THE DISTURBING PARADOX OF THE DAVID BARRON NOMINATION

Barack Obama has a preternatural preference for ivory tower elites from Harvard when it comes to judicial and executive branch appointees, and David Barron is the latest example. The White House is in the final stages of an all out push to insure David Barron gets confirmed to a lifetime Article III seat on the First Circuit.

In this regard, Mr. Barron has gotten exactly the kind of fervent support and back channel whipping the Obama White House denied Goodwin Liu, and refused to give to the nominee at OLC that David Barron stood as the designated and approved Obama acting placeholder for, Dawn Johnsen.

It turns out Mr. Obama and his White House shop really can give appropriate support to nominees if they care, which seemed to be a trait entirely lacking earlier in the Obama Presidency. And by giving the ill taken legal cover to Mr. Obama for the extrajudicial execution of American citizens, that Obama had already attempted once without, Mr. Barron certainly earned the support of the Obama White House.

It would be wonderful if Mr. Obama were to give support to candidates for judicial seats and key legal agencies who protect the Constitution instead of shredding it for convenience, but it appears to not be in the offing all that

consistently. Obama has never been the same since blowback from the release of the Torture Memos when he first took office. Even Federal judges like Mary Schroeder and Bill Canby who, less than a month after Obama took office, were stunned by the about face, and wholesale adoption, by Obama of the Bush/Cheney security state protocols. From a New York Times article at the moment:

> During the campaign, Mr. Obama harshly criticized the Bush administration's treatment of detainees, and he has broken with that administration on questions like whether to keep open the prison camp at Guantánamo Bay, Cuba. But a government lawyer, Douglas N. Letter, made the same state-secrets argument on Monday, startling several judges on the United States Court of Appeals for the Ninth Circuit.
>
> "Is there anything material that has happened" that might have caused the Justice Department to shift its views, asked Judge Mary M. Schroeder, an appointee of President Jimmy Carter, coyly referring to the recent election.
>
> "No, your honor," Mr. Letter replied.
>
> Judge Schroeder asked, "The change in administration has no bearing?"
>
> Once more, he said, "No, Your Honor." The position he was taking in court on behalf of the government had been "thoroughly vetted with the appropriate officials within the new administration," and "these are the authorized positions," he said.

Make no mistake, from my somewhat substantial knowledge of Mary Schroeder, that was the voice of shock and dismay. But it was an early tell of who and what Barack Obama, and his administration, would be on national security issues from there forward. And so, indeed, it

has been.

What was unconscionable and traitorous to the rule of law and Constitution for Obama, and the Democratic majority in the Senate, under George Bush is now just jim dandy under Barack Obama. It is intellectual weakness and cowardice of the highest order.

So we come back to the case of David Barron. Frankly, it is not hard to make the argument that what Barron has done is actually worse than the travesties of John Yoo and Jay Bybee. As unthinkable, heinous and immoral as torture is, and it is certainly all that, it is a discrete violation of domestic and international law. It is definable crime.

But what David Barron did in, at a minimum, the Awlaki Targeted Kill Memo (there are at least six other memos impinging on and controlling this issue, at a minimum of which at least one more is known to be authored by Barron, and we don't even deign to discuss those apparently), was to attack and debase the the very foundational concept of Due Process as portrayed in the Bill of Rights. Along with Habeas Corpus, Due Process is literally the foundation of American criminal justice fairness and freedom under our Constitution.

David Barron attacked that core foundation. Sure, it is in the so called name of terrorism today, tomorrow it will justify something less in grade. And something less the day after. Such is how Constitutional degradation happens. And there is absolutely nothing so far known in Mr. Barron's handiwork to indicate it could not be adapted for use domestically if the President deems it so needed. Once untethered from the forbidden, once unthinkable Executive Branch powers always find new and easier uses. What were once vices all too easily become habits. This is exactly how the once proud Fourth Amendment has disappeared into a rabbit hole of "exceptions".

This damage to Due Process occasioned by David

Barron can be quite easily argued to be more fundamental and critical to the Constitution, the Constitution every political and military officer in the United States is sworn to protect, than a temporally limited violation of criminal statutes and international norms on torture as sanctioned by Yoo and Bybee. But it is not treated that way by cheering Dems and liberals eager to confirm one of their own, a nice clean-cut Harvard man like the President, to a lifetime post to decide Constitutional law. What was detested for Jay Bybee, and would certainly be were John Yoo ever nominated for a federal judgeship, is now no big deal when it comes to David Barron. Constitutional bygones baybee; hey Barron is cool on same sex marriage, what a guy! Screw Due Process, it is just a quaint and archaic concept in a piece of parchment paper, right?

If the above were not distressing enough, the Barron nomination was supposed to, at a minimum, be used as leverage to get public release of the Barron handiwork legally sanctioning Mr. Obama to extrajudicially execute American citizens without a whiff of Due Process or judicial determination. Did we get that? Hell no, of course not. A scam was run by the Obama White House, and the Senate and oh so attentive DC press fell for it hook, line and sinker. We got squat and Barron is on the rocket path to confirmation with nothing to show for it, and no meaningful and intelligent review of his facially deficient record of Constitutional interpretation.

Barron cleared cloture late Wednesday and is scheduled for a floor vote for confirmation today, yet release of the “redacted memo” is nowhere remotely in sight. This framing on Barron’s nomination, irrespective of your ultimate position on his fitness, is a complete and utter fraud on the American citizenry in whose name it is being played. And that is just on the one Awlaki Memo that we *already know* the legal reasoning on from the self serving previous release of the “white paper” by the

Administration. Discussion of the other six identified pertinent memos has dropped off the face of the earth. Booyah US Senate, way to do your job for the citizens you represent! Or not.

