prosecutor:

Prosecutors have enormous power. Even investigations that don't result in any charges can ruin lives, ruin reputations, and drive their targets into bankruptcy. It has become an overtly political position – in general, but particularly at the federal level. If a prosecutor wants to ruin your life, he or she can. Even if you've done nothing wrong, there isn't a whole lot you can do about it.

I highly recommend reading Balko's piece in full as there is much depth there that goes beyond what there is space for in the instant post.

High profile cases like that of Aaron Swartz have brought a new light on abuse of prosecutorial power. Another example I feel compelled to mention is that of famed Hollywood director John McTiernan that was put on display last month in one of the last big articles by a friend to this blog, the late Michael Hastings. But while the famous cases like Swartz and McTiernan bring needed exposure, the root problem plagues and rots the entire system. Most defendants are at a far greater disadvantage than those who are wealthy and well known.

Former federal prosecutor and current criminal defense attorney Kenneth White, on his Popehat blog, gave a passionate and troubling description of the bigger picture in our criminal justice system:

People think the system failed or abused or singled out Aaron Swartz. This is the system, dammit, and if you think that Aaron Swartz faced what he did because he's a hacker and the government has it out for hackers, then I'm here to tell you that you're full of shit. Aaron

Swartz had a great, well-funded defense team and a healthy support system. Most people don't. If you read this blog, you know the types of things the system does to people, including people with far less ability to fight back. The system sends sick people to their death in a system that can't care for them because they smoked weed. The system denies its prisoners medical care until they have to have their genitals amputated in a fruitless effort to delay an early death from cancer. The system sticks people into cells and very literally forgets them until they've spent a few days drinking their own urine. The system strives and strains to execute people based solely on the word of serial perjurers – serial perjurers whose record of perjury they have concealed from the defense. The system prizes junk science so long as that junk science supports its allegations. The system treats invocation of constitutional rights as evidence of guilt. The system reacts with petulant fury to being questioned. The system detects and punishes law enforcement and prosecutorial misconduct so rarely that bad actors are hardly ever subjected to real consequences.

These things happen every day to people less photogenic, talented, and charismatic than Aaron Swartz.

If the Aaron Swartz case has taught us anything, it is that as a nation we desperately need to have a discussion and recalibration on prosecutorial discretion, proportionality and humanity in our criminal justice system. The "system" is not about "them", it is about us and who we are as a people. It is long past time to fix the system.

THE INTERNET DIDN'T KILL THE MIDDLE CLASS; LAXITY AND APATHY DID

In tandem with the release of his book, *Who Owns the Future?*, Jaron Lanier's interview with Salon generated a



lot of hand-wringing across social media. It seems Lanier, one of our so-called intellectual visionaries, believes that the collapse of Kodak and its 140,000 jobs, and the rise of Instagram and its 13 jobs, exemplifies the killing field of the internet. Lanier theorizes good paying jobs that once supported a thriving middle class have disappeared as internet-enabled firms replaced them. As these jobs vaporized, so did necessary benefits. Here's a key excerpt from the interview:

“Here’s a current example of the challenge we face,” he writes in the book’s prelude: “At the height of its power, the photography company Kodak employed more than 140,000 people and was worth \$28 billion. They even invented the first digital camera. But today Kodak is bankrupt, and the new face of digital photography has become Instagram. When Instagram was sold to Facebook for a billion dollars in 2012, it employed only 13 people. Where did all those jobs disappear? And what happened to the wealth that all those middle-class jobs created?”

What a crock of decade-late shit.

Where the hell was Lanier in the late 1990s and early 2000s, when the U.S. manufacturing sector nose-dived due to government policies created by corporate-acquired elected officials and appointees?

It wasn't the internet that killed the middle class. The apathy of intellectuals and the technology elite did; too few bothered to point out the potential repercussions of NAFTA and other domestic job-depleting policies. In the absence of thought leaders, corporatists sold the public and their electeds on job creation anticipated from globalizing policies; they just didn't tell us the jobs created wouldn't be ours.

It wasn't the rise of digitization that killed the middle class. It was the insufficiency of protests among U.S. brain power, including publicly-funded academics, failing to advocate for labor and home-grown innovation; their ignorance about the nature of blue collar jobs and the creative output they help realize compounded the problem.

Manufacturing has increasingly reduced man hours in tandem with productivity-increasing technological improvements. It wasn't the internet that killed these jobs, though technology reduced some of them. The inability to plan for the necessary shift of jobs to other fields revealed the lack of comprehensive, forward-thinking manufacturing and labor policies.

It all smells of Not-My-Problem, i.e., "I'm educated, technology-enabled, white collar; those stupid low-tech blue collar folks' jobs aren't my problem."

Until suddenly it is.

I remember having an argument with an academic in 2006 about the oncoming paradigm shift in education where intellectual property and its transference became the core product and key

competency in the business model. Universities, for example, would be at risk; if information was digitized and commodified, what would happen to the brick-and-mortar campuses? Eventually they would have to rationalize their existence and differentiate themselves if everybody and anybody could obtain the same education online, no matter where students were located. The cost of education could collapse in a commodified environment.

At the time I was told that wasn't realistic, it would never happen – the academic's approach to telling me I was full of shit.

Hello, MOOCs (massive open online classes).

Now academics can finally see the threat to their careers. They couldn't give a rat's butt when blue collar workers at dirty, dangerous jobs were threatened. They're worried now, though, when the jobs of white collar folks supporting cultural creatives like themselves are threatened.

A decade-plus later, an intellectual with a background in technology, suddenly realizes that the paradigm shift is rolling onto and over his world – oh, and there's a gaping maw where government policy should be to prevent the destruction of the world as he knows it. Nice latency you've got there, bub, the very definition of lax.

Another industry suffering from collapse is construction – see this active timeline and note the location of job growth up to 2008 and the corresponding collapse after the fact. This was another opportunity for visionaries a decade ago to discuss the repercussions of cheap money and inadequate protections against predatory banking. While the construction industry itself didn't suffer from a shift in technology, it was the increasing use of technology combined with lax regulation and oversight in mortgages, financing, and related derivatives that caused the collapse.

Again, intellectuals and technology folks were

mute as middle class jobs bound up in real estate, construction, finance industries were dramatically impacted by the economic meltdown. Safety nets were attacked when they weren't squashed altogether.

Lanier's mourning for Kodak is pathetic not only for its narrow comprehension, but its blindness. Kodak's film business model is non-competitive and obsolete, given current policies combined with globalization. The present is digital; Kodak should have seen this and been looking for an Instagram future of its own years ago. It should have envisioned a new economic ecosystem developed around digital images. Or it should have lobbied harder for policies that would have encouraged on-shoring versus offshoring of manufacturing facilities, jobs, and profits, in order to save its film-based business.

I suggest rapid development of time travel technology so that reactive eulogists like Lanier can beam themselves back to the end of the Clinton and early Bush administrations to fix the roots of these problems.

In the meantime, we should be encouraging proactive visionaries – true intellectuals who can see the big picture and imagine establishment of government policies preserving pay and benefits while encouraging innovation.

Otherwise we would do well to imagine and plan for a near-term future in which all manufacturing and most construction around the world is replaced by 3D printers. Our kids and grandkids may be reduced to futures in direct competition with a global employment pool of poorly compensated printer designers, printer operators, and printer repairmen, where lowest cost energy as a factor in production reigns supreme.

Perhaps Lanier will write about the horror of such a future a decade later.

