FDL: LOOKING AT THINGS AS THEY WERE; DREAMING OF THINGS THAT NEVER WOULD BE

There are multiple better voices here to address the apparent demise of Firedoglake, whether briefly or at length. I was, in a way, an interloper by chance. By fortune, actually. Because I was asked, for inexplicable reasons I will never fully understand, but will always treasure, to join Emptywheel when it morphed from The Last Hurrah into the Emptywheel blog at Firedoglake. Yes, I had been a decent contributor to both Next Hurrah, and, often, FDL, but still it was a bit of a shock when it came.

I can honestly say I, as a result, encountered some of the finest and most genuine people in my life. That happened because of FDL, both as to the lifetime friendships with people that are here with us, including, most notably, Marcy, and all the others. Marcy, Rayne, Jim White, Ed Walker, Rosalind….and, please, let us not forget Mary and some of the others no longer here. All that came, at least for me, out of seeing Scooter Libby coverage early on nearly a decade ago. At FDL.

This medium may be digital, but it has wings and real life beyond the URL’s and binary code or whatever. The people I have met and interacted with as a result of being around FDL were, with little exception, remarkable, intelligent, wonderful and I think the world has been made better by them.

So, to Jane Hamsher, Christy Hardin Smith, Siun, Pachacutec, Richard Taylor, Karl, Suzanne, Bev Wright (Bev and Book Salon was one of the most awesome things ever), Ellie, each and every one of the fantastic moderators who were the ones who kept the enterprise really alive for so long, and a host of others that allowed me to participate with them, thank you. There are too many to list, and I love one and all. You will all be missed, and I apologize to the too many other friends I met there and have not listed. You know who you are, and thank you.

I am starting to see eulogies all over the web, and most are quite decent. FDL was right, and early so, about the rule of law, the Cheney Administration, torture, surveillance, marriage equality and ACA/Obamacare, just to name a few of the plethora of topics breached on her pages. The voices have not died, but, now, the common enterprise has.

I will leave it to others to say where exactly FDL fits into the hierarchy and history of the blogosphere, but it was certainly up there. Thanks, and vaya con dios FDL.

Update, from emptywheel: bmaz forgot to mention DDay, but I'm certain it was an oversight.

A TALE OF CELEBRITY BON VIVANT CIVIL SERVANTS AND ACCESS JOURNALISM

There is a distinct problem in this country with excessive inbreeding of politicians, lobbyists and journalists. In a country where so many are now ruled by so few in power, it is becoming, if not already become, the biggest threat to American democracy. I would add in corporations, but, heck, who do you think the politicians, lobbyists and journalists represent at this point?

Now, corporations and their money through their mouthpiece lobbyists have long had a stranglehold on politics, whether through the corps themselves or their wealthy owners. But the one saving mechanism has historically been claimed to be the "Fourth Estate" of the American press who were there on behalf of the people as a check on power. But what if the Fourth Estate becomes, in fact, part of the power? What then?

What if the crucial check on federal and state power is by journalists who are little more than stenographers clamoring for access and/or co-opted social friends and elites with the powers that be? What if the sacrosanct civil servants of this country are nothing but Kardashian like shills out for a free gilded ride before they leave office to cash in with private sector riches befitting their holiness?

Golly, if only there was an example of this incestuous degradation. Oh, wait, get a load of this just put up by Kate Bennett's KGB File at Politico:

> In a generally stay-at-home administration, one member of the Obama Cabinet is proving to be the toast of

> the town. Jeh Johnson, the oh-so-serious-on-the-outside secretary of Homeland Security, is fast becoming Washington's No. 1 social butterfly, dining out at posh restaurants like CityCenter's DBGB, as he did last week with a small group that included Amy Klobuchar, Steny Hoyer, CNN's Jim Sciutto, the New York Times' Ashley Parker, author Aaron Cooley, and lobbyist Jack Quinn and his wife Susanna.
>
> For a guy who's been running a 24/7 war against terror since 2013, Johnson seems to have a lot of time to trip the light fantastic. He can often be seen enjoying regular catch-up sessions with BFF Wolf Blitzer at Café Milano (back table, naturally); and mingling at black-tie soirées, such as the Kennedy Center Spring Gala, the Opera Ball, or a champagne-fueled VIP garden party at Mount Vernon to toast French-American relations, all of which Johnson attended—and stayed at beyond the requisite cocktail-hour schmooze.
> Story Continued Below
>
> "There's rarely an invitation he'll turn down," says an aide to Johnson, who prefers to remain anonymous, of his boss's penchant for spending three-to-four evenings a week at social functions – and actually enjoying them.