Personally, there is more than sufficient information about David Barron's situational legal, and moral, ethics in the white paper alone to deem him unfit for a lifetime Article III confirmed seat on a Circuit Court of Appeal.

But, even if you disagree and consider Barron fit, you should admit the American citizenry has been ripped off in this process by the Democratically led Senate, and an Obama Administration who has picked a dubious spot to finally get aggressive in support of one of their nominees.

If Goodwin Liu and Dawn Johnsen, two individuals who had proven their desire to protect the Constitution, had received this kind of support, this country, and the world, would be a better place. Instead, Mr. Obama has reserved his all out push for a man who, instead, opted to apply situational ethics to gut the most basic Constitutional concept of Due Process. That's unacceptable, but at a minimum we should have the benefit of proper analysis of Barron's work before it happens.

FBI WILL NOW VIDEOTAPE IN CUSTODY INTERROGATIONS

[Significant Update Below]

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

agencies in relation to interrogations and confessions of those in custody.

> There was no news release or press conference to announce the radical shift. But a DOJ memorandum –obtained by The Arizona Republic – spells out the changes to begin July 11.
>
> "This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA) the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody," says the memo to all federal prosecutors and criminal chiefs from James M. Cole, deputy attorney general.
>
> "This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply," such as in the questioning of witnesses.

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

> Since the FBI began under President Theodore Roosevelt in 1908, agents have not only shunned the use of tape recorders, they've been prohibited by policy from making audio and video

> records of statements by criminal suspects without special approval.
>
> Now, after more than a century, the U.S. Department of Justice has quietly reversed that directive by issuing orders May 12 that video recording is presumptively required for interrogations of suspects in custody, with some exceptions.

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

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

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

So, we will have to wait to see the formal written guidance, and how it is stated in the relevant operation manuals for agents and US Attorneys, to get a full bead on the scope of

change. And, obviously, see how the written policies are implemented, and what exceptions are claimed, in the field.

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

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

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

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

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

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

Notable in the Presumptions contained in Section

I of the memo is that the rule applies to ALL federal crimes. No exceptions, even for terrorism. Also, the recording may be either overt or covert, which is not different from that which I have seen in many other agencies that have long recorded interrogations. Section III specifically excludes extraterritorial situations from the rule. Frankly, I am not sure why that is necessary, the ability to record is pretty ubiquitous these days, extraterritorial should be no problem for presumptive recording.

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

OBAMA WHITE HOUSE SPONSORS YOUNG AND RICH NARCISSISTIC 1% FUCKTARDS THAT WILL RUIN THE WORLD

Proving it is never too late to shine your lame duck ass for a new generation of 1% oligarchs, Barack Obama laid open the real constituency of national politicians. And proved certain any inference that such was only the constituency and province of the GOP, Koch Brothers et. al is false.

If this is not stupid and ugly to the common Democratic fanchild, it is hard to imagine what is, or could be. From the New York Times hagiography:

> On a crisp morning in late March, an elite group of 100 young philanthropists and heirs to billionaire family fortunes filed into a cozy auditorium at the White House.

> Their name tags read like a catalog of the country's wealthiest and most influential clans: Rockefeller, Pritzker, Marriott. They were there for a discreet, invitation-only summit hosted by the Obama administration to find common ground between the public sector and the so-called next-generation philanthropists, many of whom stand to inherit billions in private wealth.
>
> "Moon shots!" one administration official said, kicking off the day on an inspirational note to embrace the White House as a partner and catalyst for putting their personal idealism into practice.

"Moon shots!"

I guess the Obama White House couldn't fathom a better phrase for coming in their pants over big money.

If there is a more sick comment on the perverted state of US national politics, it is hard to imagine what it would be.

We are ruled by a bunch of oligarchs, and political handmaidens that kiss the oligarch's asses and hew their beck and call. If the fact the great once and forever symbol of the common citizen "hope and change", Barack Obama, is such a distant leader, constantly beholden to not only the future of the moneyed class, but the current too, then there is no reality for the American public.

> The well-heeled group seemed receptive. "I think it's fantastic," said Patrick Gage, a 19-year-old heir to the multibillion-dollar Carlson hotel and hospitality fortune. "I've never seen anything like this before." Mr. Gage, **physically boyish with naturally swooping Bieber bangs**, wore a conservative pinstripe suit and a white oxford shirt. His family's Carlson

> company, which owns Radisson hotels, Country Inns and Suites, T.G.I. Friday's and other brands, is an industry leader in enforcing measures to combat trafficking and involuntary prostitution.

Oh my. And holy crap.

The New York Times penned a factual report of this sick instance. Will the New York Times, Washington Post, Wall Street Journal, or any of the other august opinion pages of national press, deign themselves honest enough to write opinion and/or editorial pieces recognizing this political cancer for what it really is?

If you did not view the video, and listen to the lyrics in the video above, do so. Because that is exactly the class of "super citizens" your elected leaders are beholden to. The handful of billionaires count for far more than the actual billions of people on this earth.

Want proof? Look no further than the "liberal", "socialist", "Democratic" Obama White House, who just demonstrated the problem in Technicolor.

And, before you chafe, of course it would be even worse with Republicans in charge. But the question is no longer just which party is in control of the levers of power (though it DOES matter for SCOTUS), but where the values of the country really are.

It is almost impossible to fathom the country's values are with the pimple faced, Bieber banged, teenager scions of billionaires the Obama White House so calmly and cooly glad-hands.