TSARNAEV: RIGHT TO COUNSEL, NOT MIRANDA, IS THE KEY



Since Dzhokhar Tsarnaev was taken into custody just over a week ago, the hue and cry in the public and media discussion has centered on “Miranda” rights and to what extent the “public safety

exception” thereto should come into play. That discussion has been almost uniformly wrongheaded. I will return to this shortly, but for now wish to point out something that appears to have mostly escaped notice of the media and legal commentariat – Tsarnaev repeatedly tried to invoke his right to counsel.

Tucked in the body of this Los Angeles Times report is the startling revelation of Tsarnaev’s attempt to invoke:

A senior congressional aide said Tsarnaev had asked several times for a lawyer, but that request was ignored since he was being questioned under the public safety exemption to the Miranda rule. The exemption allows defendants to be questioned about imminent threats, such as whether other plots are in the works or other plotters are on the loose.

Assuming the accuracy of this report, the news of Tsarnaev repeatedly attempting to invoke right to counsel is critically important because now not only is the 5th Amendment right to silence in play, but so too is the right to counsel under *both* the 5th and 6th Amendments.

While the two rights are commonly, and mistakenly, thought of as one in the same due to the conflation in the language of the Miranda warnings, they are actually somewhat distinct rights and principles. In fact, there is no explicit right to counsel set out in the Fifth at all, it is a creature of implication manufactured by the Supreme Court, while the Sixth Amendment does have an explicit right to counsel, but it putatively only attaches after charging, and is charge specific. Both are critical to consideration of the Tsarnaev case; what follows is a long, but necessary, discussion of why.

In fact, "Miranda rights" is a term that is somewhat of a misnomer, the "rights" are inherent in the Constitution and cannot be granted or withheld via utterance of the classic words heard every day on reruns of Law & Order on television. Those words are an advisory of that which suspects already possess – a warning to them, albeit a critical one.

In addition to being merely an advisory of rights already possessed, and contrary to popular belief, advising suspects of Miranda rarely shuts them down from talking (that, far more often, as will be discussed below, comes from the interjection of counsel into the equation). As Dr. Richard Leo has studied, and stated, the impact of Miranda on suspects' willingness to talk to interrogators is far less than commonly believed. One study has the effect rate of Miranda warnings on willingness to talk at 16%; from my two plus decades of experience in criminal defense, I would be shocked if it is really even that high.

On top of this fact, the Miranda warnings relate only to the admissibility of evidence or, rather, the inadmissibility – the exclusion – of evidence if it is taken in violation of Miranda. Professor Orin Kerr gives a great explanation here.

Since there is, without any real question, more than sufficient evidence to convict Tsarnaev

without the need for admissibility of any verbal confession or other communicative evidence he may have provided the members of the HIG (High Value Detainee Interrogation Group), the real question was never “Miranda” but when Tsarnaev would be presented to the court which, in turn, would determine when he would be given access to counsel. Not surprisingly, one of the first people I saw to correctly point this out was Marcy Wheeler:

Folks: FAR more important, IMO, than Miranda is presentment. If he sees a judge in 2 days she'll make sure he gets a lawyer.

That could not have been more true, as was demonstrated on Monday morning, April 22, when Magistrate Judge Marianne Bowler went to the Beth Israel Deconess Medical Center where Tsarnaev was receiving treatment in custody. Also present was William Fick and Miriam Conrad (fascinating look at Conrad and her history here) of the Federal Public Defender's office in Boston. Fick, who speaks fluent Russian, and Conrad met with Tsarnaev immediately before the formal initial appearance process and represented him in the brief actual initial appearance itself.

So, all is as it should be because Tsarnaev got the initial appearance he was entitled to by law, right? No.

First off, there is the timing of the initial appearance, sometimes also colloquially referred to as “presentment”. The initial appearance is governed by Rule 5 of the Federal Rules of Criminal Procedure (FRCrP). While you may have seen mention of “within 48 hours”, the rule itself provides only that an arrested person must be taken before a magistrate “without unnecessary delay”. The “48 hours” standard for first court appearances comes from the 1991 case of *County of Riverside v. McLaughlin*, which held that 48 hours was the outside limit. The importance of the Rule 5 initial appearance was

cemented by the Supreme Court as recently as 2009 in the case of *Corley v. United States* (which even suggests delays longer than six hours may be presumptively violative).

But the 48 hour limit was not honored, in either spirit or letter, by the federal authorities in charge of the detention and interrogation of Dzhokhar Tsarnaev. The formal taking into custody of Tsarnaev, the arrest, was effected and announced at 8:45 pm EST Friday night April 19 and, as evidenced by the complaint cover sheet filed with the court, Tsarnaev was immediately in federal custody. The criminal complaint signifying the formal charging of Tsarnaev is noted by Judge Bowler to have been sworn out to her at 6:47 pm on Sunday, April 21. So, Tsarnaev was *charged* within 48 hours of his arrest, but he was not given his *initial appearance* within 48 hours, as required by Rule 5 FRCrP, *County of Riverside v. McLaughlin* and *Corley*.

The Rule 5 initial appearance was finally given to Dzhokhar Tsarnaev Monday morning April 22, as evidenced by the official transcript of the proceeding. The specific sequence and timing of these events is critical because of the nature and timing of the interrogation of Tsarnaev prior to him being advised of his Miranda warnings by Judge Bowler. It appears as if there were two substantive interrogation sessions by the HIG team, a fact reported by no less than Ray Kelly, based upon claimed briefing by the federal authorities:

The police commissioner explained that was the original story that Dzhokhar told police when they began to interrogate him in the hospital, but that he later provided a more detailed account during a subsequent interview.

Both interviews appear to have happened before authorities read the younger Tsarnaev brother his Miranda rights on Monday. According to Kelly, Dzhokhar was interrogated twice by authorities in the

hospital, the first time on “Saturday evening into Sunday morning” and the second on “Sunday evening into Monday morning.” According to an Associated Press report from earlier today, the questioning lasted a total of 16 hours before Dzhokhar stopped cooperating upon being informed of his right to remain silent.

Remember, however, from above, that “Tsarnaev had asked several times for a lawyer, but that request was ignored since he was being questioned under the public safety exemption to the Miranda rule”. This is where the Miranda, the public safety exception and right to counsel all intersect for Mr. Tsarnaev. Frankly, the government has issues on all of those fronts, but let us first look at the one that has been most discussed, and cowardly demagogued by the likes of House Intel Chairman Mike Rogers and NY Congressman Peter King, the most – Miranda and the “public safety exception”.

Professor Erwin Chemerinsky, in the Los Angeles Times, explains the nuts and bolts of the “exception”, and why it arguably does not apply to Tsarnaev’s situation:

Holder said on the Sunday talk shows that the government intended to invoke the “public safety exception” that allows suspects to be questioned without being given Miranda warnings in emergency circumstances. But this exception does not apply here because there was no emergency threat facing law enforcement.

The emergency exception to Miranda that Holder embraced was announced by the Supreme Court in *New York vs. Quarles* in 1984. A woman told the police that she had been raped by a man with a gun. When the police caught the suspect in a grocery store, they saw an empty holster and no gun. The man was asked about the

location of the gun, and he told the officer where to find it.

The Supreme Court ruled that, although the suspect had not yet been given Miranda warnings, the statement about the gun was admissible against him because of the urgent need to find the gun. In other words, the public safety exception applies only when police are acting in an emergency to prevent serious immediate harm. If the police needed to question Tsarnaev as to the location of other bombs, the emergency exception would apply.