I am not going to bother to dissect that, it speaks all too clearly for itself. And it is hard to figure which is more pukeworthy, the bon vivant civil servant or the elitism displayed by the supposed watcher last bastion journalists. It is all of the same cloth.

What's wrong in Washington DC? Here you go. When the pathology on the boneyard of American democracy is run, this vignette will appear.

Maybe this is why Tom Vilsack could find a spare couple of hours out of one of his days to explain in a deposition why he and the Obama Administration knee jerkily demanded Shirley Sherrod's resignation based upon a crank fraudulent video by a schlock like Andrew Breitbart.

Because "Executive Privilege" now means "Privileged Executives" who can party all night with their elitist journalistic pals and screw the rest of the government, and people it serves, during the day. Just like the Founders envisioned obviously.

BEAUTIFUL EQUALITY COMES TO MARRIAGES IN AMERICA

Love will find a way, and it finally has. There are many, many friends I am thinking of right now, and they all know exactly who they are. Congratulations, and it was far too long coming. Here is the opinion.

EQUALITY

There is so much to say, that it is hard to know what to actually say. There are many quotes like this one, but it is indicative of the decision:

> "laws excluding same-sex couples from

> the marriage right impose stigma and injury of the kind prohibited by our basic charter.”

What I don’t find in the majority decision, as wonderful as it is, is discussion of heightened scrutiny, strict scrutiny, or other clear cut, across the board protection for the status of sexual identity. And that is disappointing. Also why I cried bit when SCOTUS, two years ago to this very day, callously refused to take the incredibly wonderful tee shot that Vaughn Walker gave them in the Proposition 8 case previously.

I guess the handwriting was on the wall when even the old liberal lion Steve Reinhardt, a man I have met, and a judge I truly love and revere, pulled up short and did not have the balls to take the root concept of sexual identity “equality” where it naturally flowed when he had the pen in his wise hand. But he didn’t then, and his old friend Tony Kennedy has not today.

So, while there is so much to cheer right this moment, we, and this country, are still far from where we need to be with regard to inclusion of all our citizens in the concept of equality. It is more than black and white, it is straight, gay and trans too. We are all on this patch of earth together, and we all are equal, and that needs to be admitted legally by the highest court in the land and understood by all the people it serves.

So, there are still miles to be traveled. Let the four, count them four, spittle laced, bigoted, backwards, and disgusting dissents in the *Obergefell* decision speak for themselves. Honestly, they make me want to puke. For all that were celebrating the enlightened liberal thought of Chief Justice John G. Roberts yesterday, today is a rough reminder of who and what he really is. And you really have to read Scalia and Alito to understand the fucked up pathology of the dissenters. Wow.

A BIG DAY AT SCOTUS ON OBAMACARE AND FAIR HOUSING

A little more than two hours ago, a fairly monumental day at the Supreme Court got underway. Two big boxes of opinion were brought out signaling at least two, and perhaps as many as four, new decisions were going to be announced. It was only two, but they are huge and critically important decisions *King v. Burwell*, better known as the "Obamacare case", and *Texas Dept of Housing v. Inclusive Communities Project*, better known as the Fair Housing case.

Both *King* and *Texas Housing* are big, and both have been the cause of serious apoplexy and fear among liberals and progressives. And both were decided very much in the favor of the liberal position, so it was a very good day on both issues.

First off is King v. Burwell, and the full opinion is here. It is a 6-3 opinion written by Chief Justice Roberts. Many people seem shocked that the majority was 6-3. I am not. While I thought the challenger King plaintiffs had a cognizable legal argument, it always struck me as a losing one, and one the Chief Justice was unlikely to sign off on after his sleight of hand to keep the ACA alive in the earlier *NFIB* case.

Similarly, though Anthony Kennedy was a bigger concern because of his states rights history, he has a long history on protecting citizens on social justice issues (which is why we are about to get marriage equality, maybe as soon as tomorrow). And, once Obamacare was upheld in *NFIB*, and all the millions of additional Americans had been given health insurance access (which, let us keep in mind, is still different than actual healthcare), it really became a social justice issue, and thus one Kennedy would be very troubled to strip away.