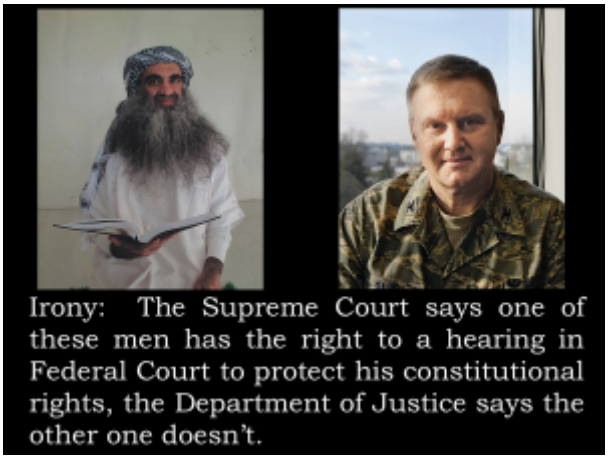
[Seriously, watch the video from the one, the only, fantastic Tubes:

> Young and rich
> Everything I desire
> Light bulbs with shades
> in every room
> And work is play—believe me
> Nothing must come too hard

> It comes in the mail
> most everyday

Maybe our leaders should find a more representative, and morally balanced, set of leaders for the future.]

1ST AMENDMENT JUSTICE DELAYED IS JUSTICE DENIED FOR COL. MORRIS DAVIS



Col. Morris Davis is, at least for my money, an American hero. He served and fought not only for his country, but for the Constitution he swore to protect. The subject of what happened to him at the hands of the very government he defended deserves a much longer, and deeper, dive than I have time for in this post. We will likely come back for that at a later date as it seems as if the legal case Col. Davis brought to correct the wrongs done to him will likely go on forever.

And the going on forever part is the subject of this post. Col. Davis was scheduled to have a hearing in United States District Court in Washington DC tomorrow in front of Judge Reggie Walton. But the hearing was postponed. And that

is the problem, this is the FOURTEENTH (14th) TIME hearing on Col. Davis' case has been delayed. One delay was due to a conflict on Judge Walton's part, and one because the offices of Davis' attorneys at the ACLU in New York were substantially damaged by Hurricane Sandy. Other than that, the delay has been at the hands of an intransigent and obstreperous DOJ. If the actions of the DOJ in relation to Col. Davis are not "bad faith", it is hard to imagine what the term stands for.

Now, to be fair, it appears the latest delay was at the unilateral hand of the court, as yesterday's minute entry order reads:

> In light of the fact that potentially dispositive motions remain pending, it is hereby ORDERED that the status hearing currently scheduled for Friday, February 21, at 9:15 a.m. is CONTINUED to a date and time to be determined by the Clerk.

The problem with that is that the "dispositive motions" the court speaks of as being "pending" have been "pending" for a VERY long time, since July of last year. And the case itself has been going on since the complaint was filed on January 8, 2010.

Why is it taking so long you ask? Because of the aforementioned bad faith and obstreperousness of the Department of Justice, that's why. To get an idea of just what is going on here, a little background is in order. Peter Van Buren gives a good, and relatively brief synopsis:

> Morris Davis is not some dour civil servant, and for most of his career, unlikely to have been a guest at the Playboy Mansion. Prior to joining the Library of Congress, he spent more than 25 years as an Air Force colonel. He was, in fact, the chief military prosecutor at Guantánamo and showed enormous courage in October 2007 when he

> resigned from that position and left the Air Force. Davis stated he would not use evidence obtained through torture. When a torture advocate was named his boss, Davis quit rather than face the inevitable order to reverse his position.
>
> Morris Davis then got fired from his research job at the Library of Congress for writing an article in the Wall Street Journal about the evils of justice perverted at Guantanamo, and a similar letter to the editor of the Washington Post. (The irony of being fired for exercising free speech while employed at Thomas Jefferson's library evidently escaped his bosses.) With the help of the ACLU, Davis demanded his job back. On January 8, 2010, the ACLU filed a lawsuit against the Library of Congress on his behalf. In March 2011 a federal court ruled against the Obama Administration's objections that the suit could go forward (You can read more about Davis' struggle.)
>
> Moving "forward" is however a somewhat awkward term to use in regards to this case. In the past two years, forward has meant very little in terms of actual justice done.

Yes, you read that right. Col. Davis was fired from the job he truly loved at the Congressional Research Service because he, on his own time as a private citizen, exercised his First Amendment right to speak. As one of Davis' pleadings puts it:

> Col. Davis was unconstitutionally removed from his position at the Library of Congress' Congressional Research Service for writing opinion pieces in the Wall Street Journal and the Washington Post expressing his nonpartisan, personal views on the

> failures of the American military commissions established to try detainees at Guantánamo Bay, Cuba. His speech lies at the very core of the First Amendment and exemplifies the kind of speech that federal courts have been most vigilant in protecting from government retaliation.

The full pleading that quote came from, Col. Davis' response to the government's motion for summary judgment (one of the "pending dispositive motions") can be found here and is a good read if you are interested in more background.

That is exactly what happened and what is at stake. And you do not have to take my word for it, Judge Walton thinks it is a solid and valid claim too. Here is language from Judge Walton in an order in late January 2010, not long after the case was filed:

> The Court is satisfied that the plaintiff has established, at least based on the record before the Court at this time, that the likelihood of success on the merits and public policy prongs of the preliminary injunction standard weigh in his favor. Essentially, the record before the Court suggests that the plaintiff was terminated immediately after two specific opinion editorials he authored were published in national newspapers. Regardless of the defendants' contention to the contrary, it appears that the content of the plaintiff's published opinions was one of the reasons, if not the primary reason, he was fired, i.e., because the plaintiff took a position on the prosecution of detainees being housed at the United States military's Guantánamo Bay facility which the Congressional Research Service felt would call into question its impartially as to any policy recommendation it would

> make and any research it would conduct on that issue. This conclusion is supported by the fact that the opinion articles were specifically referenced in the plaintiff's termination letter, and also the timing of the letter, which was issued only several days after his writings were published. The plaintiff's likelihood of success position therefore is well-founded, at least with respect to the record the Court now has before it. And as to the public interest prong, it cannot be questioned that government employees retain First Amendment rights. (citations omitted)

So, there is really no question but that protected First amendment rights were involved, and that Col. Davis was wrongfully fired for exercising them. Makes you wonder why the DOJ would string him out and fight so hard in a case that is only about the rights and not even about the money damages he suffered as a result (that would have to be litigated in a separate action).

