CHRIS HEDGES ET. AL WIN ANOTHER ROUND ON THE NDAA

You may remember back in mid May Chris Hedges, Dan Ellsberg, Jennifer Bolen, Noam Chomsky, Alexa O'Brien, Kai Wargalla, Birgetta Jonsdottir and the US Day of Rage won a surprising, nee stunning, ruling from Judge Katherine Forrest in the Southern District of New York. Many of us who litigate felt the plaintiffs would never even be given standing, much less prevail on the merits. But, in a ruling dated May 16, 2012, Forrest gave the plaintiffs not only standing, but the affirmative win by issuing a preliminary injunction.

Late yesterday came even better news for Hedges and friends, the issuance of a permanent injunction. I will say this about Judge Forrest, she is not brief as the first ruling was 68 pages, and todays consumes a whopping 112 pages. Here is the setup, as laid out by Forrest (p. 3-4):

> Plaintiffs are a group of writers, journalists, and activists whose work regularly requires them to engage in writing, speech, and associational activities protected by the First Amendment. They have testified credibly to having an actual and reasonable fear that their activities will subject them to indefinite military detention pursuant to § 1021(b)(2).

> At the March hearing, the Government was unable to provide this Court with any assurance that plaintiffs' activities (about which the Government had known—and indeed about which the Government had previously deposed those individuals) would not in fact subject plaintiffs to military detention pursuant to § 1021(b)(2). Following the March hearing (and the Court's May 16 Opinion on the preliminary injunction), the Government fundamentally changed its position.
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> In its May 25, 2012, motion for reconsideration, the Government put forth the qualified position that plaintiffs' particular activities, as described at the hearing, if described accurately, if they were independent, and without more, would not subject plaintiffs to military detention under § 1021. The Government did not—and does not—generally agree or anywhere argue that activities protected by the First Amendment could not subject an individual to indefinite military detention under § 1021(b)(2). The First Amendment of the U.S. Constitution provides for greater protection: it prohibits Congress from passing any law abridging speech and associational rights. To the extent that § 1021(b)(2) purports to encompass protected First Amendment activities, it is unconstitutionally overbroad.
>
> A key question throughout these proceedings has been, however, precisely what the statute means—what and whose activities it is meant to cover. That is no small question bandied about amongst lawyers and a judge steeped in arcane questions of constitutional law; it is a question of defining an individual's core liberties. The due process rights guaranteed by the Fifth Amendment

> require that an individual understand what conduct might subject him or her to criminal or civil penalties. Here, the stakes get no higher: indefinite military detention—potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever. The Constitution requires specificity—and that specificity is absent from § 1021(b)(2).

Those were the stakes in the litigation and Katherine Forrest did not undersell them in the least. Now, truth be told, there is not really a lot of new ground covered in the new decision that was not touched on in the earlier ruling, but it is even more fleshed out and also formalizes a declination of the government's motion for reconsideration filed in June as well as argument on the additional grounds necessary for a permanent injunction over the preliminary injunction initially entered. As Charlie Savage pointed out, it is a nice little gift coming on the same day the House voted 301-118 to re-up the dastardly FISA Amendments Act.

And Forrest really did go out of her way to slap back the government's bleating that courts should stay out of such concerns and leave them to the Executive and Legislative Branches, an altogether far too common and grating refrain in DOJ arguments in national security cases (p 11-12):

> The Court is mindful of the extraordinary importance of the Government's efforts to safeguard the country from terrorism. In light of the high stakes of those efforts as well as the executive branch's expertise, courts undoubtedly owe the political branches a great deal of deference in the area of national security. See Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2711 (2010). Moreover, these same considerations counsel particular attention to the Court's obligation to

> avoid unnecessary constitutional questions in this context. Cf. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). Nevertheless, the Constitution places affirmative limits on the power of the Executive to act, and these limits apply in times of peace as well as times of war. See, e.g., Ex parte Milligan, 72 U.S. (4 Wall.) 2, 125-26 (1866). Heedlessly to refuse to hear constitutional challenges to the Executive's conduct in the name of deference would be to abdicate this Court's responsibility to safeguard the rights it has sworn to uphold.
>
> And this Court gives appropriate and due deference to the executive and legislative branches—and understands the limits of its own (and their) role(s). But due deference does not eliminate the judicial obligation to rule on properly presented constitutional questions. Courts must safeguard core constitutional rights. A long line of Supreme Court precedent adheres to that fundamental principle in unequivocal language. Although it is true that there are scattered cases—primarily decided during World War II—in which the Supreme Court sanctioned undue deference to the executive and legislative branches on constitutional questions, those cases are generally now considered an embarrassment (e.g., Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of Japanese Americans based on wartime security concerns)), or referred to by current members of the Supreme Court (for instance, Justice Scalia) as "wrong" (e.g., Ex parte

> Quirin, 317 U.S. 1 (1942) (allowing for the military detention and execution of an American citizen detained on U.S. soil)). Presented, as this Court is, with unavoidable constitutional questions, it declines to step aside.

If you relish such things, especially the rare ones where the good guys win, the whole decision is at the link. If you would like to read more, but not the entire 112 pages, the summary portion is contained in pages 3-14. For those longtime readers of Emptywheel, note the citation to *Ex Parte Milligan* on pages 12, 37, 51 and 79. Our old friend Mary would have been overjoyed by such liberal use of *Milligan*, especially this passage by Judge Forrest on pages 79-80:

> A few years later, in *Milligan*, the Supreme Court held:
> "Neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus." 71 U.S. at 4. The Court stated, "No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open." Id. at 73.

Indeed. Keep this is mind, because the concept of military tribunals not being appropriate to try citizens "at a place where the courts are open" is a critical one. Although the language invokes "citizens", the larger concept of functioning courts being preferable will be coming front and center as the Guantanamo Military Tribunals move through trial and into the appellate stages, and will also be in play should Julian Assange ever really be extradited for trial in the United States (a big if, but one constantly discussed).