As to the general overview, Rick Hasen at Election Law Blog has a great summary:

> Before the case, so much ink was spilled (and more virtual ink virtually spilled) on the question of deference to the IRS's interpretation of ambiguity under the statute (under the so-called "Chevron" doctrine) as well as principles of federalism, which were used to argue for results for and against the Administration in the case. There were also questions about the standing of various plaintiffs. There were arguments about the intent of the drafters, and what MIT economist Gruber said, or may have said, or may have misspoken about the way the law was supposed to work. In the end, the Court rejected application of Chevron deference to the IRS and federalism made no appearance. Nor did standing or Gubert get discussed. Instead the Court's analysis went basically like this:
>
> The question whether tax subsidies applied to poor people in states that did not set up their own health care exchange is important, so important that it is hard to believe that Congress would have delegated that question to an agency (and particularly to the IRS, whose job it is to collect revenue not

> design health care policy). So there is no "Chevron" deference on the question. The court has to use its tools of statutory interpretation to decide the case. The law, read as a whole, is ambiguous. It is certainly possible to read the challenged language as giving subsidies only to people in state exchanges and not in the federal exchange. But there are other parts of the law, read in context, that only make sense if subsidies apply to those in state or federal exchanges. In such an ambiguous case, it is the purpose of the law that should govern. "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."

Go read all of Rick's post, it is also notable for its explanation as to why *King* is likely the last word on the ACA as a viable entity and Obamacare is here to stay. I concur.

I would like to point out one aspect of the King decision I find particularly rewarding – the lack of attention to all the extrinsic noise that has been generated over the many months the *King* case was pending by all the crazed pundits on both sides of the issue at heart. Absent was all the relentless sturm and drang about standing, loss of standing, federalism, what Hans, err Jon, Gruber said or didn't say, post hoc interviews with Congress members, their staff and lobbyists and what it meant, and all other sundry sorts of faux legislative history by people that apparently would not recognize real "legislative history" if it hit them in the butt. That is very satisfying thing for somebody that thinks appellate decisions should, at their core, be based on the statutes, precedence and the record on appeal.

For this I am thankful for the clarity and

cleanliness of Roberts opinion. As a side note, the majority's scuppering of the *Chevron* basis has created a side issue among us in the legal chattering class as to whether it signals a weakening of the "Chevron Doctrine". Rick seems to think there is a fundamental weakening here. I am not so sure of that at all, even though I have had sincere problems with *Chevron* pretty much as long as I have been practicing law, as it gives far too much deference to often out of control administrative agencies, and the appellate burden is very onerous to overcome bad administrative rulings.

We shall see how the components of today's decision in King play out in the future, but it was a very good day for the law, and the ACA, today.

The second, and also huge, case handed down today is the Texas Fair Housing decision, and the full opinion is here. Although it will be overshadowed today by the more famous (infamous?) *King* Obamacare decision, the *Texas* case is absolutely critical to the ability to fight and control discrimination.

As the excellent Lawrence Hurley reports for Reuters:

> On a 5-4 vote in a major civil rights case, the court decided that the law allows for discrimination claims based on seemingly neutral practices that may have a discriminatory effect. Justice Anthony Kennedy, a conservative who often casts the deciding vote in close cases, joined the court's four liberals in the majority.
>
> The ruling also was a triumph for President Barack Obama and his administration, which had backed Inclusive Communities Project Inc, a nonprofit group in Texas that claimed the state violated the law by disproportionately awarding low-income housing tax credits to developers who

> own properties in poor, minority-dominated neighborhoods.
> …..
> Although a broad win for civil rights advocates on the legal theory, Kennedy, writing for the court, indicated in the ruling that the Texas plaintiffs could ultimately lose when the case returns to lower courts.
>
> The court was considering whether the 1968 law allows for so-called disparate impact claims in which plaintiffs only need to show the discriminatory effect of a particular practice and not evidence of discriminatory intent. There was no dispute over the law's prohibition on openly discriminatory acts in the sale and rental of housing.
>
> Kennedy wrote that Congress indicated in 1988 when it amended the law that it intended disparate impact claims to be available.
>
> "It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification," Kennedy added.
>
> Kennedy also made clear there are limits to the types of claims that can be brought, saying that "statistical disparity" alone is not enough. Plaintiffs must "point to a defendant's policy or policies causing that disparity," Kennedy added.

As Adam Serwer said on Twitter (here and here), "banks and insurance companies have been trying to tee up this case for years because they thought the Roberts court would rule in their favor" and "without this law, it's unlikely any of the banks would have paid any price for trapping minorities in bad loans regardless of credit". That is right. But it goes further than that, the "disparate impact" claim is one of the

most important tools available to fight discrimination that may not be apparent on the face of a cagily crafted provision or business model policy, but which nevertheless is effected by it. Discriminatory animus has gotten very sophisticated, and this tool under the Fair Housing Act of 1968 is necessary to have to fight it.