As the graphic at the top questions, why is the DOJ willing to give free speech rights to a terrorist at Guantanamo and not to Col. Morris Davis? Bad faith is the answer. Complete, scandalous, bad faith.

FRIDAY NEWS DUMP NOT DEAD YET: STEPHEN KIM GUILTY PLEA

Just when Kevin Drum declared the "Friday News Dump" dead, comes proof news of said death was

greatly exaggerated.

As Josh Gerstein and others have reported, the plea will be entered this afternoon:

> Under the terms of the agreement, Kim will plead guilty to a single felony count of disclosing classified information to Rosen in June 2009, and serve a 13-month prison sentence. Judge Colleen Kollar-Kotelly would have to accept the sentence or reject it outright?, in which case Kim could withdraw his plea. Kim would also be on supervised release for a year, but would pay no fine.
>
> Judge Kollar-Kotelly is expected to accept the guilty plea at today's hearing, but will not impose a sentence until sometime later.

Well, that is kind of a big deal dropped out of nowhere on a Friday afternoon.

As you may recall, this is the infamous case where the Obama/Holder DOJ was caught classifying a journalist, James Rosen of Fox News, as an "aider and abettor" of espionage. As the Washington Post reported, the scurrilous allegation was clear as day in a formal warrant application filed as an official court document:

> "I believe there is probable cause to conclude that the contents of the wire and electronic communications pertaining to the SUBJECT ACCOUNT [the gmail account of Mr. Rosen] are evidence, fruits and instrumentalities of criminal violations of 18 U.S.C. 793 (Unauthorized Disclosure of National Defense Information), and that there is probable cause to believe that the Reporter has committed or is committing a violation of section 793(d), as an aider and abettor and/or co-conspirator, to which the materials relate," wrote FBI agent Reginald B. Reyes in a May 28,

> 2010 application for a search warrant.
>
> The search warrant was issued in the course of an investigation into a suspected leak of classified information allegedly committed by Stephen Jin-Woo Kim, a former State Department contractor, who was indicted in August 2010.
>
> The Reyes affidavit all but eliminates the traditional distinction in classified leak investigations between sources, who are bound by a non-disclosure agreement, and reporters, who are protected by the First Amendment as long as they do not commit a crime.
>
> [snip]
>
> As evidence of Mr. Rosen's purported culpability, the Reyes affidavit notes that Rosen and Kim used aliases in their communications (Kim was "Leo" and Rosen was "Alex") and in other ways sought to maintain confidentiality.
>
> "From the beginning of their relationship, the Reporter asked, solicited and encouraged Mr. Kim to disclose sensitive United States internal documents and intelligence information…. The Reporter did so by employing flattery and playing to Mr. Kim's vanity and ego."
>
> "Much like an intelligence officer would run an [sic] clandestine intelligence source, the Reporter instructed Mr. Kim on a covert communications plan… to facilitate communication with Mr. Kim and perhaps other sources of information."

Of course, the fully justifiable uproar over the Rosen treatment by DOJ eventually led to "new guidelines", being issued by the DOJ. The new guidelines are certainly a half step in the

right direction, but wholly unsatisfactory for the breadth and scope of the current Administration's attack on the American free press.

But now the case undergirding the discussion in the Stephen Kim case will be shut down, and the questions that could play out in an actual trial quashed. All nice and tidy!

Frankly, I have mixed emotions about the reported Kim plea itself. It is, all in all, a pretty good deal for Kim and his attorney, the great Abbe Lowell. The case is done, bad precedent does not get etched into a jury verdict and appeal, and the nightmare has an end in sight for the defendant, Stephen Kim. All things considered, given the seriousness of the espionage and false statement charges in the indictment, 13 months is a good outcome. And it is not a horrible sentence to have as a yardstick for other leakers (were I Ed Snowden and Ben Wizner, I would like this result). By the same token, the damage done by the ridiculous antics and conduct of the DOJ in getting to this point is palpable. It will leave a stain that won't, and shouldn't, go away.

That still leaves the matter of Jeffrey Sterling, and reporter James Risen, though. Whither DOJ on that? And it is an important question since the much ballyhooed and vaunted "New Media Policies" announced by DOJ left wide open the ability to force Risen (and others that may some day be similarly situated) to testify about his sources of face jail for contempt.

JUDGE LAMBERTH TAKES DOJ TO WOODSHED; DOJ

MOVES PEAS UNDER DIFFERENT PODS

There was an interesting, albeit little noticed, order issued about ten days ago in the somewhat below the radar case of *Royer v. Federal Bureau of Prisons*. Royer is a federal inmate who has served about half of his 20 year sentence who in 2010 started bringing a mandamus action complaining that he was improperly classified as a "terrorist inmate" causing him to be wrongfully placed in Communication Management Unit (CMU) detention. The case has meandered along ever since.

Frankly, beyond that, the root case facts are not important to the January 15, 2014 Memorandum and Order issued by Judge Royce Lamberth in the case. Instead, Lamberth focused, like a white hot laser, on misconduct, obstreperousness and sheer incompetence on the part of the United States Department of Justice (DOJ) who represents the Defendant BOP in the case.