So, all in all, yesterday's decision by Judge Forrest has far ranging significance, and is a remarkably refreshing and admirable one that should be widely celebrated. That said, a note of caution is in order: Enjoy it while you can, because if you are the betting type, I would not lay much of the family farm on Forrest's decision holding up on appeal.

There was talk on Twitter that the Supreme Court would reverse, but I am not sure it even gets that far. In fact, unless Chris Hedges et. al get a very favorable draw on the composition of their appellate panel in the 2nd Circuit, I am dubious it goes further than that. And one thing is sure, the government is going to appeal.

MESS AT DHS: THE ICE LADY GOETH AND THOUGHTS ON THE REAL STORY

As Marcy appropriately pointed out, there was a LOT of news dumped in the waning moments and bustling milieu of a Friday afternoon; not just pending a holiday weekend, but with a press corps still hung over from, and yammering about, the empty chairs and empty suits at the GOP National Convention. I have some comments on the cowardice of justice

by DOJ on Arpaio, but will leave that for another time.

But the declination of prosecution of Joe Arpaio was not the only Arizona based story coming out of the Obama Administration Friday News Dump. Nor, in a way, even the most currently interesting (even if it ultimately more important to the citizens of Maricopa County, where Arpaio roams free to terrorize innocents and political opponents of all stripes and nationalities). No, the more immediately interesting current story in the press is that of Suzanne Barr, DHS and Janet Napolitano. Not to mention how the press has bought into the fraudulent framing by a Bush era zealot to turn a garden variety puffed up EEO complaint into a national scandal on the terms and conditions of the conservative, sex bigoted, right wing noise machine.

And what a convoluted tale this is too. It is NOT what it seems on the surface. The complainant referenced in all the national media, James Hayes, had nothing whatsoever to do with the DHS official, Suzanne Barr, who just resigned. There is a LOT more to the story than is being reported. And there are far more questions generated than answers supplied. What follows is a a more fully fleshed out background, and some of my thoughts and questions.

You may have read about this DHS story already, but here is the common generic setup from the mainstream media, courtesy of the New York Times:

> The accusations against Ms. Barr came to light as part of a discrimination lawsuit filed by James T. Hayes Jr., a top federal immigration official in New York, against Ms. Napolitano, contending that he had been pushed out of a senior management position to make room for a less-qualified woman and then was retaliated against when he threatened to sue. The lawsuit also accused Ms. Barr

> of creating “a frat-house-type atmosphere that is targeted to humiliate and intimidate male employees.”
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> 
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> The resignation — amid a three-day holiday weekend sandwiched between the Republican and Democratic national conventions — came at a time when the public was likely paying little attention to events in Washington. But Representative Peter T. King of New York, the Republican chairman of the House Homeland Security Committee, released a statement in which he vowed to continue to scrutinize the matter when Congress returns from its August break.
>
> “The resignation of Suzanne Barr raises the most serious questions about management practices and personnel policies at the Department of Homeland Security,” Mr. King said, adding that the committee would review “all the facts regarding this case and D.H.S. personnel practices across the board.”

The Complaint of James T. Hayes, Jr: So, Suzanne Barr really must have laid one on this Jimmy Hayes chap, right?? Uh, no. Not really. Not at all. Let’s take a look at the actual complaint as legally pled. These are my thoughts, as a lawyer, reading it:

> 1) The plaintiff is one “James T. Hayes, Jr.”.
>
> 2) Mr. Hayes was basically a run of the

> mill Border Patrol and INS lackey (“special agent”) in southwestern Texas and southern California who apparently had the “right stuff” to climb like wildfire through the civil service ranks after 911 in the Bush/Cheney/Ridge incarnation or DHS that was ginned up out of thin air by an ideologically conservative administration newly formed and trying to implement an act of Congress it did not want, but was more than willing to take advantage of ideologically.
>
> 3) Other than the claim by Hayes that his work was “outstanding”, Mr. Hayes does not allege, nor appear to have displayed in any regard, any exceptional skills, aptitude, nor performance in his line level work, and beyond, which could explain his advancement from a line level scrub on the desolate Texas border to positions he had no educational training for. Nevertheless Hayes appears to have had a meteoric rise, all under the newly established conservative Bush/Cheney/Ridge doctrinaires at DHS in the mid 2000s.
>
> 4) After Obama was elected, he appointed Janet Napolitano to head DHS. Napolitano, say what you will about her, is a consummate technocrat. To the victors go political spoils, Napolitano had a massive job to do, and as she is wont to do, started doing it. One of those things appears to be backing Hayes out of the front line picture and putting more competent and ideologically consistent people in the front line positions. This is what every new administration does when they come in under a party shift in control.
>
> 5) The REAL object of Hayes’ scorn, and central defendant (even if not formally named in the caption of the complaint)

> in Hayes' lawsuit, is NOT Suzanne Barr, but is, instead, another Napolitano confidante, Dora Schriro. Schriro was, and is, a corrections and incarceration specialist of some repute in both Arizona, nationally and, now, in New York. I have never personally met Schriro that I am aware of, but friends who have say she is very smart and very innovative.
>
> 6) When I say the main beef of Plaintiff Hayes is Schriro, I am not kidding. The allegations against Barr being trumped up in the media are literally the equivalent of dicta and are contained within paragraphs 43-49 of the complaint. **NONE of the alleged sexual shenanigans by Suzanne Barr happened to Hayes himself**. NONE of it. From my reading of the complaint, the allegations as to Barr might very well never see the light of a jury's eyes, even if Hayes' life depended on it. It is salacious, to be sure; but it is scurrilous bunk and Hayes' complaint is going absolutely nowhere on its own. Let's be crystal clear, the salacious details gratuitously inserted by Hayes only serve to make his ordinary EEO complaint into a big irresistible scandalicious ball of attraction for a complicit press that lives for the same and either can't or won't ask the further questions.
>
> 7) Hayes appears to be a disgruntled conservative ladder climber who got the ladder pulled out from underneath him once the new (and presumably more competent) people came into office with Obama. It was not a sexual harassment thing, it was a root ideology and competence thing. The kind of thing that happens in cabinet level bureaucracies every time there is a fundamental power shift in the party in control of the

> White House.
>
> 8) Oh, and the people that allegedly were the actual recipients of the alleged “sexual abuse” from Suzanne Barr wanted so little to do with Hayes and his complaint that they not only would not join as plaintiffs, they refused to let Hayes use their names because they were not down with what he was doing.
>
> 9) Hayes does not have the guts to say it, but makes continuous veiled inference to homosexual activity (see, for instance, paragraphs 80-83) in his complaint.