Texas Fair Housing was a 5-4 decision authored, somewhat surprisingly, by Anthony Kennedy where he joined the four justices of the "liberal bloc". It is yet another indication of where Tony Kennedy is on "social justice" issues, again a trend that augurs well for marriage equality. We shall know soon enough!

LORETTA LYNCH IS A DUBIOUS NOMINEE FOR ATTORNEY GENERAL

Loretta Lynch is an excellent nominee for Attorney General, and her prior actions in whitewashing the blatant and rampant criminality of HSBC should not be held against her, because she didn't know that at the time she last whitewashed that criminal enterprise, right?

No. Nothing could be further from the truth.

This is a cop out by Lynch's advocates. Lynch either knew, or damn well should have known. She signed off on the HSBC Deferred Prosecution

Agreement (DPA), if she was less than fully informed, that is on her. That is what signing legal documents stands for….responsibility. Banks like HSBC, Credit Suisse, ING etc were, and still are, a cesspool of criminal activity and avoidance schemes. Willful blindness to the same old bankster crimes by Lynch doesn't cut it (great piece by David Dayen by the way).

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

And that is only scratching the real surface of my objections to Lynch. There are many other areas where Lynch has proven herself to be a dedicated, dyed in the wool "law and order adherent" and, as Marcy Wheeler artfully coined, "executive maximalist". Lynch's ridiculous contortion, and expansion, of extraterritorial jurisdiction to suit the convenient whims of the Obama Administration's unparalleled assault on the Rule of Law in the war on terror is incredibly troubling. Though, to be fair, EDNY is the landing point of JFK International and a frequent jurisdiction by designation. Some of these same questions could have been asked of Preet Bharara (*see, e.g. U.S. v. Warsame*) Loretta Lynch has every bit the same, if not indeed more, skin in the game as Bharara, whether by choice or chance.

Lynch has never uttered a word in dissent from this ridiculous expansion of extraterritorial jurisdiction. Lynch's record in this regard is crystal clear from cases like *US v. Ahmed, Yousef, et. al.* where even Lynch and her office

acknowledged that their targets could not have "posed a specific threat to the United States" much less have committed specific acts against the US.

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

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

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

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

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

And this post has not even touched on more mundane, day to day, criminal law and procedure issues on which Lynch is terrible. And horrible regression from Eric Holder. Say for instance pot. Decriminalization, indeed legalization, of marijuana is one of the backbone elements of reducing both the jail and prison incarceration rate, especially in relation to minorities. Loretta Lynch is unconscionably against that (See, e.g., p. 49 (of pdf) et. seq.). Lynch appears no more enlightened on other sentencing and prison reform, indeed, she seems to be of a standard hard core prosecutorial wind up law and order lock em up mentality. Lynch’s positions on relentless Brady violations by the DOJ were equally milquetoast, if not pathetic (See, e.g.

p. 203 (of pdf) et. seq.). This discussion could go on and on, but Loretta Lynch will never come out to be a better nominee for Attorney General.

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

CUBA LIBRE! A MOMENTOUS SHIFT IN RELATIONS

Without any question, the news of the day is the direct turnabout in relations between the United States and Cuba announced this morning. There is a rather long list of areas in which many people, including me, have profound disappointment with Barack Obama over. Lack of accountability for torture is but the latest and greatest in the news consciousness of the attuned public. But today is not such a day; today Barack Obama has risen to at least part of his once heralded promise. Today, Mr. Obama has my love and affection. Today is one of the type and kind of foreign policy, whether toward middle east or other global neighbors, moments promised in Cairo and rarely, if ever, fulfilled in tangible deeds instead of words. So, today, sincere thanks and appreciation to President Obama.

Here are the basics from the AP:

> The United States and Cuba have agreed to re-establish diplomatic relations and open economic and travel ties, marking a

> historic shift in U.S. policy toward the communist island after a half-century of enmity dating back to the Cold War, American officials said Wednesday.
>
> The announcement came amid a series of sudden confidence-building measures between the longtime foes, including the release of American prisoner Alan Gross, as well as a swap for a U.S. intelligence asset held in Cuba and the freeing of three Cubans jailed in the U.S.
>
> President Barack Obama and Cuban President Raul Castro were to separately address their nations around noon Wednesday. The two leaders spoke by phone for more than 45 minutes Tuesday, the first substantive presidential-level discussion between the U.S. and Cuba since 1961.
>
> Wednesday's announcements followed more than a year of secret talks between U.S. and Cuban officials in Canada and the Vatican. U.S. officials said Pope Francis was personally engaged in the process and sent separate letters to Obama and Castro this summer urging them to restart relations.