The *New York v. Quarles* case Chemerinsky discusses as setting out the public safety exception can be found here. In light of the fact that not only had multiple voices, from Attorney General Holder, to President Obama, to a myriad of investigation authorities, both local and federal, stated there was no evidence of further threat, there is some merit to Professor Chemerinsky's opinion on the *Quarles* exception not being applicable to Tsarnaev by the time his interrogation commenced on Saturday April 20.

Of course, the DOJ did not rely on *Quarles* alone, they also invoked their now infamous "'Public Safety Exception Memo" first incarnated in a memo from Attorney General Holder dated October 19, 2010, and formally distributed in a cleaned up version dated October 21, 2010. The memo goes beyond the basic immediate public safety questions permitted by *Quarles* to allow further broader ranging questions:

There may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government's interest in

obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation. [4] In these instances, agents should seek SAC approval to proceed with unwarned interrogation after the public safety questioning is concluded. Whenever feasible, the SAC will consult with FBI-HQ (including OGC) and Department of Justice attorneys before granting approval. **Presentment of an arrestee may not be delayed simply to continue the interrogation, unless the defendant has timely waived prompt presentment.** (Emphasis added)

Let us give the DOJ and HIG team the benefit of the doubt under *Quarles*, and even their own self-stated memo (which is neither binding nor controlling law in any regard), and grant that some base level of questioning of Tsarnaev was reasonable to confirm there were no outstanding bombs, weapons or other dangers, and no outstanding co-conspirators and/or terrorist ties, whether domestic or foreign. In fact, there is court precedent in a recent case via the decision of Judge Nancy Edmunds to uphold this use of the public safety exception, in the case of the “Undie Bomber”, Umar Farouk Abdulmutallab

Grant all of these root questions, and the bolded language – from the Obama DOJ’s own Public Safety Exception Memo – delineates why there is *still* a significant problem with the treatment of Tsarnaev. The Rule 5 initial appearance, i.e. “presentment”, was not complied with as to Tsarnaev, and public safety questioning can neither appropriately nor legitimately delay it.

In fairness to the Obama DOJ, who has been roundly blasted for the Public Safety Exception Memo, they arguably could have gone further and not included the such strong guidance against violation of Rule 5. There is authority from both the Ninth Circuit in *United States v.*

DeSantis, 870 F.2d 536, 541 (9th Cir. 1989), and the Fourth Circuit in *United States v. Mobley*, 40 F.3d 688, 692–93 (4th Cir. 1994), *cert. denied*, 514 U.S. 1129 (1995), for the proposition that, like *Miranda*, the right to counsel can give way briefly for the public safety exception under *Quarles*.

The extensions of the public safety exception to right to counsel by the courts in *Desantis* and *Mobley*, however, give little, if any, support to the government's actions vis a vis Mr. Tsarnaev, because the intrusion into the constitutional right to counsel in both the other cases was so fleeting – in both it was no more than a question or two about a weapon on the premises of a search while the search warrant was actively being executed. Nothing whatsoever like the 16 hours of interrogation applied to Tsarnaev, across at least two sessions, over a period of at least two days. The “public safety” interrogation of Tsarnaev was not immediate to potential danger, was not narrow and limited, and occurred long after he had been taken into custody. And, apparently, at least as to one of those sessions, the “Sunday evening into Monday morning” session, the interrogation occurred well after formal charges had been filed with Judge Bowler.

Let's take a look at the “right to counsel”, why it differs, and is arguably far more important in the Tsarnaev scenario than utterance of the “*Miranda* warnings”. The right to counsel during custodial police interrogations emanates from the seminal 1964 case of *Escobedo v. Illinois*. The language of the decision syllabus reflects the bright line rule announced by the court:

...where a police investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect in police custody who has been refused an opportunity to consult with his counsel and who has not been warned of his constitutional right to keep silent, the accused has been

denied the assistance of counsel in violation of the Sixth and Fourteenth Amendments; and no statement extracted by the police during the interrogation may be used against him at a trial.

Escobedo, as direct law, was implicitly obviated two years later by the decision in *Miranda v. Arizona*, where the court suddenly, and somewhat curiously, placed the right to custodial interrogation counsel under the umbrella of the Fifth Amendment instead of the Sixth.

The primacy, and fundamental nature of the right to custodial interrogation counsel, however, was confirmed in the 1981 decision of *Edwards v. Arizona*, where the court held suspects have the right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation, as declared in *Miranda*, and that right cannot be invaded absent a clear and valid waiver. While it is true, under *Berghuis v. Thompson*, a suspect must affirmatively invoke his right to counsel as opposed to simply standing silent, there is no authority for interrogators to simply ignore and frustrate, over an extended period, a suspect's express request for counsel as appears to have occurred in Tsarnaev's case.

Once, however, a defendant is presented to the court for initial appearance, he will be afforded counsel, and counsel will in almost all cases stop immediate questioning, both to prevent incrimination and to preserve evidence as leverage for plea negotiations. That is exactly what a defense counsel should do, and exactly what our constitutional system of justice and protections contemplates. This is also exactly why the Rule 5 presentment, and not "Miranda", has always been the critical concern in analyzing the Tsarnaev case, and still is. Once legitimate general questions as to public safety had been asked, Tsarnaev should have been afforded his Rule 5 initial appearance and access to counsel. Clearly Judge Bowler was available on Sunday the 21st, since, as

previously noted, she was available to accept the swearing and filing of the criminal complaint.

Again, the timing of the interrogation, and requests for counsel, will prove critical. There are still many questions and facts to be locked down on these issues including, but not limited to:

When in the timeline did Dzhokhar Tsarnaev first invoke by requesting counsel?

How many times did he attempt to do so?

In light of the fact much of his communication to the HIG interrogators was reportedly written, were his attempts to invoke in writing too?

How did the interrogation team document Tsarnaev's non-written responses in light of the difficulty he had in communicating?

Was there a video or audio record made to preserve the evidence?

Did Tsarnaev provide any evidence that would warrant continuation of the *Quarles* public safety questioning?

In light of the fact that Undie Bomber Abdulmutallab (who actually *had* layers of foreign terrorist ties and activities outside of the continental US) was only questioned for 50 minutes under the public safety exception, why did Tsarnaev (who had no such ties or activity) require 16 hours of interrogation over two full days, substantial portions of which were *after* charges were filed?

The bottom line is this: not telling a suspect about his rights in order to try obtain brief, immediate and emergency public safety information is one thing. Straight out denying

and refusing a defendant constitutional rights he is legally entitled to, and has tried to invoke, is quite another. The government has issues on both fronts as to Tsarnaev.

The other thing that must be remembered is all of the foregoing likely only affects the admissibility of evidence communicated in the relevant period by Tsarnaev, not the legality of his detention and not the ability of the government to convict him. At best, it involves evidentiary exclusion principles only. There is, by all accounts, more than enough evidence to convict the man without anything he communicated being admitted in a trial (if indeed there ever is a trial). Dzhokhar Tsarnaev will not be walking free in society again no matter how it sorts out. Big and emotionally fraught cases of national interest rarely make for good, and sound, creation of law and the Tsarnaev case is no exception.