Lawyers who do plaintiff’s employment law have written hundreds of complaints like this one. They are a dime a dozen. Interestingly enough, you must seek redress initially in the EEO (Equal Employment Office), and do so in a timely manner (which Hayes may have egregiously violated). Hayes did, however, even if with questionable timing, go to the EEO (see paragraph 165 of complaint) but, clearly, the EEO apparently (even though “partially” upholding some minor item of complaint, in some regard) thought there were not sufficient damages to award meaningful compensation and/or dispensation to Hayes and, thus, Hayes filed his complaint in District Court for the District of Columbia. (I am seeking information on the EEO process for Hayes, should the information become available, I will supplement).

In short, the record is a little thin currently, but looks rather suspect substantively as to Mr. Hayes’ claims. Long on whining and salacious

innuendo, short on actual compelling nature and pertinent facts.

Which makes you wonder why DHS suddenly put Suzanne Barr on administrative leave long after the filing of the complaint on May 21, 2012. It seems rather clear some of the individuals mentioned in Hayes' complaint have now come forth and executed at least affidavits attesting to issues with Barr. But, what was the timing of those affidavits in relation to when Barr was put on leave? (It appears the affidavits may have been the cause of the sudden administrative leave of Barr, but it is far from clear). Who sought to have the affidavits created and placed in the record – Hayes, DHS, the individuals themselves? (if the individuals had not done it before, knowing the matter was percolating, it truly seems unlikely it was them). These are extremely pertinent questions which cannot be answered yet.

One thing I can tell you is Suzanne Barr is not a normal political sitting duck though; it is significant she has decided to step down so early. Barr is a confidante of Napolitano, and Janet does not suffer fools and incompetents easily. In fact, Janet Napolitano, say what you will about her, is a *very* competent and able technocrat and bureaucrat. More than that, however, Suzanne Barr has some juice of her own. Her father was Burton Barr, the powerful Republican speaker of the Arizona Legislature for twenty years in the 70s and 80s. Barr was a pragmatic, reasonable, dealmaking leader, the likes of which are now long gone in the Arizona Republican party (and the national GOP too it seems). The massive and elegant Phoenix Central Public Library is named in Burton Barr's honor.

Burton Barr's daughter Sue also worked with, and is close to, both Jon Kyl and John McCain, before joining forces with Napolitano. Again, in short, Sue Barr is not without a little clout; how did it come to this? This matter has actually been percolating for a least a year behind the scenes, going back to the EEO

process; why has there not been heavier support for her, and why has there not been reportage until now; who is pushing the memes being purveyed?

Nobody is asking that question, but they darn well should be, because it is a good one. In DC politics of this level, when an individual has the base for such support, and it is not evidently there, there is a reason why. What is the reason here? Because, again, thinking it is just Hayes' complaint does not pass the smell test.

Most all of the above relates to Hayes vis a vis Suzanne Barr; but Barr, as stated above, is not even the woman Hayes is *really* complaining stole the candy from his lunchbox. No, despite the focus of the media and lust for the salacious tidbits, that woman would be not Suzanne Barr, but one Dora Schriro.

Who is Dora Schriro? Here the saga takes another unexpected, and not quite fully fleshed out, nor clear, turn. Hayes' complaint pleads one, and only one, substantive count and that is for "retaliation" in violation of the Civil Rights Act, title 42 USC 2000(e) et seq.

Hayes centers the entire count around his replacement as national ICE Director of Detention and Removal Operations ("DRO") in the Washington DC main office. After the Obama/Napolitano Administration took control of DHS, the lead detention job, the DRO, was effectively given to Schriro and thus began Hayes' litany of gripes.

This is the description of Dora Schriro alleged in James Hayes' complaint:

> 31. However, Schriro had no experience in managing a Federal law enforcement department, she had never exercised management control over a department charged with the enforcement of Federal laws, and she had no experience managing FFederal budgets, *inter alia*.
>
> 32. Schriro was not qualified for the position Plaintiff had because of her lack of Federal law enforcement experience.
>
> 33. Schriro did have experience, however, working with Secretary Napolitano.
>
> 34. Schriro enjoyed a long standing relationship with the Secretary.
>
> 35. Plaintiff believed that he was being replaced in his duties because of this relationship and because he was not female.

Two things jump out from the picture of Schriro painted by Hayes; first he considered her completely unqualified and without sufficient skills to run the ICE detention/removal operation and, secondly, she is a woman engaged in a questionable relationship with Janet Napolitano, and that is why she got his job. The latter is so scurrilous as to not merit a response (not to mention Hayes alleges no factual support to respond to).

But let's look at the former – the qualifications of Dora Schriro.

Far from the naif painted by Hayes, Schriro has a long and distinguished career leading major detention operations. In fact, by the time Hayes was given his first regional office slot in 2004, Dora Schriro was taking over leadership of the Arizona Department of Corrections which, along with California, is the biggest prison system in the western United States. Prior to being lured to Arizona by then Governor

Napolitano – presumably not because of any "special relationship" with Napolitano, but to be an outside reformer for Arizona's burgeoning, corrupt and moribund prison system – Schriro spent over eight years leading the prison system for the state of Missouri. Prior to Missouri, Schriro spent over four years as a Deputy Commissioner for the sprawling Rikers Island complex in New York. For Hayes to argue Schriro was unqualified for her duties is absurd to the extreme.