This news alone would have constituted something earth shattering, but there is much more than just that. In fact, the AP laid out the merest of backgrounds with that opening. There is much, much, more. I have the official press release, and

it is so good, and compelling, I am going to put it up, all here, right now (it is long, and makes this post long, so bear with me. If you want to, feel free to skip back down to analysis and thoughts):

> Today, the United States is taking historic steps to chart a new course in our relations with Cuba and to further

engage and empower the Cuban people. We are separated by 90 miles of water, but brought together through the relationships between the two million Cubans and Americans of Cuban descent that live in the United States, and the 11 million Cubans who share similar hopes for a more positive future for Cuba.

It is clear that decades of U.S. isolation of Cuba have failed to accomplish our enduring objective of promoting the emergence of a democratic, prosperous, and stable Cuba. At times, longstanding U.S. policy towards Cuba has isolated the United States from regional and international partners, constrained our ability to influence outcomes throughout the Western Hemisphere, and impaired the use of the full range of tools available to the United States to promote positive change in Cuba. Though this policy has been rooted in the best of intentions, it has had little effect – today, as in 1961, Cuba is governed by the Castros and the Communist party.

We cannot keep doing the same thing and expect a different result. It does not serve America's interests, or the Cuban people, to try to push Cuba toward collapse. We know from hard-learned experience that it is better to encourage and support reform than to impose policies that will render a country a failed state. With our actions today, we are calling on Cuba to unleash the potential of 11 million Cubans by ending unnecessary restrictions on their political, social, and economic activities. In that spirit, we should not allow U.S. sanctions to add to the burden of Cuban citizens we seek to help.

> Today, we are renewing our leadership in the Americas. We are choosing to cut loose the anchor of the past, because it is entirely necessary to reach a better future – for our national interests, for the American people, and for the Cuban people.
>
> Key Components of the Updated Policy Approach:
> Since taking office in 2009, President Obama has taken steps aimed at supporting the ability of the Cuban people to gain greater control over their own lives and determine their country's future. Today, the President announced additional measures to end our outdated approach, and to promote more effectively change in Cuba that is consistent with U.S. support for the Cuban people and in line with U.S. national security interests. Major elements of the President's new approach include:
>
> Establishing diplomatic relations with Cuba-
> · The President has instructed the Secretary of State to immediately initiate discussions with Cuba on the re-establishment of diplomatic relations with Cuba, which were severed in January 1961.
> · In the coming months, we will re-establish an embassy in Havana and carry out high-level exchanges and visits between our two governments as part of the normalization process. As an initial step, the Assistant Secretary of State for Western Hemisphere Affairs will lead the U.S. Delegation to the next round of U.S.-Cuba Migration Talks in January 2015, in Havana.
> · U.S. engagement will be critical when appropriate and will include continued strong support for improved human rights conditions and democratic reforms in

Cuba and other measures aimed at fostering improved conditions for the Cuban people.

· The United States will work with Cuba on matters of mutual concern and that advance U.S. national interests, such as migration, counternarcotics, environmental protection, and trafficking in persons, among other issues.

Adjusting regulations to more effectively empower the Cuban people-
· The changes announced today will soon be implemented via amendments to regulations of the Departments of the Treasury and Commerce. Our new policy changes will further enhance our goal of empowering the Cuban population.

· Our travel and remittance policies are helping Cubans by providing alternative sources of information and opportunities for self-employment and private property ownership, and by strengthening independent civil society.

· These measures will further increase people-to-people contact; further support civil society in Cuba; and further enhance the free flow of information to, from, and among the Cuban people. Persons must comply with all provisions of the revised regulations; violations of the terms and conditions are enforceable under U.S. law.

Facilitating an expansion of travel under general licenses for the 12 existing categories of travel to Cuba authorized by law-
· General licenses will be made available for all authorized travelers in the following existing categories: (1) family visits; (2) official business of the U.S. government, foreign

governments, and certain intergovernmental organizations; (3) journalistic activity; (4) professional research and professional meetings; (5) educational activities; (6) religious activities; (7) public performances, clinics, workshops, athletic and other competitions, and exhibitions; (8) support for the Cuban people; (9) humanitarian projects; (10) activities of private foundations or research or educational institutes; (11) exportation, importation, or transmission of information or information materials; and (12) certain export transactions that may be considered for authorization under existing regulations and guidelines.

· Travelers in the 12 categories of travel to Cuba authorized by law will be able to make arrangements through any service provider that complies with the U.S. Treasury's Office of Foreign Assets Control (OFAC) regulations governing travel services to Cuba, and general licenses will authorize provision of such services.