How the Tsarnaev facts and case is discussed, sorted out in court, and what foundation it lays for future cases – and there will be future cases – does, however, speak loudly as to who we are as a nation. Are we the cowering nation of supposed leaders such as Mike Rogers and Peter King, or are we the strong and resolute one envisioned by our Founding Fathers and protected by the constitutional rights they bequeathed us with? Recent polls have shown that Americans are increasingly “skeptical about sacrificing personal freedoms for security.” The people have that right, we should listen to them.

DOMA’S DAY AT THE SUPREMES

UPDATE
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HERE IS THE TRANSCRIPT OF TODAY'S ARGUMENT

I am going to do something different today and put up a post for semi-live coverage – and discussion – of the DOMA oral arguments in the Supreme Court this morning. First, a brief intro, and then I will try to throw tidbits in here and there as I see it during and after the arguments.

The case at bar is styled *United States v. Windsor, et al.* In a nutshell, Edith Windsor was married to Thea Spyer, and their marriage was recognized under New York law. Ms. Spyer passed away in 2009 and Windsor was assessed \$363,000.00 in inheritance taxes because the federal government, i.e. the IRS, did not recognize her marriage to Spyer in light of the Defense of Marriage Act, or DOMA. Litigation ensued and the 2nd Circuit, in an opinion written by Chief Judge Dennis Jacobs, struck down DOMA as unconstitutional and ruled in favor of Edith Windsor. Other significant cases in Circuit Courts of Appeal hang in the lurch of abeyance awaiting the Supreme Court decision in *Windsor*, including *Golinski v. Office of Personnel Management*, *Gill v. OPM* and *Pedersen v. Office of Personnel Management*.

As an aside, here is a fantastic look at the restaurant where Edith Windsor and Thea Spyer met nearly 50 years ago.

Arguing the case will be Solicitor General Donald B. Verrilli again for the United States, Paul Clement for the Bi-Partisan Legal Advisory Group (BLAG) on putative behalf of Congress,

because the Obama Administration ceased defending DOMA on the grounds it was discriminatory and unconstitutional, and Robbie Kaplan for Edith Windsor. Clement and Verrilli are well known by now, but for some background on Robbie Kaplan, who is making her first appearance before the Supremes, here is a very nice article. Also arguing will be Harvard Law Professor Vicki Jackson who was "invited" by SCOTUS to argue on the standing and jurisdiction issue, specifically to argue that there is no standing and/or jurisdiction, because the Obama Administration quit defending and BLAG will argue in favor of standing and jurisdiction.

Here is a brief synopsis of the argument order and timing put together by Ed Whelan at National Review Note: I include Whelan here only for the schedule info, I do not necessarily agree with his framing of the issues).

Okay, that is it for now, we shall see how this goes!

Live Updates:

10:39 am It appears oral arguments are underway after two decisions in other cases were announced.

10:51 am RT @SCOTUSblog: #doma jurisdiction arg continues with no clear indication of whether majority believes #scotus has the power to decide case.

11:00 am By the way, the excellent SCOTUSBlog won a peabody award for its coverage of the Supreme Court.

11:05 am @reuters wire: 7:56:34 AM RTRS – U.S. SUPREME COURT CONSERVATIVE JUSTICES SAY TROUBLED BY OBAMA REFUSAL TO DEFEND MARRIAGE LAW

11:15 am Wall Street Journal is reporting: Chief Justice John Roberts told attorney Sri Srinivasan, the principal deputy solicitor general, that the government's actions were "unprecedented." To agree with a lower court ruling finding DOMA unconstitutional but yet

seeking the Supreme Court to weigh in while it enforces the law is “has never been done before,” he said.

11:20 am Is anybody reading this, or is this a waste?

11:32 am @SCOTUSblog Kennedy asks two questions doubting #doma validity but nothing decisive and Chief Justice and Kagan have yet to speak.

11:40 am Wall Street Journal (Evan Perez) Chief Justice Roberts repeatedly expressed irritation at the Obama administration, telling Ms. Jackson, the court-appointed lawyer, and without specifically mentioning the administration, that perhaps the government should have the “courage” to execute the law based on the constitutionality rather instead of shifting the responsibility to the Supreme Court to make a decision.

11:45 am Wall Street Journal (Evan Perez) Paul Clement, attorney for lawmakers defending the law, argued that the went to the very heart of Congress’s prerogatives. Passing laws and having them defended was the “single most important” function of Congress, he argued.

11:52 am Wall Street Journal (Evan Perez) Justice Scalia and Mr. Srinivasan parried on whether Congress should have any expectation that laws it passes should be defended by the Justice Department. Mr. Srinivasan said he wouldn’t give an “algorithm” that explained when Justice lawyers would or wouldn’t defend a statute, but ceded to Justice Scalia’s suggestion that Congress has no “assurance” that when it passes a law it will be defended. That’s not what the OLC opinion guiding the Justice Department’s actions in these cases says, Justice Scalia interjected.

11:56 am Associated Press (Brent Kendall) One of the last questions on the standing issue came from Justice Samuel Alito, who asked whether the House could step in to defend DOMA without the Senate’s participation, given that it takes both chambers to pass a law.

11:59 am Bloomberg News During initial arguments today on the 1996 Defense of Marriage Act, Justice Anthony Kennedy suggested that a federal law that doesn't recognize gay marriages that are legal in some states can create conflicts. "You are at real risk of running in conflict" with the "essence" of state powers, Kennedy said. Still, he also said there was "quite a bit" to the argument by backers of the law that the federal government at times needs to use its own definition of marriage, such as in income tax cases.

Justice Ruth Bader Ginsburg said that when a marriage under state law isn't recognized by the federal government, "One might well ask, what kind of marriage is this?"

12:05 pm @SCOTUSblog Final update: #scotus 80% likely to strike down #doma. J Kennedy suggests it violates states' rights; 4 other Justices see as gay rights.

12:07 pm The argument at the Court is well into the merits portion of the case now

12:09 pm Wall Street Journal (Brent Kendall) Justice Kennedy, however, jumped in with federalism concerns, questioning whether the federal government was intruding on the states' territory. With there being so many different federal laws, the federal government is intertwined with citizens' day-to-day lives, he said. Because of this, DOMA runs the risk of running into conflict with the states' role in defining marriage, he said.

12:12 pm It is pretty clear to me, from a variety of sources I am tracking, that the Court has serious problems with DOMA on the merits. Clement is getting pounded with questions on discrimination, conflict with state laws and federalism concerns. Pretty clear that if standing is found, DOMA is going down.

12:15 pm Wall Street Journal (Brent Kendall) Justice Ginsburg again says the denial of federal benefits to same-sex couples pervades every area of life. DOMA, she said, diminished

same-sex marriages to “skim-milk” marriages. Justice Elena Kagan (pictured) follows a short time later saying DOMA did things the federal government hadn’t done before, and she said the law raised red flags.

12:19 pm @reuters wire: U.S. SUPREME COURT CONCLUDES ORAL ARGUMENTS ON FEDERAL LAW RESTRICTING SAME-SEX BENEFITS

12:30 pm @AdamSerwer Con Justices contemptuous of Obama decision not to defend DOMA but still enforce law. Kennedy said “it gives you intellectual whiplash”

Okay, as I said earlier, if the Justices can get by the standing issue, it seems clear that DOMA is cooked. I *think* they will get by standing and enter a decision finding DOMA unconstitutional as to Section 3, which is the specific part of the law under attack in *Windsor*. That effectively guts all of DOMA.