But there is more, much more, to Schriro. She is a prison reformer of the type liberals so often desire and call for, yet never really get to see in the practical bureaucracy in the United States. When Scriro first came to Arizona, the Phoenix New Times did a very extended feature on her. The material covers, in a balanced and fair fashion, both the plaudits and the gripes (and there are a lot of both) regarding her style and leadership beliefs. The one irreducible minimum is she favors a decidedly reform minded brand of compassionate community based incarceration:

> In Arizona….
>
> > During her 11 months on the job, Schriro has wasted no time introducing her parallel universe. She's selling ice cream sandwiches to prisoners, with profits going to victims' groups. She's overhauled a salary system so archaic that some employees were getting pay reductions when they were promoted. She's tapping community colleges to improve education programs. She wants alternatives to prison for criminals who violate terms of probation or parole.
>
> In Missouri….
>
> > "She walked into a mess,"

> recalls Clarence Harmon, former St. Louis police chief who went on to become the city's mayor. "They had riots. You could go out there, you'd sit there and be talking to the watch commander who had five diamond rings on, all bigger than your eyes. These guys got paid next to nothing, but they made up for it, you know what I mean. At one point, I told somebody, 'They [inmates] can get drugs, they can get anything. The only thing they can't get is a woman in there.' Well, we found out they could do that, too."
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> Schriro didn't entirely solve security problems in St. Louis — there was at least one escape in the four years she was workhouse warden — but that's not necessarily her fault, Harmon says. "A lot of the problems are institutional," he says. "She made a great turnaround, let's put it that way."
>
> Before long, Schriro was making headlines for bringing inmate families into the workhouse for picnics with their felonious loved ones. There were arts and crafts, live theater, Halloween parties and special visits on Mother's Day. During the holidays, she brought in Santa Claus to comfort juveniles charged as adults with crimes as serious as murder. She improved education programs, got inmates involved in charity work and even had voter-registration drives.
>
> Schriro called it the Seduction

> > Principle. “We attempt to seduce people to try something they didn’t do before to leave a lingering taste in their mouths so they will continue to seek these activities when they go to another place,” she told the St. Louis Post-Dispatch in a 1992 interview.

> In general….

> > Schriro’s signature is Parallel Universe, which is essentially an extension of the Seduction Principle. Life in prison should replicate life on the outside so inmates will be ready when they’re released. That means requiring prisoners to work or attend school and giving them freedom to decide when they’ll do laundry, visit the commissary, fill prescriptions or otherwise spend time. Elected inmate councils should help decide how prisons are run. There should be more drug treatment and an emphasis on victims’ rights, with prisoners donating to charities and listening to victims and their families talk about the consequences of crime.

Dora Schriro Detention Theory and The Death Penalty: Oh, and the biggee. While Schriro is generally loathe to say so on the record, she has a long history of conduct and belief against the death penalty (lest any blood lust conservatives get their knickers in a wad, that did not stop Schriro from her job duty, as she presided over dozens of executions in both Missouri and Arizona).

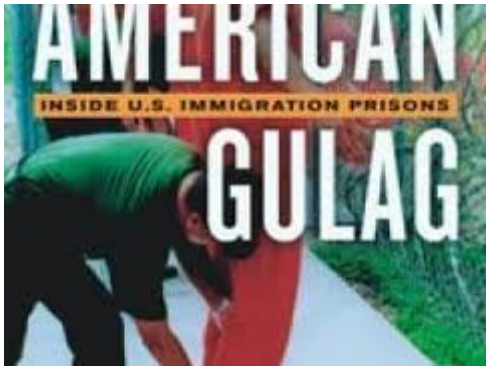
The lock'em up prison industry is one of the few true growth sectors in US commerce over the last twenty years; it is little wonder that Dora Schriro has her detractors within and about the system, and the New Times article, "Dora's Darlings" paints both sides of her reformist program views in detail. It is certainly not a sector where one voice could change the landscape quickly, but Dora Schriro came pretty darn close during her time in Arizona.

Here, from the Tucson Citizen, quoting tough Pima County Attorney (i.e. chief prosecutor) Barbara LaWall, is the coda to Dora Schriro's time at the helm of the Arizona Department of Corrections:

> On Monday, one day after the 2009 Super Bowl, Schriro will begin her post as senior adviser to former Arizona Gov. Janet Napolitano, recently confirmed as director of Homeland Security.
>
> "In the five years since (the Lewis prison siege), I think the evidence of what she's managed to accomplish has shown up as a result of the award DOC just got," said Pima County Attorney Barbara LaWall, referring to the national Innovations in American Government Award.
>
> Since Schriro's reforms have been in effect, inmate violence and drug use are down and more inmates are enrolled in education classes and have earned their GEDs (high school equivalency certificates). And early results of recidivism studies show that fewer released prisoners are committing crimes and returning to prison.

So that is the history and position from which the Obama Administration brought Schriro in to try to bring stability and reform to the (as the Arizona prison system was when she arrived) suddenly burgeoning "illegal" immigration

detention system run by the United States government.



And, let's be honest, a prison reformer with fairly radical liberal theories was not going to last in Arizona under a state government suddenly shepherded by Jan Brewer as opposed to Janet Napolitano. Especially considering the man once, and always, pulling the strings on the Jan Brewer wooden puppet is Chuck Coughlin, a bought and paid for lackey of the for profit private prison industry titan Corrections Corporation of America (CCA). So, the fact Schriro left Arizona for professionally sunnier climes in DC is quite understandable.

What is less easy to fathom is why Dora Schriro left her lofty perch at DHS so quickly. Schriro started at DHS in February 2009, right after the inauguration, and confirmation of Napolitano; however she suddenly left in 2011 after scant more than two years on the job and plenty of opportunity for fundamental reform of the US immigrant detention system left to accomplish (See also the report from Amnesty International).

Questions Raised By This Story: Dora Schriro left a very lofty and important perch in the Obama Administration, not long into the job, with prospects excellent for another 4-5 years to implement the programs she deeply cared about in the hotbed core of immigration detention. Why? And under what circumstances? To go back basically to Rikers Island for Bloomberg who is close to being term limited out, even if it is in the capacity of director? Really? Again, why?