· The policy changes make it easier for Americans to provide business training for private Cuban businesses and small farmers and provide other support for the growth of Cuba's nascent private sector. Additional options for promoting the growth of entrepreneurship and the private sector in Cuba will be explored.

Facilitating remittances to Cuba by U.S. persons-
· Remittance levels will be raised from $500 to $2,000 per quarter for general donative remittances to Cuban nationals (except to certain officials of the government or the Communist party); and donative remittances for humanitarian projects, support for the Cuban people,

and support for the development of private businesses in Cuba will no longer require a specific license.

· Remittance forwarders will no longer require a specific license.

Authorizing expanded commercial sales/exports from the United States of certain goods and services-
· The expansion will seek to empower the nascent Cuban private sector. Items that will be authorized for export include certain building materials for private residential construction, goods for use by private sector Cuban entrepreneurs, and agricultural equipment for small farmers. This change will make it easier for Cuban citizens to have access to certain lower-priced goods to improve their living standards and gain greater economic independence from the state.

Authorizing American citizens to import additional goods from Cuba-
· Licensed U.S. travelers to Cuba will be authorized to import $400 worth of goods from Cuba, of which no more than $100 can consist of tobacco products and alcohol combined.

Facilitating authorized transactions between the United States and Cuba-
· U.S. institutions will be permitted to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions.

· The regulatory definition of the statutory term “cash in advance” will be revised to specify that it means “cash before transfer of title”; this will provide more efficient financing of authorized trade with Cuba.

· U.S. credit and debit cards will be permitted for use by travelers to Cuba.

· These measures will improve the speed,

efficiency, and oversight of authorized payments between the United States and Cuba.

Initiating new efforts to increase Cubans' access to communications and their ability to communicate freely-

· Cuba has an internet penetration of about five percent—one of the lowest rates in the world. The cost of telecommunications in Cuba is exorbitantly high, while the services offered are extremely limited.

· The commercial export of certain items that will contribute to the ability of the Cuban people to communicate with people in the United States and the rest of the world will be authorized. This will include the commercial sale of certain consumer communications devices, related software, applications, hardware, and services, and items for the establishment and update of communications-related systems.

· Telecommunications providers will be allowed to establish the necessary mechanisms, including infrastructure, in Cuba to provide commercial telecommunications and internet services, which will improve telecommunications between the United States and Cuba.

Updating the application of Cuba sanctions in third countries-

· U.S.-owned or -controlled entities in third countries will be generally licensed to provide services to, and engage in financial transactions with, Cuban individuals in third countries. In addition, general licenses will unblock the accounts at U.S. banks of Cuban nationals who have relocated outside of Cuba; permit U.S. persons to participate in third-country professional meetings and conferences related to Cuba; and,

allow foreign vessels to enter the United States after engaging in certain humanitarian trade with Cuba, among other measures.

Pursuing discussions with the Cuban and Mexican governments to discuss our unresolved maritime boundary in the Gulf of Mexico-

· Previous agreements between the United States and Cuba delimit the maritime space between the two countries within 200 nautical miles from shore. The United States, Cuba, and Mexico have extended continental shelf in an area within the Gulf of Mexico where the three countries have not yet delimited any boundaries.

· The United States is prepared to invite the governments of Cuba and Mexico to discuss shared maritime boundaries in the Gulf of Mexico.

Initiating a review of Cuba's designation as a State Sponsor of Terrorism-

· The President has instructed the Secretary of State to immediately launch such a review, and provide a report to the President within six months regarding Cuba's support for international terrorism. Cuba was placed on the list in 1982.

Addressing Cuba's participation in the 2015 Summit of the Americas in Panama-

· President Obama will participate in the Summit of the Americas in Panama. Human rights and democracy will be key Summit themes. Cuban civil society must be allowed to participate along with civil society from other countries participating in the Summit, consistent with the region's commitments under the Inter-American Democratic Charter. The United States welcomes a constructive dialogue among Summit governments on the

Summit’s principles.

Unwavering Commitment to Democracy, Human Rights, and Civil Society
A critical focus of our increased engagement will include continued strong support by the United States for improved human rights conditions and democratic reforms in Cuba. The promotion of democracy supports universal human rights by empowering civil society and a person’s right to speak freely, peacefully assemble, and associate, and by supporting the ability of people to freely determine their future. Our efforts are aimed at promoting the independence of the Cuban people so they do not need to rely on the Cuban state.