That is it for the “Live Coverage” portion of the festivities today. It should be about an hour and a half until the audio and transcript are available. As soon as they are, I will add them as an update at the top of the post, and will then put this post on the top of the blog for most of the rest of the day for further discussion. It has been both a fascinating and frustrating two days of critical oral argument; please continue to analyze and discuss!

THE PROP 8 ORAL ARGUMENTS BEFORE THE SUPREME COURT

A momentous morning in the Supreme Court. All the work, analysis, speculation, briefing and lobbying culminated in an oral argument in *Hollingsworth v. Perry*



lasting nearly an hour and a half – half an hour over the scheduled time. There are a lot of reports and opinions floating around about what transpired.

Here is Tom Goldstein

Here is Reuters led by Lawrence Hurley and David Ingram

Here is Lyle Denniston of SCOTUSBlog

Here is USA Today

Here is Huffington Post's Mike Sacks with a video report

Here is Ryan Reilly and Mike Sacks with a written report at HuffPost

Suffice it to say, we do not know a heck of a lot after oral arguments than we did right before them. The full range of decision is on the table. However, there were certainly some hints given. Scalia and Alito are very hostile, and Thomas is almost certainly with them in that regard although he once again stood mute. Ginsburg, Kagan and Sotomayor seemed receptive to the Ted Olson's arguments. Breyer oddly quiet and hard to read. As is so often the case, that left Anthony Kennedy in effective control of the balance.

If Kennedy's tenor at argument is any guide, and it isn't necessarily, he is unlikely to sign on

to a broad ruling. In fact he may be struggling with standing, but that is very hard to read. Several commenters I have seen interpreted Kennedy's questions as having a real problem with standing and signaling a possibility of punting the case on that basis. From what I have read so far, I wouldn't say that...and neither does Adam Serwer, who was present at argument.

So, in short, I would summarize thusly: Standing is a bigger issue than I had hoped, and there is more resistance to a broad ruling than I had hoped. But the game is still on. Remember when Jeff Toobin's train wreck/plane wreck take after the ACA oral arguments; you just don't know and cannot tell.

I will likely be back later after analysis of the pertinent material. For now, let me leave you with that material and media so you too can hear and see the groundbreaking day in the Supreme Court:

Here is the full transcript of the oral arguments

Here is the audio of the proceedings

Enjoy, and I look forward to discussing this! And, again, there will be updates to this post throughout the day, so keep checking for them.

[As always on these Prop 8 posts, the absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Please visit Mirko and check out his stock of work.]

A PATH TO CIVIL RIGHTS

HISTORY FOR THE SUPREME COURT, OBAMA AND VERRILLI

Just
about
a
month
ago,
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stration to file a brief in favor of marriage equality in the *Hollingsworth v. Perry* Prop 8 case before the Supreme Court, I described the stakes:

And here we are on the cusp on the next defining moment in the quest for equality for all in the US. It is not for origin, not for skin color, not for gender, but for something every bit as root fundamental, sexual identity and preference. Marriage equality, yes, but more than that, equality for all as human beings before the law and governmental function.

For all the talk of the DOMA cases, the real linchpin for the last measure of equality remains the broad mandate achievable only through *Hollingsworth v. Perry*, the Proposition 8 case.

It was true then, it is true now. To the everlasting credit of of President Obama, Solicitor General Verrilli and the Administration, they did indeed file a brief in support. It was a surprisingly strong brief with a clarion call for full equality based upon heightened scrutiny; yet is was conflicted with a final ask only for a restricted ruling limited

in application to either just California or, at most, a handful of somewhat similarly situated states. In short, the ask in the Administration's brief was not for equality for all, in all the states; just in some.

On the eve of one one of the seminal moments of Supreme Court history – it is easily arguable this is far more of a defining moment than the ACA Healthcare scuffle was – it is again incumbent on the Administration to give the justices the headroom to make a broad decision granting equality for all.

Even in the short time since the Obama Administration filed their brief, between February 28 and now, the mounting tide of public opinion and desire for full equality has grown substantially in multiple ways. Colorado, a state where the thought was once beyond contentious, passed full civil union equality and Governor Hickenlooper signed it into law. And a new comprehensive Washington Post/ABC News public poll has found that a full 58% of Americans now support the legality of gay nuptials, and a whopping 81% of adults between the ages of 18 and 29 so support.

The writing is on the wall, and the trend overwhelming. And it simply does not make sense for the Obama Administration to buck this tidal wave and argue only for equality in a handful of states, with equality for some, but far from for all. Barack Obama and Donald Verrilli laid every bit the foundation needed to argue for broad based full equality – in all states – in their brief.

It is time for Mr. Obama and Mr. Verrilli to step up and forcefully tell the Supreme Court that full equality is the right way to rule. The Court granted Solicitor General Verrilli time to express the Administration's position in the oral argument Tuesday; he should use it in the name and cause of full broad based equality. It is a time for leadership; this is a moment for Mr. Obama and his attorney to display it.

By the same token, it is also time for the Supreme Court to do the same. So often it has been argued the "Court should not get out in front of popular opinion". Bollocks, the Court should refuse to put themselves behind public opinion, and an ever strengthening one at that, by shamefully ducking the perfect opportunity to stand for that which the Constitution purports to stand, equal protection for all.

There are a myriad of legal arguments and discussions, and just about every commenter and expert in the field has been offering them up over the last week. I will leave that to another day, after the court has heard the oral arguments, we have our first inclination of what the justices are focused on, and the case is under advisement for decision.

For now, here are a couple of warm ups for Tuesday's oral argument in *Hollingsworth v. Perry*/Prop 8 and Wednesday's oral argument in *United States v. Windsor*/DOMA. First a nice little video "Viewer's Guide to Gay Marriage Oral Arguments" with Supreme Court barrister extraordinaire, and SCOTUSBlog founder, Tom Goldstein. Here is a handy flow chart of all the different possibilities, and the why for each, of how the court may rule on both cases. It is really pretty neat and useful tool.

The briefing is long done now and the Justices understand the issues. But if the ACA/Healthcare cases taught us anything, it is that Justice Roberts is concerned about the legacy and esteem of the court. And Justice Kennedy has already shown how committed he is to fairness in social justice issues and willing to even go out on limbs ahead of controversial public opinion with his written opinions.

At this point, the most effective leverage is not repeated discussion of the minutiae of law, but rather the demonstration of the righteousness of full equality. History will prove fools of those who sanction continued bigotry against marital equality, and anything less than a broad based heightened scrutiny

finding, for equality for all people, in all states, is a continuation of such unacceptable bigotry.

UPDATE: Professor Adam Winkler of UCLA has a piece out today that embodies my point in the post perfectly. Discussing the disastrous and ugly 1986 decision of the Supreme Court in *Bowers v. Hardwick* to uphold sodomy laws when times and opinion had already changed, and the profound regret felt by Anthony Kennedy's predecessor, Lewis Powell, Professor Winkler writes:

Kennedy is clearly a justice who considers how his legacy will be shaped by his votes. In 1992, when the Supreme Court was asked to overturn *Roe* in a case called *Planned Parenthood v. Casey*, Justice Kennedy originally sided with the conservatives to reverse the controversial privacy decision. Like Justice Powell in *Bowers*, Justice Kennedy then changed his vote. He went to see Justice Harry Blackmun, the author of *Roe*, and explained that he was concerned about how history would judge Kennedy's decision to end constitutional protections for women's right to choose.