The answer is we do not really know; and, until the fuller story is reported by the national

media, we are not going to know, much less understand, the context.

One thing is for certain, with Rep. Peter King (R-MuslimBigotLand) blathering like the pompous nincompoop he is, from his perch at the top of the House Homeland Security Committee, it is hard to believe the opposite coast opportunistic blowhard, Darrell Issa, will not be far behind with the House Oversight Committee because, messin with DHS is one of Issa's hobby horses.

But, that begets the bigger question, can Peter King, Darrell Issa and the national media keep their heads out of the bigoted, discriminatory gutter on this story? If you have not yet read James T. Hayes' complaint in this case, do so now. And try to scrape the slime off of your eyes from doing so, as a result of his dripping innuendo, scandalous and scurrilous pleading. It is hard to imagine a more contemptible complaint, nor one more cravenly pled in innuendo and impertinent allegations, considering the one poorly and contemptibly set out single prayer for relief. From the surface, this is the stuff Rule 11 sanctions should rightly be made of. It would be nice if the press could help us out with a little in depth competent reportage.

It is actually shocking the American mainstream press has so far passed on the blatant insidious innuendo of the Hayes complaint and Peter King bombast, and only implied their decadent ravings. Expect worse from them; as is being evidenced by the British tabloid press already.

From The Daily Mail:

> **Big Sis Janet Napolitano 'promoted woman with whom she had a 'long relationship' while her female staff tormented male colleagues with 'sexually charged games"**
>
> > Hayes claims that Schriro, who is now commissioner of the city Department of Correction, was not as qualified him for the role as she did not have as much

> law-enforcement experience.
>
> ‘Schriro did have experience, however, working with Secretary Napolitano,’ it writes. ‘Schriro enjoyed a long-standing relationship with the secretary.’
>
> The lawsuit does not outline the exact nature of the relationship between Napolitano and the woman she brought with her to Washington from Arizona.
> It has long been rumoured that ‘Big Sis’ Napolitano is a lesbian, but in 2002 she publicly denied the claims.
>
> Schriro is a widow; she was married for just 10 months in 1991 before her husband, St Louis’s director of public safety Gay Carraway, died of cancer. He was 20 years her senior.
>
> She has previously gushed about how much she looks up to Napolitano, naming her as one of her greatest influences – alongside her late husband and grandparents.
>
> ‘Janet Napolitano is one of the smartest people I’ve ever met,’ she told Education Update.
> ‘She’s totally capable of having a great time wherever she is and regardless of the workload.’

As the Brits would say, it would take a “bloody fool” to not see what gutter the craven likes of Plaintiff James Hayes and Congressman Peter King would like to drive this story into. Will the American media condone and be complicit in such thinly veiled bigotry?

What really happened with Hayes, Schriro, Barr, Napolitano and the other unknown folks who apparently executed affidavits (and were they pressured by one party or the other to do so)? It is hard to tell at this point, but it is beyond unlikely that the real story is what is being portrayed to date in any of the national media. Let me say one other thing, irrespective of all the questions legitimately raised by this matter, if all the allegations against Barr are true, they arguably go well over the line of acceptability.

But Barr denies the allegations and Hayes is, shall we say, particularly whiny and lacking in credibility on his face. If it was a one time joke between stressed officials letting their hair down, that is one thing; if it is a repetitive pattern, especially tied to commonality of alcohol (which seems to be the implication), then such should not stand. But now both Barr and Schriro are gone from DHS, Hayes is curiously left in his still lofty and exalted position as SAC for New York, and there are a plethora of questions about all of them.

Summation: As to substantive evidence of Hayes' complaint, the Barr allegations look pretty weak and impertinent and, in fact, that is exactly (among a LOT of other compelling defenses) what the government has argued in response (Note, the response is temporarily withdrawn pending a more appropriate pleading of the complaint by Hayes as the first one was insufficient). As to Napolitano, Schriro and Barr coming in with a new Administration and putting their stamp on it, ever since since the victory of the Jacksonian Democrats in 1828, when the term "to the victor belong the spoils" was coined, that is just how federal cabinet level government works. Not to mention, of course, Dora Schriro was a hell of a lot more qualified in detention leadership than James T. Hayes.

There is a heck of a story here, but so far it begets many more questions than it does answers. The traditional press needs to quit focusing on

the salacious, and simple, and dig deeper to answer some of those questions. The real story may even be more exciting (and more salacious) than what we have seen so far.

THE SCOTUS HEALTHCARE DECISION COMETH

[**UPDATE**:Okay, from the SCOTUSBlog "The entire ACA is upheld, with exception that federal government's power to terminate states' Medicaid funds is narrowly read." Key language from the decision on the mandate:

> The money quote from the section on the mandate: Our precedent demonstrates that Congress had the power to impose the exaction in Section 5000A under the taxing power, and that Section 5000A need not be read to do more than impose a tax. This is sufficient to sustain it.

And, boy howdy, was I wrong. I steadfastly maintained that CJ Roberts would never be the swing vote on a 5-4 majority, but would only join a liberal majority on the heels of Tony Kennedy. WRONG! The mandate survives solely as a result of Roberts and without Kennedy. Wow.

Final update thought. While I think the mandate should have been constructed as a tax, it clearly was not in the bill passed. You want to talk about “legislating from the bench”? Well hard to see how this is not a remarkable example of just that. I am sure all the plebes will hypocritically cheer that, and fail to note what is going on. Also, if the thing is a “tax” how is it not precluded as unripe under the AIJA? don’t have a fine enough reading of the opinion – read no reading yet – to discern that apparent inconsistency.

As to the Medicaid portion, here is the key opinion language on that:

> Nothing in our opinion precludes Congress from offering funds under the ACA to expand the availability of health care, and requiring that states accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.

Oh well, people on the left have been crying for this crappy law, now you got it. Enjoy. I will link the actual opinion as soon as it is available.