The U.S. Congress funds democracy programming in Cuba to provide humanitarian assistance, promote human rights and fundamental freedoms, and support the free flow of information in places where it is restricted and censored. The Administration will continue to implement U.S. programs aimed at promoting positive change in Cuba, and we will encourage reforms in our high level engagement with Cuban officials.

The United States encourages all nations and organizations engaged in diplomatic dialogue with the Cuban government to take every opportunity both publicly and privately to support increased respect for human rights and fundamental freedoms in Cuba.

Ultimately, it will be the Cuban people who drive economic and political reforms. That is why President Obama took steps to increase the flow of resources and information to ordinary Cuban citizens in 2009, 2011, and today. The Cuban people deserve the support of

> the United States and of an entire region that has committed to promote and defend democracy through the Inter-American Democratic Charter.

The whole statement was put up here because every type inch of it is worth knowing and pointing out. I wonder if this letter from “America’s Society/Council of the Americas” didn’t presage a lot of today’s result (h/t Olivier Knox). Either way, it is nothing less than the formal ending of the cold war between the United States and Cuba, and that is one spectacular point in time. Cold War dead enders, and people whose hatred of the Castro regime supersedes their common sense and acceptance of a changed world, will decry today’s move and slime Mr. Obama for having made it. Mental midgets, from both sides of the aisle of idiocy, such as Bob Menendez and Marco Rubio, have already done that. But they are the rotting rump of over 50 years of failed policy that has denied Cubans the very means and base from which to effect the very change the critics demand.

I think the press release is both elegant, detailed, and compelling. Other than bullheadedness, there hasn’t been any good reason to not do this for a long time. to quote Ken Gude on Twitter:

> Is there any real argument for not normalizing relations with #Cuba? It has been the single dumbest & least effective US policy for decades.

Yes, that is exactly correct. Hey, even the Pope

was involved! And Americans who do travel to Cuba will be able to legally bring back cigars. So there is that too for “cigar aficionados”, which undoubtedly, and illegally, have included some of the bellicose political humps in DC who have screamed against this for decades. Sorry backwards Beltway boobs, it is a new day now, and the American people, and even the Latino community in Florida, support the new day in substantial margins as shown in this Atlantic Council poll graph.

Okay, here are a few parting thoughts: First, Mr. Obama must immediately move his Administration to remove Cuba from the list of State Sponsors of Terrorism list. Secondly, the Obama Administration should immediately seek out and work with Bob Corker, the incoming Chair of the Senate Foreign Relations Committee, and a man whou ought be far more responsible and approachable than the foreign relations belligerent that has been Democrat Bob Menendez. Thirdly, the Administration should immediately facilitate, in every manner possible, the collaboration between American and Cuban health officials and modalities, both to fight ebola, AIDS, and as to general medicine and treatment.

In closing, while there is still much to be done, and many deadenders to overcome, this is a beautiful day. The language from the opening paragraph of the Administration press release is a perfect close:

> We are separated by 90 miles of water, but brought together through the relationships between the two million Cubans and Americans of Cuban descent that live in the United States, and the 11 million Cubans who share similar hopes for a more positive future for Cuba.

A more positive future for both sides of that 90 miles of water is in order. And a long time coming. Today is the first day of a new, and exciting beginning. Before I was born, my

parents’ favorite place to travel was to Cuba. It was not just my mother’s love of Hemmingway, but both of their love for Havana and the people and places of Cuba. I very much look forward to seeing what they saw, and felt so strongly.

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

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

There are too many instances in the SSCI Torture Report to catalogue individually, but let’s be perfectly clear, the failure to prosecute the guilty in this cock up is NOT restricted to what is still far too euphemistically referred to as “torture”.

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

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

18 U.S.C. §1001 False Statements

18 U.S.C. §1621 Perjury

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

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

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

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

Okay, here are the critical working documents:

> The SSCI Torture Report
>
> The Minority Response to SSCI Torture Report
>
> Dianne Feinstein’s Statement

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

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

> …drafted a letter to Attorney General John Ashcroft asking the Department of Justice for "a formal declination of prosecution, in advance, for any employees of the United States, as well as any other personnel acting on behalf of the United States, who may employ methods in the interrogation of Abu Zubaydah that otherwise might subject those individuals to prosecution. The letter further indicated that "the interrogation team had concluded "that "the use of more aggressive methods is required to persuade Abu Zubaydah to provide the critical information we need to safeguard the lives of innumerable innocent men, women and children within the United States and abroad." The letter added that these "aggressive methods" would otherwise be prohibited by the torture statute, "apart from potential reliance upon the doctrines of necessity or of self-defense."