Here are some samples straight off of Royce Lamberth's pen:

> Plaintiff's discovery requests were served on June 19, 2013. Defendant failed to respond on July 19, 2013, as required, nor did defendant file a motion for extension of time. Defendant's first error, therefore, was egregious—arrogating to itself when it would respond to outstanding discovery.

and

> Defendant's fourth error was on August 5, 2013, when it filed its responses to interrogatories and produced a few additional documents. The answers to interrogatories contained no signature under oath, with untimely objections signed by counsel. Even novices to litigation know that answers to interrogatories must be signed under oath. Any attorney who practices before this Court should know that this Court does not tolerate discovery responses being filed on a "rolling" basis

Lamberth then goes on to grant the inmate plaintiff pretty much all his discovery motion and hammers the DOJ by telling plaintiff to submit its request for sanctions in the form of award of attorney fees and costs. Ouch; bad day for the DOJ.

Then the court lowered the boom. After noting that DOJ's defense was "completely without merit" and "incompetent", Lamberth puts a giant stake in the heart of the holier than thou DOJ:

> Defendant's sneering argument that plaintiff is not prejudiced by all this delay by defendant because he remains incarcerated is beyond the Court's comprehension. The whole point of this litigation is whether defendant can continue to single out plaintiff for special treatment as a terrorist during his continued period of incarceration. Did any supervising attorney ever read this nonsense that is being argued to this Court?

OUCH!!

> I regret that I am away sitting by designation on another court with a terrible backlog, or I would hold a hearing in open court to hold the government attorneys accountable for

> their misconduct here. Plaintiff's discovery efforts should not be further delayed, and requiring payment of attorney's fees will make clear that the Court totally and categorically rejects the practice of the government in this case.

Well, you just don't see that every day, and certainly not in the hallowed halls of Prettyman Courthouse in DC. It is, however, something that is a long time coming to the DOJ, who has for years arrogated themselves the right to lie, cheat and violate ethical rules in their litigation at every level of court.

It is why another Chief Judge, Alex Kozinski of the 9th Circuit, also exploded recently about the DOJ's relentlessly unconscionable tactics in engaging in Brady violations. Every judge in this country's federal courts ought be taking note, and bringing the weight of court sanction down on the DOJ.

So, what did DOJ do in response to the blistering whipping Royce Lamberth laid on them in *Royer*? Exactly what you would expect, hiding the pea by switching the pods covering it. Quietly, and under the cover of weekend electronic filing on Saturday, DOJ noticed the wholesale substitution of counsel on the Royer case. It was a terse one page noticed that substantively stated only:

> The Clerk of the Court will please enter the appearances of Assistant United States Attorneys Daniel F. Van Horn and Brian P. Hudak as counsel for Defendant Federal Bureau of Prisons and remove the appearances of all prior counsel for Defendant in the above-captioned case.

There were previously four DOJ attorneys assigned to the Royer defense: Charlotte Abel was designated lead and signer of the initial pleadings, and as Laurie Weinstein (signatory on

subsequent responsive answer), Rhonda Campbell and Rhonda Fields. All four were removed as counsel by DOJ Saturday, and replaced by Daniel Van Horn, Chief of the Civil Division, and Brian Hudak, another AUSA at DOJ Main.

No mention of punishment of the DOJ attorneys for their misconduct. There never is as Alex Kozinski complained so vociferously of. Even when there is no option but to have the Department of Justice Office of Professional Responsibility (OPR) open a case on a department attorney, the investigation turns into a black hole to conceal and whitewash the bad behavior. As I wrote in 2010, the OPR is an intentionally feckless, conflict infested, black hole designed by David Margolis and DOJ leaders to hide misconduct and shield their own attorneys.

Fordham University law professor Bruce A. Green, a former federal prosecutor and ethics committee co-chair for the ABA Criminal Justice Section, once famously said of OPR:

> I used to call it the Roach Motel of the Justice Department, Cases check in, but they don't check out.

Don't be looking for any substantive actions addressing, much less punishing, the previous attorneys Judge Royce Lamberth took to the woodshed in Royer. DOJ imperiously simply won't stand for it, and their first move was to shuffle the pea under the shell pods under the cover of a weekend.

Out with the old, in with the new, all better now over a sleepy weekend! If past is prologue, look for DOJ to be giving awards to Abel, Weinstein, Campbell and Fields for their incompetence. After all, DOJ has a history of rewarding bad behavior, and efforts to cover it up.

Because that is the way of the DOJ.

THE CIVIL LIBERTIES CELEBRATION HANGOVER WEARS OFF

At the end of last week, I joked a little about privacy and civil liberties advocates having had the “best week ever”. It was indeed a very good week, but only relatively compared to the near constant assault on the same by the government. But the con is being put back in ICon by the Administration and its mouthpieces.

As I noted in the same post, Obama himself has already thrown cold water on the promise of his NSA Review Board report. Contrary to some, I saw quite a few positives in the report and thought it much stronger than I ever expected. Still, that certainly does not mean it was, or is, the particularly strong reform that is needed. And even the measures and discussion it did contain are worthless without sincerity and dedication to buy into them by the intelligence community and the administration. But if Obama on Friday was the harbinger of the walkback and whitewash of real reform, the foot soldiers are taking the field now to prove the point.

Sunday morning brought out former CIA Deputy Director Michael Morrell on CBS Face the Nation to say this:

> I think that is a perception that’s somehow out there. It is not focused on any single American. It is not reading

> the content of your phone calls or my phone calls or anybody else's phone calls. It is focused on this metadata for one purpose only and that is to make sure that foreign terrorists aren't in contact with anybody in the United States.

Morrell also stated that there was "no abuse" by the NSA and that Ed Snowden was a "criminal" who has shirked his duties as a "patriot" by running. Now Mike Morrell is not just some voice out in the intelligence community, he was one of the supposedly hallowed voices that Barack Obama chose to consider "reform".