And here is THE FULL OPINION]

Well, the long awaited moment is here: Decision Day On The ACA. If you want to follow the live roll out of the Supreme Courts decisions, here is a link to the incredibly good SCOTUSBlog live coverage. Coverage starts at 9 am EST and the actual Court proceedings starting at 10 am EST.

This post will serve two functions. The first is to lay just a very brief marker, for better or worse (undoubtedly the latter I am afraid), going into decision day, hour and moment, and a ready location to post the decision of the court and link the actual opinions. The minute they are known and links available, they will be put

here in an update at the top of the post. That way you can start the discussion ahead of the decisions, lay a record of your predictions ahead of time AND have a place to immediately discuss the rulings as they come in and immediately afterward.

Many friends and other pundits involved in the healthcare SCOTUS discussion have been working for weeks on alternative drafts of posts and articles to cover every contingency so they can immediately hit the net with their takes. That is great, and some of them will be a service. But I have just been too busy lately to expend that kind of energy on something so canned. Sorry about that. So my actual analysis and thoughts will mostly have to come later, but they will be on the merits, such as they may be, when the actual decisions are in. Also, I will be in comments and on Twitter (under "bmaz" of course).

Okay, with the logistics out of the way, I have just a few comments to lodge on the front end of this gig. First off, the ACA/PPA started off as truly about health *insurance*, not about health *care* from the start, and that is, still, never more true than today. Marcy laid out why this is, and why a LOT of people may get, or be forced into, purchasing health insurance, but there is a real question as to whether they will be able to afford to actually use what they will be commanded to buy. See here, here and here as a primer. Those points are pretty much as valid today as they were back when she wrote them.

Secondly, I have no real actual idea how the ruling will come down as to the merits. But, just for sport and grins, I guess I should take a stab at what I think after all the briefing and oral arguments, so here goes. The Anti-Injunction Act argument that the issue is a tax matter and therefore cannot be ripe for consideration until implemented and applied, will be rejected. The individual mandate is struck by a very narrow majority in a very carefully worded opinion written by John

Roberts. The remainder of the ACA is deemed severable and is left to stand, and the Medicaid provisions are left intact, again by a narrow majority. Here is the thing, I would not bet one red cent of my *own* money on the foregoing; but if I could play with *your* money, I guess that is how I would roll. Maybe. Note that, before oral argument, my prediction was that the mandate would be upheld; I may regret not sticking with that call.

The real $64,000 question is the mandate, and that could just as easily be upheld, in which case it will likely be by a 6-3 margin (I still think Roberts writes the opinion, and if that is to uphold that means it will be 6-3). Here is what I will unequivocally say: however this goes down as to the mandate, it is a very legitimate issue; the arguments by the challengers, led by Randy Barnett, are now, and always were, far more cognizant than most everyone on the left believed or let on. I said that before oral argument, I said that after oral arguments and I say that now. Irrespective of what the actual decision turns out to be. Oh, and I always thought the hook liberals desperately cling to, *Wickard v. Filburn*, was a lousy decision to start with.

I have been literally stunned by the ridiculous hyperbole that has been blithely bandied about on the left on the ACA cases and potential striking of the mandate. Kevin Drum says it would be “ridiculous”, James Fallows says it would be a “coup!”, Liz Wydra says the entire legitimacy of SCOTUS is at issue, So do the Jonathans, Chait and Cohn. A normally very sane and brilliant guy, Professor David Dow, went off the deep end and says the justices should be impeached if they invalidate the mandate. The Huffington Post, and their supposed healthcare expert, Jeffrey Young, ran this insanely idiotic and insulting graphic. It is all some of the most stupefyingly hyperbolic and apoplectic rubbish I have ever seen in my life.

Curiously, the ones who are screaming about, and

decrying,”politicization of the Court”, my colleagues on the left, are the ones who are actually doing it with these antics. Just stop. Please. The mandate, and really much of the ACA was ill conceived and crafted from the get go. Even if the mandate is struck, the rest of the law can live on quite nicely. Whatever the decision of the court, it will be a legitimate decision on an extremely important and very novel extension of Commerce Clause power that had never been encountered before.

One last prediction: Irrespective of the outcome today, the hyperbole will continue. So, there is the warm up. Let’s Get Ready To Rumble!

DOJ ETHICS: PIN HEADS, BLOCH HEADS & THE ROCKET

Whoooosh! And, like that, the complete acquittal in *USA v. William Roger Clemens* came and went. The five year long, over $10 million Clemens prosecution was a joke on the tax paying American public.

And so it goes for one defendant accused by the Department of Justice. What about other defendants who have come within the purview of the DOJ for false statements, perjury and obstruction of Congress? Say, for instance, our old friend Scott Bloch.

A friend of mine asked if the following order entered yesterday in Bloch's case by DC District Court Magistrate Judge Deborah Robinson meant Scott Bloch must report immediately to Jail?

> By a petition filed on June 19, 2012, the United States Probation Office advised that Defendant requests permission to travel internationally in August, 2012. U.S. Probation Office Petition (Document No. [74]) at 1. In the petition, the Probation Office notes that on April 27, 2010, Defendant was released by this court pending sentencing, subject to the condition, inter alia, that he report his travel plans to the Probation Office. Id.; see also Release Order (Document No. 5). The release order was entered after Defendant appeared before the undersigned and entered a plea of guilty to a one-count information by which he was charged with criminal contempt of Congress. 04/27/2010 Minute Entry. However, by an order filed on August 2, 2011, Defendant was permitted to withdraw his plea. Memorandum Opinion and Order (Document No. 73) at 1, 13. In the interim, no other charge has been filed, and no further proceedings have been scheduled; accordingly, Defendant is not on release pending sentencing, and has not been since August 2, 2011, the date on which he was permitted to withdraw his plea. It is, therefore, ORDERED that the release order (Document No. 5) is hereby VACATED nunc pro tunc to August 2, 2011. (lcdar3)

No, my friend was joking; but, still, the laugh is superbly taken. Looks to me like Bloch is scott free (some pun intended) OR (Own Recognizance) pending any other charges. Where are the new charges and/or plea?