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

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

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

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

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

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

> dated 09/16/2014 re: constructive amendment argument. (PANEL) Paper filing deficiency: None. [9242910] (JFF)

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

As can quickly be discerned, the appeal centers really on common statutory interpretation as applied to the facts in the public trial record. The issue is whether there was sufficient evidence to convict Bonds because his statement describing his life as a celebrity child – in response to a question asking whether his trainer ever gave him any self-injectable substrances – was evasive, misleading, and capable of influencing the grand jury to minimize the trainer's role in the distribution of performance enhancing drugs, and whether, under the law, that can properly constitute obstruction. I wrote an extensive piece arguing the weakness and infirmities of the verdict at the time it was handed down by the jury. Which is when the jury also acquitted Bonds of all the substantive underlying perjury counts.

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

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

UPDATE: Well well, I am sitting in Alice Cooperstown having lunch, waiting for my preliminary hearing to reconvene, and Josh Gerstein just sent me the answer to the question of this post. YES! Indeed the sealed filings are a slimy last minute trick pulled by the DOJ. DOJ

was trying to insert grand jury testimony from the aforementioned government BALCO investigator, Jeff Novitsky, into the appeal when it has never, at any point of the proceedings, whether in the trial court or 9th Circuit, been part of the record or indictment.

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

> The grand jury transcripts referred to in the government's motion and letter are not part of the record on appeal. Had they been before the district court in any form, the proper method of adding them to the appellate record would have been by means of a timely motion to correct or modify the record under Rule 10(e) of the Federal Rules of Appellate Procedure. The transcripts which are the subject of the government's motion, however, were never placed before the district court in either pretrial, trial, or post-trial proceedings. Notably, the declaration of AUSA Merry Jean Chan which accompanies the government's motion makes no claim that the transcripts were filed with the district court. "Papers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal." Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th Cir. 1988) (citing, inter alia, United States v. Walker, 601 F.2d 1051, 1054–55 (9th Cir.1979)).
>
> Should the Court nonetheless wish to consider the transcripts in question, they fully support Mr. Bonds's argument that the district court constructively amended the indictment by instructing on "Statement C" as a basis for conviction on the Count Five obstruction count, although that statement was not

> contained in the indictment. In his testimony, in discussing Statement C, then labeled “Statement F” before the grand jury, Novitsky admitted that Mr. Bonds had responded to the pending question—“Did Greg ever give you anything that required a syringe to inject yourself with?”—with a “denial” before veering off into a digression about “being a celebrity child.” (RT of February 3, 2011, at 110.) Novitsky’s admission that the prosecutor’s question was in fact answered by Mr. Bonds constituted a good reason why the grand jury would not have relied on Statement C in indicting on the obstruction charge. The only manner of accurately ascertaining whether a grand jury relied on an act in indicting is by the inclusion of that act in the indictment itself. Here, Statement C was expressly excised from the indictment by the use of asterisks. See Appellant Bonds’s Petition for Rehearing En Banc, at 16.

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

MEET ADAM KWASMAN, ARIZONA’S RACIST BIGOT POLITICIAN OF THE MONTH

With the latest furor over minor children and the border already in full swing on top of all

the other immigration fear mongering going on in this election year, you would think you had about heard it all when it comes to preening idiotic nonsense from “conservative” politicians.

Think again.

Exhibit A: This somewhat beyond amazing story of Adam Kwasman, a current member of the Arizona State Legislature and a candidate for Congress in Arizona LD-1. Kwasman, in a mad rush to the gun nut bigot fest protest of immigrant children in southern Arizona, inspired by the Murietta hatred, saw a bus load of YMCA campers in a school bus on their way to summer camp. Kwasman, displaying every ounce of his razor sharp Einstein like brilliance, immediately concluded they were evil immigrants.

From Brahm Resnik and the Arizona Republic:

> He [Kwasman] had tweeted from the scene, “Bus coming in. This is not compassion. This is the abrogation of the rule of law.” He included a photo of the back of a yellow school bus.
>
> Kwasman later told me he saw the migrant children. “I was actually able to see some of the children in the buses. The fear on their faces…. This is not compassion,” he said.
>
> But there was a problem with Kwasman’s story: There was no fear on their faces. Those weren’t the migrant children in the school bus. Those were children from the Marana school district. They were heading to the YMCA’s Triangle Y Camp, not far from the Rite of Passage shelter for the migrants, at the base of Mt. Lemmon.
>
> 12 News reporter Will Pitts, who is at the protest scene, says he saw the children laughing and taking pictures of the media.

Watch Brahm Resnik make an idiot of Kwasman at this link. I will not embed the video because I cannot get rid of the auto play command.