Which ought to tell you quite a bit about what Barack Obama really thinks about true reform and your privacy interests. Not much. In fact, Morrell suggested (and Obama almost certainly agrees) that the collection dragnet should be expanded from telephony to also include email. Not exactly the kind of "reform" we had in mind.

Then, Sunday night 60 Minutes showed that fluffing the security state is not just a vice, but an ingrained habit for them. Hot on the heels of their John Miller blowjob on the NSA, last night 60 Minutes opened with a completely hagiographic puff piece on and with National Security Advisor Susan Rice. There was absolutely no news whatsoever in the segment, it was entirely a forum for Rice and her "interviewer", Lesley Stahl, to spew unsupported allegations about Edward Snowden (He "has 1.5 million documents!"), lie about how the DOJ has interacted with the court system regarding the government surveillance programs (the only false statements have been "inadvertent") and rehab her image from the Benghazi!! debacle. That was really it. Not exactly the hard hitting journalism you would hope for on the heels of a federal judge declaring a piece of the heart of the surveillance state unconstitutional.

Oh, yes, Susan Rice also proudly proclaimed herself "a pragmatist like Henry Kissinger

which, as Tim Shorrock correctly pointed out, is not exactly reassuring from the administration of a Democratic President interested in civil liberties, privacy and the rule of law.

So, the whitewashing of surveillance dragnet reform is in full swing, let the giddiness of last week give way to the understanding that Barack Obama, and the Intelligence Community, have no intention whatsoever of "reforming". In fact, they will use the illusion of "reform" to expand their authorities and power. Jonathan Turley noted:

> Obama stacked the task force on NSA surveillance with hawks to guarantee the preservation of the program.

Not just preserve, but to give the false, nee fraudulent, patina of Obama Administration concern for the privacy and civil liberties concerns of the American citizenry when, in fact, the Administration has none. It is yet another con.

Or, as Glenn Greenwald noted:

> The key to the WH panel: its stated purpose was to re-establish public confidence in NSA — NOT reform it.

There may be some moving of the pea beneath the shells, but there will be no meaningful reform from the administration of Barack Obama. The vehicle for reform, if there is to be one at all, will have to come from the Article III federal courts. for an overview of the path of Judge Leon's decision in *Klayman* through the DC circuit, see this piece by NLJ's Zoe Tillman.

Lastly, to give just a little hope after the above distressing content, I recommend a read of this excellent article by Adam Serwer at MSNBC on the cagy pump priming for surveillance reform Justice Sotomayor has done at the Supreme Court:

> If Edward Snowden gave federal courts the means to declare the National

> Security Agency's data-gathering unconstitutional, Sonia Sotomayor showed them how.
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> It was Sotomayor's lonely concurrence in U.S. v Jones, a case involving warrantless use of a GPS tracker on a suspect's car, that the George W. Bush-appointed Judge Richard Leon relied on when he ruled that the program was likely unconstitutional last week. It was that same concurrence the White House appointed review board on surveillance policy cited when it concluded government surveillance should be scaled back.
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> > "It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," Sotomayor wrote in 2012. "This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."

Give the entire article a read, Adam is spot on. If there is to be reform on the surveillance dragnet, it will almost certainly have to be the handiwork of the courts, and Justice Sotomayor planted the seed. The constant barrage of truth and facts coming from the Snowden materials, what Jay Rosen rightfully terms "The Snowden Effect" is providing the food for Sotomayor's seed to flower. Hopefully.

CONNING THE RECORD, CONNING THE COURTS, DEFRAUDING THE PEOPLE

In the parlance of the once and forever MTV set, civil libertarians just had one of the "Best Weeks Ever". Here is the ACLU's Catherine Crump weighing in on the surprising results of President Obama's Review Board:

> Friday, the president's expressed willingness to consider ending the NSA's collection of phone records, saying, "The question we're going to have to ask is, can we accomplish the same goals that this program is intended to accomplish in ways that give the public more confidence that in fact the NSA is doing what it's supposed to be doing?"
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> With this comment and the panel's report coming on the heels of Monday's remarkable federal court ruling that the bulk collection of telephone records is likely unconstitutional, this has been the best week in a long time for Americans' privacy rights.

That "federal court ruling" is, of course, that of Judge Richard Leon handed down a mere five days ago on Monday. Catherine is right, it has been a hell of a good week.

But lest we grow too enamored of our still vaporous success, keep in mind Judge Leon's decision, as right on the merits as it may be, and is, is still a rather adventurous and activist decision for a District level judge, and will almost certainly be pared back to some extent on appeal, even if some substantive parts of it are upheld. We shall see.

But the other cold water thrown came from Obama

himself when he gave a slippery and disingenuous press conference Friday. Here is the New York Times this morning capturing spot on the worthless lip service Barack Obama gave surveillance reform yesterday:

> By the time President Obama gave his news conference on Friday, there was really only one course to take on surveillance policy from an ethical, moral, constitutional and even political point of view. And that was to embrace the recommendations of his handpicked panel on government spying — and bills pending in Congress — to end the obvious excesses. He could have started by suspending the constitutionally questionable (and evidently pointless) collection of data on every phone call and email that Americans make.
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> He did not do any of that.
> ….
> He kept returning to the idea that he might be willing to do more, but only to reassure the public "in light of the disclosures that have taken place."
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> In other words, he never intended to make the changes that his panel, many lawmakers and others, including this page, have advocated to correct the flaws in the government's surveillance policy had they not been revealed by Edward Snowden's leaks.
>
> And that is why any actions that Mr. Obama may announce next month would certainly not be adequate. Congress has to rewrite the relevant passage in the Patriot Act that George W. Bush and then Mr. Obama claimed — in secret — as the justification for the data vacuuming.