When, if ever, will the DOJ Public Integrity Section (PIN) get around to pursuing the blatant

in your face, egregious, actual crime against Congress committed by a critical federal investigative and prosecutorial attorney appointed to protect federal employees and whistleblowers instead of the silly corporate and in-bred Congressional protection racket charges inherent in the Roger Clemens, Barry Bonds and John Edwards prosecutions?

Okay, if I was Bloch's defense attorney, William Sullivan of Pillsbury, I would absolutely say this is bunk, put my client on OR or cut him loose considering the dilly dallying, thumbs in ass, conduct of the DOJ. Since I am not him, I would like to know what the heck is going on. It has been nearly a year since Royce Lamberth, somewhat surprisingly, allowed Bloch to withdraw from his plea.

In their collusive attempt to get Bloch's plea withdrawn, the DOJ and Bloch avowed they had already been discussing alternative paths for either charging or plea. That was before Lamberth allowed the withdrawal, i.e. well over a year ago. What in the world is stopping the DOJ from prosecuting this Criminal? In that same time period, they tried Roger Clemens twice, the second one lasting over two months, but apparently they just can't find the time to prosecute a real criminal like Scott Bloch, doing real damage to government and Congress

Here is the thing, the date of the "Geek Squad wipe" Bloch obstructively did to his government computers was 12/18/2006 – the statute has now presumptively run on that. House Oversight requested their depo/interview on 12/6/2007 and actually took it on 3/4/2008. So, probably, there are still offenses within the SOL but it is wasting away. This just is NOT that complicated of a gig IF you are not completely pulling punches.

Seriously, please, tell me why we are still hanging where we are? A misdemeanor level rookie municipal prosecutor could have convicted Bloch in about a day and a half, maybe two day, long trial. The crack team at DOJ lead by the heads

of PIN just can’t get er done? Scott Bloch should be heading to prison, not off on an Independence Day holiday vacation.

The real question here is not when will Bloch be dealt with, but why has he not been standardly, and appropriately – yet – still, even as of this quite late date within the statute of limitations? This course of conduct by the DOJ of colluding with Bloch to have him avoid accountability is a mocking joke on both the Article I Congress and the Article III Court. Yet, no questions are asked, no explanations given by DOJ, and few, if any, answers demanded by the press or Congress. The Obama DOJ, from their first moment, unequivocally, and inexplicably, aligned and sided with the criminal defendant Bloch, and diametrically opposite the interest of the public and rule of law.

Why do you think that is? Take a look at this in contrast to the way Roger Clemens was treated by the United States Department of Justice. And the way the Banksters have NOT been treated to the “niceties” of the US Criminal Justice system.

Golly, I wonder why that is? If Barack Obama and Eric Holder’s DOJ cannot answer for the lack of viable Wall Street/Financial Products Industry prosecutions, and have such little to say after the catastrophically worthless persecution of Roger Clemens, maybe the DOJ could at least tell the people it represents what the hell it is doing with Mr. Scott Bloch.

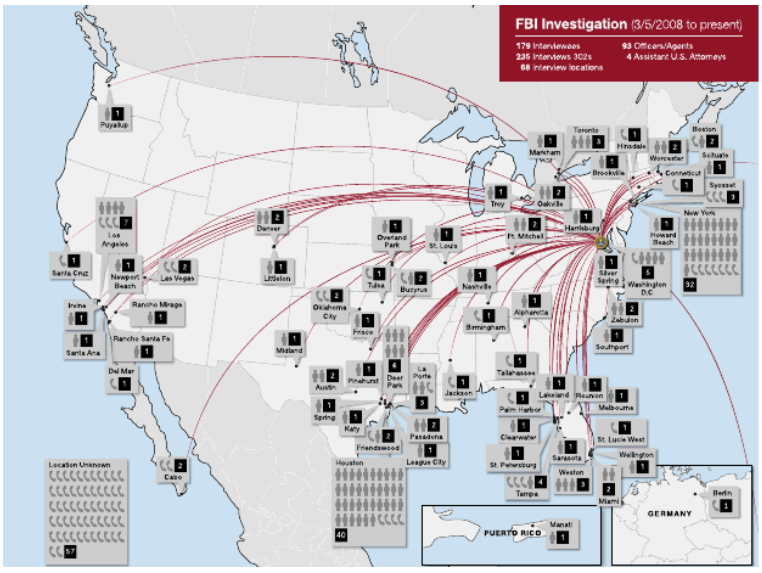
Naw, that is probably just too much to ask from America’s finest.

WHY THE DOJ CAN’T

PROSECUTE BANKSTERS: MAP OF CLEMENS INVESTIGATION

At a time when there are still no significant prosecutions of major players, banks and investment shops responsible for the financial fraud that nearly toppled the world economy and is still choking the US economy, we get an explanation why from an unlikely source – the Roger Clemens trial in Judge Reggie Walton's courtroom in the DC District. During defense examination of FBI special agent John Longmire today, a map of the FBI/DOJ investigation of Roger Clemens, who was accused of lying about getting a few steroid shots in the late 90s and early 2000s, was displayed. We are now two full months into the second trial of Roger Clemens stemming from this investigation.

Any more questions on why DOJ cannot get around to prosecuting banksters??



SCOTUS CERT GRANT IN CLAPPER TAKES KEY 9TH CIRCUIT CASES HOSTAGE

Marcy noted briefly Monday morning, the Supreme Court granted certiorari in *Clapper v. Amnesty International*:

> SCOTUS did, however, grant cert to Clapper v. Amnesty, which I wrote about here and here. On its face, Clapper is just about the FISA Amendments Act. But it also has implications for wiretap exceptions—and, I've argued—data mining exceptions to the Fourth Amendment. In any case, SCOTUS seems interested in reversing the 2nd Circuit opinion, which had granted standing to people whose work had been chilled by the passage of the FAA. Also, as I hope to note further today, SCOTUS' Clapper decision may also impact the *Hedges v. Obama* ruling from last week.