Like many people, Justice Kennedy may believe that the public tide against marriage discrimination is growing and that gay marriage is inevitable. History is not likely to be kind to those justices who vote to continue relegating LGBT people to second-class citizenship. As the swing justice ponders how to rule in the gay-marriage cases, Justice Powell's well-known regret over *Bowers*, and the widespread recognition that *Bowers* was wrongly decided, will almost certainly weigh on his mind.

Adam's article is worth a full read. And I agree with it completely.

FURTHER REFLECTIONS ON THE OBAMA AMICUS BRIEF IN PROP 8

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g a post up for discussion and the crucible of discussion here and on Twitter – and a bit of sleep – I have some further thoughts on the amicus brief filed late yesterday by the Obama Administration in *Hollingsworth v. Perry*.

My ultimate conclusions on what the Obama amicus means and portends has not changed much, but there are several things that should be said both to explain my criticism and give a little more credit to the Administration where due. First an analogy explaining my criticism of the Obama brief.

Imagine if, when *Brown v. Board of Education* was being considered, the Eisenhower Administration had instructed it's Assistant Attorney General and OLC chief, J. Lee Rankin, to amicus brief that only Kansas and a handful of other similarly situated states, but not the rest of the country where the bigotry of segregation was at its most prevalent worst, should be granted desegregation. How would history have held Mr. Eisenhower and Mr. Rankin? That is, of course, not what happened in *Brown*; the Eisenhower Administration filed an amicus brief demanding equality and desegregation for all citizens, in all states.


Messrs. Obama, Holder and Verrilli, however, fell short of such a demand for equality for all in the civil rights moment, the *Brown v. Board*, of their time. Let the record reflect they did have the courage to join the game, which is in and of itself a commendable thing, just that they did not muster the full courage to play to win for all Americans, regardless of their particular state of domicile – and especially not for those in the states with the most sexual orientation bigotry and discrimination.

In this regard, I think our friend at Daily Kos, Adam Bonin, summarized the duality of the Obama amicus quite well:

To be sure, the brief argues all the right things about why laws targeting gays should be subject to heightened scrutiny, and that none of the proffered justifications for treating their relationships differently have merit (“Reference to tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles.”) Still, for those who were seeking a full-throated endorsement of 50-state marriage equality, you will find this brief lacking.

That said, from the day this suit was filed in May 2009, I have suggested that this limited path is the Court would ultimately take. And it can be dangerous to advance positions which the Court might reject, especially when they are not necessary for the resolution of the instant case. But, still, there was an opportunity for boldness here, and the Obama administration did not take it. As a great man once said:

Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law – for if we are truly created equal, then



surely the love we commit to one
another must be equal as well.

Adam's point about the fear of overreaching when the *Perry* litigation was originally filed is a good one. As I think he has evolved to having less fear in that regard over time, the explanation for such a shift comes from the changed nature of the ground underneath the larger issue. It is a testament to the genius of the *Perry* litigation in its inception, and even more so to the way Judge Vaughn Walker framed an actual trial that laid bare, with both evidence and the inability for haters to provide credible evidence, the hollow immorality and rank bigotry of the Proponents of Proposition 8.

The space created by Judge Walker's amazing decision created the headroom for a cascade of events in DOMA cases, equality legislation in states and popular votes in other states, all in favor of marriage equality. This past election cycle provided the once unthinkable result of marriage equality going four for four in popular votes.

The ground has so seismically changed, the momentum of social conscience so strong, that we simply occupy a different place now than existed at the start of the *Perry* litigation. And that is the ground the Supreme Court will have to recognize when they hear oral arguments on March 26 in *Hollingsworth v. Perry* and March 27 in the DOMA cases.

Regardless of the messy way in which it did so, the Supreme Court (and its Chief Justice, John Roberts) proved in the ACA cases that they are aware of, and attend to, the legacy of the court. It is crystal clear that marriage equality, and equality for sexual orientation, is happening. The only question at this point is how complete, how fast.

This is the great civil rights measure of this period in American history; I find it hard to

believe Justice Anthony Kennedy, who has already displayed his social conscience in *Lawrence v. Texas*, wants to be on the wrong side of history. In August of 2010, on the release of Vaughn Walker's historic trial court opinion, I quoted Linda Greenhouse in laying out why I thought Justice Kennedy would swing the majority in favor of marriage equality when *Perry* made its way to the court for review:

As the inestimable Linda Greenhouse noted recently, although the Roberts Court is increasingly dogmatically conservative, and Kagan will move it further in that direction, the overarching influence of Justice Anthony Kennedy is changing and, in some ways, declining. However, there is one irreducible characteristic of Justice Kennedy that still seems to hold true; she wrote of Kennedy:

...he embraces whichever side he is on with full rhetorical force. Much more than Justice O'Connor, whose position at the center of the court fell to him when she left, Justice Kennedy tends to think in broad categories. It has always seemed to me that he divides the world, at least the world of government action – which is what situates a case in a constitutional framework – between the fair and the not-fair.

The money quotes of the future consideration of the certain appeal and certiorari to come on Judge Walker's decision today in *Perry v. Schwarzenegger* are:

Laws designed to bar gay men and lesbians from achieving their goals through the political process are not fair (he wrote

the majority opinion striking down such a measure in a 1996 case, *Romer v. Evans*) because “central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”

.....

In a book titled “Justice Kennedy’s Jurisprudence,” a political scientist, Frank J. Colucci, wrote last year that Justice Kennedy is animated by an “ideal of liberty” that “independently considers whether government actions have the effect of preventing an individual from developing his or her distinctive personality or acting according to conscience, demean a person’s standing in the community, or violate essential elements of human dignity.” That is, I think, a more academically elegant way of saying fair versus not-fair.

So the challenge for anyone arguing to Justice Kennedy in the courtroom, or with him as a colleague in the conference room, would seem to be to persuade him to see your case on the fair (or not-fair, depending) side of the line.

I believe that Linda is spot on the money with her analysis of what drives Anthony Kennedy in his jurisprudence. And this is exactly what his longtime friend, and Supreme Court advocate

extraordinaire, Ted Olson will play on and argue when the day arrives.

Well, that day is upon us now. Honestly, with the tide of momentum headed in the direction it is, I am less and less convinced John Roberts wants to be on the wrong side of civil rights history either.

But giving the Justices the moral and sociological headroom to grant equality to *all* the citizens, in *all* the states, especially those in the discriminatory swaths of the country, is key to the cause. The *Perry* Plaintiffs have done their part. Yesterday, the Obama Administration had the opportunity to go the distance, and they pulled up slightly short.

I feared Obama might come up so short their brief could be counterproductive; that did not occur. The song could have been, and should have been, stronger; but credit where due, they hit the necessary notes. It is filed and done, and it is overall an important and powerful thing. *Perry* Plaintiffs' attorney Ted Boutsous put it well:

Their arguments from start to finish would apply to other states," he said. "The argument of the day (against same-sex marriage) is the responsible pro-creation argument. The United States takes it apart piece by piece. It's those same types of arguments that are used in other jurisdictions to justify the exclusion of gays and lesbians from marriage.

And as Marcia Coyle observed in the National Law Journal BLT article the Boutsous quote above came from:

And the heightened scrutiny analysis, he added, is "exceedingly important," not just in the marriage context but in other contexts where gay men and women face discrimination.

Marcia is exactly right (and her report well worth a read), and between the Perry Plaintiffs' merits brief and the Obama Administration amicus brief, there is a foundation from which to argue to all the Justices, but especially Anthony Kennedy and John Roberts, for equality for all across the board.