Precisely. The NYT comes out and calls the dog a dog. If you read between the lines of this Ken Dilanian report at the LA Times, you get the

same preview of the nothingburger President Obama is cooking up over the holidays. As Ken more directly said in his tweet, “Obama poised to reject panel proposals on 702 and national security letters.” Yes, indeed, count on it.

Which brings us to that which begets the title of this post: I Con The Record has made a Saturday before Christmas news dump. And a rather significant one to boot. Apparently because they were too cowardly to even do it in a Friday news dump. Which is par for the course of the Obama Administration, James Clapper and the American Intel Shop. Their raison de’etre appears to be keep America uninformed, terrorized and supplicant to their power grabs. Only a big time operator like Big Bad Terror Voodoo Daddy Clapper can keep us chilluns safe!

So, the dump today is HERE in all its glory. From the PR portion of the “I Con” Tumblr post, they start off with Bush/Cheney Administration starting the “bulk” dragnet on October 4, 2001. Bet that is when it first was formalized, but the actual genesis was oh, maybe, September 12 or so. Remember, there were security daddies agitating for this long before September 11th.

Then the handcrafted Intel spin goes on to say this:

> Over time, the presidentially-authorized activities transitioned to the authority of the Foreign Intelligence Surveillance Act (“FISA”). The collection of communications content pursuant to presidential authorization ended in January 2007 when the U.S. Government transitioned the TSP to the authority of the FISA and under the orders of the Foreign Intelligence Surveillance Court (“FISC”). In August 2007, Congress enacted the Protect America Act (“PAA”) as a temporary measure. The PAA, which expired in February 2008, was replaced by the FISA Amendments Act of 2008, which was enacted in July 2008 and remains in effect. Today, content

> collection is conducted pursuant to section 702 of FISA. The metadata activities also were transitioned to orders of the FISC. The bulk collection of telephony metadata transitioned to the authority of the FISA in May 2006 and is collected pursuant to section 501 of FISA. The bulk collection of Internet metadata was transitioned to the authority of the FISA in July 2004 and was collected pursuant to section 402 of FISA. In December 2011, the U.S. Government decided to not seek reauthorization of the bulk collection of Internet metadata.
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> After President Bush acknowledged the TSP in December 2005, two still-pending suits were filed in the Northern District of California against the United States and U.S. Government officials challenging alleged NSA activities authorized by President Bush after 9/11. In response the U.S. Government, through classified and unclassified declarations by the DNI and NSA, asserted the state secrets privilege and the DNI's authority under the National Security Act to protect intelligence sources and methods. Following the unauthorized and unlawful release of classified information about the Section 215 and Section 702 programs in June 2013, the Court directed the U.S. Government to explain the impact of declassification decisions since June 2013 on the national security issues in the case, as reflected in the U.S. Government's state secrets privilege assertion. The Court also ordered the U.S. Government to review for declassification all prior classified state secrets privilege and sources and methods declarations in the litigation, and to file redacted, unclassified versions of those documents with the Court.

This is merely an antiseptic version of the timeline of lies that has been relentlessly exposed by Marcy Wheeler right here on this blog, among other places. What is not included in the antiseptic, sandpapered spin is that the program was untethered from law completely and then "transitioned" to FISC after being exposed as such.

Oh, and lest anybody think this sudden disclosure today is out of the goodness of Clapper and Obama's hearts, it is not. As Trevor Timm of EFF notes, most all of the "I Con" releases have been made only after being forced to by relevant FOIA and other court victories and that this one in particular is mostly germinated by EFF's court order (and Vaughn index) obtained.

So, with that, behold the "I Con" release of ten different declarations previously filed and extant under seal in the *Jewel* and *Shubert* cases. Much of the language in all is similar template affidavit language, which you expect from such filings if you have ever dealt with them. As for individual dissection, I will leave that for later and for discussion by all in comments.

The one common theme that I can discern from a scan of a couple of note is that there is no reason in the world minimally redacted versions such as these could not have been made public from the outset. No reason save for the conclusion that to do so would have been embarrassing to the Article II Executive Branch and would have lent credence to American citizens properly trying to exercise and protect their rights in the face of a lawless and constitutionally infirm assault by their own government. The declarations by Mike McConnell, James Clapper, Keith Alexander, Dennis Blair, Frances Fleisch and Deborah Bonanni display a level of too cute by a half duplicity that ought be grounds for sanctions.

The record has been conned. Our federal courts have been conned. All as the Snowden disclosures

have proven. And the American people have been defrauded by pompous terror mongers who value their own and institutional power over truth and honesty to those they serve. Clapper, Alexander and Obama have the temerity to call Ed Snowden a traitor? Please, look in the mirror boys.

Lastly, and again as Trevor Timm pointed out above, these are just the declarations for cases the EFF and others are still pursuing. What of the false secret declarations made in *al-Haramain v. Obama*, which the government long ago admitted were bogus? Why won't the cons behind "I Con" release those declarations? What about the frauds perpetrated in *Mohamed v. Jeppesen* that have fraudulently ingrained states secrets cons into the government arsenal?

If the government wants to come clean, here is the opportunity. Frauds have been perpetrated on our courts, in our name. We should hear about that. Unless, of course, Obama and the "I Cons" are really nothing more than simple good old fashioned cons.

[By the way, Christmas is a giving season. If you have extra cheer to spread, our friends like Cindy Cohn, Trevor Timm, Hanni Fakhoury and Kurt Opsahl et al at EFF, and Ben Wizner, Alex Abdo, Catherine Crump et al at the ACLU all do remarkable work. Share your tax deductible love with them this season if you can. They make us all better off.]

MILITARY COMMISSIONS (IN US!) FOR NON-AFGHAN PRISONERS HELD AT PARWAN?

BRILLIANT!

When it comes to building policy around Afghanistan, the Obama administration is an endless fount of ideas with colossally ugly optics mixed with untenable legal positions. The latest brilliant offering from them is a beauty:

> The Obama administration is actively considering the use of a military commission in the United States to try a Russian who was captured fighting with the Taliban several years ago and has been held by the U.S. military at a detention facility near Bagram air base in Afghanistan, former and current U.S. officials said.

Wait. He was "fighting with the Taliban"? Doesn't that make him a standard combatant and traditional prisoner of war? Here is more of what the Post has on his history:

> The Russian is a veteran of the Soviet war in Afghanistan in the 1980s who deserted and ended up fighting U.S. forces after the Sept. 11, 2001, attacks. U.S. officials said the man, thought to be in his mid- to late 50s, is suspected of involvement in several 2009 attacks in which U.S. troops were wounded or killed. He was wounded during an assault on an Afghan border post that year and later captured.
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> Little else is known about him except for his nom de guerre, Irek Hamidullan.

No. Still nothing in this description that distinguishes Hamidullan from any other non-Afghan teaming up with the Taliban to take on US forces there. And yet, the military seems to think that their "case" against Hamidullan is among the strongest against the 53 non-Afghan prisoners the US admits to housing at Parwan:

> Military prosecutors have examined the evidence against Hamidullan and consider the case among the strongest that could be brought against any of the foreigners held at the Parwan Detention Facility near Bagram.
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> "He's pretty well-connected in the terrorist world," said one official with firsthand knowledge of the case. Hamidullan is thought to have links to one or more insurgent groups and ties to Chechnya, a part of the Russian Federation where rebels have fought two unsuccessful wars for independence.
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> Officials said Hamidullan remains committed to violent jihad and has sworn that he will return to the battlefield if he is released from prison. U.S. officials said that they have discussed the case with Moscow but that the Russians displayed little or no interest in his return. The senior official said transfers "are not always just up to us. Other countries have a say. Detainees have a say" in cases in which there are concerns about inhumane treatment.

How in the world does one become a fitting subject for a special military commission as an illegal combatant even while pledging to "return to the battlefield"? Even with the accusations that Hamidullan is said to be "pretty well-connected in the terrorist world" his own description of his commitment to violent jihad is to return to the battlefield, not to bring that jihad to the US. I still see nothing in what has been disclosed here that makes him different from a conventional prisoner of war.

The Post article eventually gets around to the whole issue of how Congress, led by such brave figures as Lindsey Graham, has been paralyzed in fear of the "Holy Hell" that could break out should Guantanamo prisoners be tried in US Federal Court. They bring out Adam Schiff to

note that the same cowardice would apply for the Parwan prisoners. And just as Afghanistan balked at instituting their own program of indefinite detention without trial during the process of handing over the Parwan prison to Afghan control, we learn in this article that Afghanistan refused to put similar language into the Bilateral Security Agreement.

Perhaps the biggest laugh of all in this episode comes from the Obama administration having to rely on none other than Mike Rogers for the admonition that we must be very afraid of this group of prisoners:

> "The people the U.S. houses in Bagram are pretty bad," said Rep. Mike Rogers (R-Mich.), chairman of the House Intelligence Committee, who has visited the prison in Afghanistan. "They are the worst."

After first characterizing this group of prisoners as "pretty bad", Rogers seems to catch himself and remember his duty in delivering the statement, upgrading their status to "the worst". Even though Rogers has served in Congress since just before 9/11, it seems that he has selective amnesia when it comes to making stupid pronouncements about prisoners. Rumsfeld's famous pronouncement that the Guantanamo prisoners were the "worst of the worst" was later debunked when it was revealed that only about 4% of them had actually been taking part in fighting. Rogers seems determined not to let a pesky thing like history stand in the way of a well-turned phrase. And the Obama administration seems determined not to let a pesky thing like international law or the rules of war get in the way of security theater as played out in a military commission.

WHEN SUSAN RICE IS RIGHT, SHE'S RIGHT!

From the No Kidding Files, courtesy of Jason Leopold, comes this gem from vaunted National Security Advisor Susan Rice:

> "Let's be honest: at times we do business with govts that do not respect the rights we hold most dear"

Well, hello there Susan, I couldn't agree more. Especially on days when I see things like this from the ~~Glenn Greenwald and Pierre Omidyar Snowden file monopoly~~ err, Barton Gellman at the Washington Post:

> The National Security Agency is gathering nearly 5 billion records a day on the whereabouts of cellphones around the world, according to top-secret documents and interviews with U.S. intelligence officials, enabling the agency to track the movements of individuals — and map their relationships — in ways that would have been previously unimaginable.
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> ….
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> The number of Americans whose locations are tracked as part of the NSA's collection of data overseas is impossible to determine from the Snowden documents alone, and senior intelligence officials declined to offer an estimate. "It's awkward for us to try to provide any specific numbers," one intelligence official said in a telephone interview. An NSA spokeswoman who took part in the

> call cut in to say the agency has no way to calculate such a figure.

It is thoroughly loathsome that Americans must do business with a government that does this, and insane that it is their own government.

It is “awkward” to determine how many innocent Americans are rolled up in the latest out of control security state dragnet the United States government is running globally. Actually, that is not awkward, it is damning and telling. Therefore the American citizenry must not know, at any cost.

Susan Rice is quite right, we are forced to “do business” with a government that does “not respect the rights we hold most dear”

[Here is the full text of the Susan Rice speech today that the above quote was taken from. It is a great speech, or would be if the morals of the United States under Barack Obama matched the lofty rhetoric]