Mr. Obama and Mr. Holder can help immeasurably in the coming days leading up to oral argument and decision by the Justices by using their bully pulpit to advocate for full heightened scrutiny equal protection for all, in all states. The cause endures and their duty maintains. And we, as citizens can give them the support and positive feedback to help them do so. Let the final push for full equality begin.

THE OBAMA DOJ FILES A TIMID BRIEF IN PERRY/PROP 8!

The news was broken, right around 2:00 pm EST by NBC's Pete Williams, that the Obama Administration would indeed file a brief in support of



marriage equality in *Hollingsworth v. Perry*. Here was the original tweet by NBC's Williams:

Obama Justice Dept to file Supreme Court amicus brief today opposing Prop 8 in

Calif and expressing support for same-sex marriage to resume.

Here was Williams' followup story at NBCNews.com. The inherent problem with the original report was that it tended to indicate the Obama Administration was briefing only on the restricted *Romer v. Evans* posture heinously crafted by Judge Stephen Reinhardt in the 9th Circuit.

So, we were left hanging wondering exactly how the Obama Administration really briefed the issue, was it a limited *Romer* brief, or one for full marriage equality and heightened scrutiny under the equal protection and due process clauses that would give all citizens, nationwide, equality as I argued for earlier this week?

We now have the answer, and the brief, and here it is the brief in all its not quite glory:

The Obama Administration has, shockingly (okay, I do not mean that in the least), tried to nuance its way and split babies. Typical cowardly bunk by Mr. Obama. Lyle Denniston at SCOTUSBlog depicted it thusly:

The historic document, though, could give the Court a way to advance gay marriage rights, without going the full step – now being advocated by two California couples who have been challenging Proposition 8 since 2009 – of declaring that marriage should be open to all same-sex couples as a constitutional requirement.

Administration sources said that President Obama was involved directly in the government's choice of whether to enter the case at all, and then in fashioning the argument that it should make. Having previously endorsed the general idea that same-sex individuals should be allowed to marry the person they love, the President was said to

have felt an obligation to have his government take part in the fundamental test of marital rights that is posed by the Proposition 8 case. The President could take the opportunity to speak to the nation on the marriage question soon.

In essence, the position of the federal government would simultaneously give some support to marriage equality while showing some respect for the rights of states to regulate that institution. What the brief endorsed is what has been called the “eight-state solution” – that is, if a state already recognizes for same-sex couples all the privileges and benefits that married couples have (as in the eight states that do so through “civil unions”) those states must go the final step and allow those couples to get married. The argument is that it violates the Constitution’s guarantee of legal equality when both same-sex and opposite-sex couples are entitled to the same marital benefits, but only the opposite-sex couples can get married.

Honestly, I think Mr. Denniston is being kind. President Obama’s position bears the mark of a full throated coward. Clearly, when Mr. Obama said this to ABC News, he was blowing smoke up the posterior of the American public:

...obviously, my personal view, which is that I think that same-sex couples should have the same rights and be treated like everybody else. And that’s something I feel very strongly about and my administration is acting on wherever we can.

That statement would say that Obama actually supports full equal protection for ALL Americans. But the position staked out today in the Administration’s brief filed by his

Solicitor General puts the lie to Obama's rhetoric.

Mr. Obama has consistently lied about his dedication to civil liberties, privacy and the Fourth Amendment, I guess it should not be shocking that he would lie about his dedication to civil rights for all, across all the states, in the form of marriage equality. And that is exactly what he has done. And as Denniston's article makes clear, this decision bore the active participation and decision making of Obama personally. The cowardice is his to bear personally. Thanks for the fish Mr. Obama.

That is the biggest of the *Hollingsworth v. Perry* briefing news today, but certainly not the entirety of it. Also filed today, among others, was a brief by a group of 14 states led by Massachusetts and New York and an interesting brief by NFL players Chris Kluwe and Brendon Ayanbadejo. The brief by the 14 states is helpful in the way it portrays marriage in the states, both straight and gay, and in that it, on page four, adopts the position of Olson, Boies and the Prop 8 Plaintiffs that the Supreme Court must find for full heightened scrutiny protection for sexual orientation under the Equal Protection and Due Process Clauses. The Kluwe and Ayanbadejo brief, frankly, is not particularly helpful in that regard as it only discussed the limited *Romer* based finding that would leave marriage equality up to the states.

The same group of American businesses who weighed in on the DOMA cases also filed a brief today in *Hollingsworth v. Perry*. In a more negative development, former Solicitor Walter Dellinger also filed an amicus brief today that is literally loathsome and dangerous in its argument against even giving standing for appeal to the Supreme Court. Dellinger embarrassed himself, but so too did Barack Obama. Must be something in the water of centrist Democratic thought.

So, there you have it. It was a rather important, if not quite as fulfilling as should

have been, day in the life of the *Hollingsworth v. Perry* litigation. I guess credit should be given to Mr. Obama even for weighing in at all, and undoubtedly most media and pundits will slather him with praise for just that. Somehow, I cannot. The full measure of greatness was there for the taking, and Barack Obama, Eric Holder and Donald Verrilli, Jr. whiffed at the full mark of greatness. They will be remembered for their support, and their failure to truly step up will likely dissipate with time; but let it be said here and now.

In spite of the cowardly and restrictive actions by the “liberal President Obama” the cause of true heightened scrutiny protection for ALL Americans endures and lives on. Just not with the support of the President of the United States of America. that “leader” took the cheap “states rights” cowardly way out. Let us hope Anthony M. Kennedy and the majority of the Supreme Court have higher morals and muster as men.

[As always on these Prop 8 posts, the absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Please visit Mirko and check out his stock of work.]

OBAMA, HOLDER, VERRILLI AND THE MARK OF CIVIL RIGHTS HISTORY

Leaving aside the heinous 3/5 compromise set forth by James Wilson and Roger Sherman at the founding Philadelphia Constitutional Convention,

American history is marked by significant moments of dedication to civil rights for its citizens. Far from perfect, it has been a struggle and evolution. As Ralph Waldo Emerson noted:

Nothing great was ever achieved without enthusiasm.

Which is certainly true, from the Founding Fathers, to Lincoln and the Emancipation Proclamation, to the 19th Amendment protecting the right of women to vote, to the Civil Rights Act of 1964, moments of enthusiasm, sweat, toil and, eventually, greatness mark the struggle for equality for all in the United States.

And here we are on the cusp on the next defining moment in the quest for equality for all in the US. It is not for origin, not for skin color, not for gender, but for something every bit as root fundamental, sexual identity and preference. Marriage equality, yes, but more than that, equality for all as human beings before the law and governmental function.

For all the talk of the DOMA cases, the real linchpin for the last measure of equality remains the broad mandate achievable only through *Hollingsworth v. Perry*, the Proposition 8 case. The case for full equality in *Hollingsworth* has been made beautifully, and strongly, in the Respondent's Brief penned by Ted Olson, David Boies, Theodore Boutrous and Jeremy Goldman.

But there is still a missing voice in the discussion, that of the United States government. The government has the voice, and spoke it loudly in the DOMA litigation, first in a policy declaration letter to Congress, then in lower court briefing and finally in Supreme Court briefing. Mr. Obama's initial policy declaration noted that we must "suspicious of classifications based on sexual orientation" and concluded:

...that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Indeed that is true, but it only takes the equality movement so far, it still leaves room and ability for bias against sexual orientation by individual states, most notably on the front of marriage equality, but potentially a host of other invidious modalities as well.

That is not good enough. It is time for the government, by and through the Obama Administration, to take the final step in cementing full equality for all citizens, not just as to the federal government, but as to the states as well. The government needs to file an amicus brief supporting full equality in *Hollingsworth v. Perry*.

Three men are in the crucible – President Barack Obama, Attorney General Eric Holder and Solicitor General Donald Verrilli, Jr. History will remember these men either way, but they have the opportunity to be remembered among the giants in civil rights history. It is a defining moment for their once and future legacy.

What a major moment in history this is, and will be, if the if the Obama Administration Solicitor General files a brief in support of full heightened scrutiny based protection for sexual orientation.

It brings to mind the scene from “Lincoln” where President Lincoln says

“Now, Now, Now”

and forces the 13th amendment through because “Now” was the moment to eradicate slavery in one fell swoop and waiting posed unconscionable risks and further damning inequality.

Such is exactly the time and place now as to the last recognized measure of fundamental equality,

sexual orientation. The *Perry* Plaintiffs' team has argued well in their brief for the broad principles of due process and equal protection heightened scrutiny that would resolve these issues "Now". All the stars are aligning. Prominent Republicans have filed an amicus brief. So too a broad swath of leading American businesses. Openly gay Congress members are calling for it.

Now is the time to seize the moment and eradicate discrimination across the board against gay men and women. This is the moment for enthusiasm, and President Obama, Attorney General Holder and Solicitor General Verrilli have a historic opportunity to help make it happen. This is the moment, and they need to step up. Great men take such great steps.

The time is "Now, Now, Now".

File the amicus brief for full equality in *Hollingsworth v. Perry* gentlemen.

RICK SCOTT CONTINUES STRUGGLE TO LOOK HUMAN, ENDORSES MEDICAID EXPANSION WHILE INFURIATING TEA PARTY

Rick Scott was elected Governor of Florida in 2010 by a razor-thin margin that many attribute to his strong support from the Tea Party movement. A large portion of that support was garnered through his highly public opposition to President Obama's Affordable Care Act. However, with the small exception of my Congressional district electing batshit crazy Tea Partier Ted

Yoho in 2012, it appears that the Tea Party is on a bit of a retreat in Florida and so, with Charlie Crist now looking like a very formidable opponent for the 2014 gubernatorial race, Scott is systematically reversing his position on a number of issues away from the crazy and toward both the human and the humane.

A huge step in Scott's attempted move back toward humanity took place early yesterday evening, as he announced his support for Florida participating in expansion of Medicaid under the ACA. He even resorted to the death of his mother to justify the move:

The governor said he gained new perspective after his mother's death last year, calling his decision to support a key provision of the Affordable Care Act a "compassionate, common sense step forward," and not a "white flag of surrender to government-run healthcare."

However, the representatives of Professional Crazy were not amused by this development. From the same AP article:

"I am flabbergasted. This is a guy who, before he was a candidate for governor, started an organization to fight 'Obamacare' in the expansion of medical entitlements. This is a guy who said it will never happen on his watch. Well, here it is," said Slade O'Brien, Florida director of the conservative group Americans for Prosperity.

In other words, AFP notes that Scott was just one more of their huge investments that produced very poor returns.

And McClatchy brings us the Tea Party response, thankfully translated from the original jibberish:

"This is just another example of

Republicans lying to Floridians,” said Everett Wilkinson of Palm Beach Gardens, calling Scott “the Benedict Arnold to the patriot and tea party movement in Florida.”

Of course, Florida’s Grifter in Chief (who still holds the record for the largest federal fine paid by a company for Medicare fraud) wouldn’t make this move if he couldn’t further enrich his old HCA co-conspirators or other corporate fraudsters, and so he has engineered a new opportunity. From the AP article:

Scott’s announcement came hours after federal health officials said they plan to approve the state’s longstanding request to privatize its Medicaid program statewide if they agree to beef up transparency and accountability measures. He said that decision signaled that feds were willing to work with the state to give them the flexibility they need.

Okay, now I see the “transparency” in this particular move.

Yesterday’s move by Scott comes on the heels of his amazing turn-arounds on his participation in the blatantly partisan efforts to suppress Democratic votes in the 2012 election and a stunning reversal on education funding, as well. His reversal on voting was carried out on no less a platform than CNN and his education reversal made for an interesting observation from the editorial writers at the Gainesville Sun:

It’s startling to see Gov. Rick Scott transform from being the University of Florida’s tormentor to its new best friend.

And the Senate and House Minority Leaders see through Scott’s reversal on K12 funding:

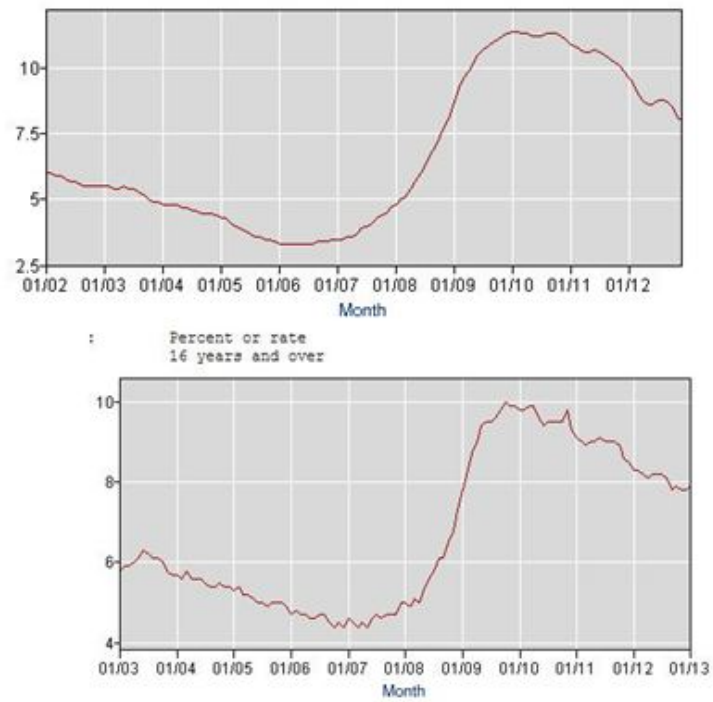
Senate Minority Leader Chris Smith, D-Fort Lauderdale, said the economy is moving forward, but Scott is “back-pedaling” with his eyes on the 2014 election because his reform efforts in education, pensions and insurance have not been popular.

“When he’s now throwing divots and dollars at education, after he came in and slashed education, he’s finally admitting that he was wrong to try to starve education.

“Because of the things he’s done in the past, he’s not really putting them ahead.”

House Minority Leader Perry Thurston, D-Fort Lauderdale, called Scott’s proposal “woefully lacking” because of the requirement for state employees to contribute 3 percent of their pay into the Florida Retirement System and the \$1.3 billion in cuts to education in 2011.

In the end though, even with these reversals, Scott will have to deal with the fact that his moves to slash taxes had zero impact on Florida’s unemployment rate. The graphs below, from the Bureau of Labor Statistics, show Florida’s unemployment rate on the top and the overall US unemployment rate on the bottom. Florida fared exactly as the rest of the US did in its recovery from the economic meltdown of 2008 despite Scott’s claims that his plan would lead to a faster recovery of jobs in Florida.



It will be interesting to see how Scott tries to spin these lackluster results on job creation. I'd put a big wager on Scott saying it's all Obama's fault.