As Marcy indicated, there is nothing good afoot from SCOTUS taking cert in *Clapper*; if they wanted to leave the very nice decision of the 2nd Circuit intact, they simply leave it intact and don't grant review. Oh, and, yes, Marcy is quite right, it's a very safe bet that Clapper will "impact" the also very nice recent decision in Hedges, which is, itself, headed with a bullet to the 2nd Circuit.

There was, of course, much discussion of the significance of the *Clapper* cert grant yesterday on Twitter; one of the best of which was between Marcy, Lawfare's Steve Vladeck and, to a lesser extent, me. To make a long story a little shorter, I said (here and here):

> See, and I HATE saying this, I think Kennedy will do just that+then same 5

> will kill al-Haramain once it gets to SCOTUS and then they will have capped the Bush wiretapping well completely and closed off standing significantly for the future.

Yikes, I did not contemplate just how true this statement was; the *Clapper* cert grant has already had a far deeper and more pernicious effect than even I suspected. This morning, in a move I do not believe anybody else has caught on to yet, the 9th Circuit quietly removed both *al-Haramain* and the CCR case encaptioned *In Re: NSA Telecommunications Litigation/CCR v. Obama* from the oral argument calendar that has long been set for June 1 in the old 9th Circuit Pasadena courthouse. The orders for both al-Haramain and CCR are identical, here is the language from the *al-Haramain* one:

> Argument in this case scheduled for June 1, 2012 in Pasadena, California, is vacated pending the Supreme Court's decision in *Clapper v. Amnesty Int'l*, No. 11- 1025. The court may order supplemental briefing following the Supreme Court's decision. Oral argument will be rescheduled.

Whoa. This is extremely significant, and extremely unfortunate. Also fairly inexplicable. Entering the order for *CCR* makes some sense, since it involves the same "fear of surveillance" standing issue as is at issue in *Clapper*; but doing it for *al-Haramain* makes no sense whatsoever, because *al-Haramain* is an "actual" surveillance standing case.

There simply is no issue of the claimed, putative, standing concern that permeates *Clapper* and *CCR*. Well, not unless the 9th Circuit panel thinks the Supreme Court might speak more broadly, and expand the parameters wildly, in *Clapper* just as they did in *Citizens United*. That would be a pretty ugly path for the Supreme beings to follow; but, apparently, not

just a cynical bet on my part, but also a bet the 9th Circuit immediately placed as well.

To be fair, even positive forward thinking players, like Steve Vladeck, thought the lower courts might be copacetic, or that the Supremes might comply. Maybe not so much. I know, shocking. Here is a glimpse, through Vladeck, of the situation:

> But at a more fundamental level, there's one more point worth making: Readers are likely familiar with Alex Bickel's Passive Virtues, and his thesis that, especially on such sensitive questions where constitutional rights intersect with national security, courts might do best to rely on justiciability doctrines to duck the issue—and to thereby avoid passing upon the merits one way or the other. [Think Joshua at the end of WarGames: "The only winning move is not to play."] And at first blush, this looks like the perfect case for Bickel's thesis, given the implications in either direction on the merits: recognizing a foreign intelligence surveillance exception and thereby endorsing such sweeping, warrantless interceptions of previously protected communications vs. removing this particular club from the government's bag…
>
> And yet, the foreign intelligence surveillance exception only exists because it has already been recognized by a circuit-level federal court, to wit, the FISA Court of Review. Whether the passive virtues might otherwise justify judicial sidestepping in such a contentious case, the fact of the matter is that this is a problem largely (albeit not entirely, thanks to the FISA Amendments Act) of the courts' making. To duck at this stage would be to let the FISA Court of Review—the judges of which are selected by the Chief

> Justice—have the last word on such a momentous question of constitutional law. In my view, at least, that would be unfortunate, and it's certainly not what Bickel meant…

Back to al-Haramain and the effects in the 9th Circuit. Here is the latest, taken from the Motion for Reconsideration filed late yesterday by al-Haramain, Wendell Belew and Asim Ghafoor:

> The question presented in Clapper is thus wholly unrelated to the issues presented on the defendants' appeal in the present case. The Supreme Court's decision in Clapper will have no effect on the disposition of the present case. Thus, there is no reason to delay the adjudication of this appeal pending the decision in Clapper, which would only add another year or more to the six-plus years that this case has been in litigation.
>
> It makes sense for the Court to have vacated the oral argument date for Center for Constitutional Rights v. Obama, No. 11-15956, which involves theories of Article III standing similar to those in Clapper. It does not, however, make sense in the present case, where Article III standing is based on proof of actual past surveillance rather than the fear of future surveillance and expenditures to protect communications asserted in Clapper.

Yes, that is exactly correct.

And, therein, resides the problem with Vladeck's interpretation of what is going on with the *Clapper case*. Steve undersold, severely, just how problematic *Clapper* is. Both the discussion herein, and the knee jerk action of the 9th Circuit, the alleged liberal scourge of Democratic Federal Appellate Courts, demonstrate

how critical this all is and why *Clapper* is so important.

Clapper has not only consumed its own oxygen, it has consumed that of independent, and important, nee critical, elements of the only reductive cases there are left in the United States judicial system in regards to these ends. That would be, at an irreducible minimum, *al-Haramain* in the 9th Circuit.

If you have forgotten about *al-Haramain*, and the proceedings that took place in the inestimable Vaughn Walker's, court, here it is. Of all the attempts to attack the Bush/Cheney wiretapping crimes, *al-Haramain* is the only court case that, due to its unique circumstances, has been successful. It alone stands for the proposition that mass crimes were, in fact, committed. *al-Haramain* had a tough enough road ahead of it on its own, the road has become all the more treacherous now because of *Clapper*.

The 9th Circuit should grant the motion for reconsideration and reinstate *al-Haramain* on the oral argument calendar, but that is quite likely a longshot at this point. Expect the DOJ to file a very aggressive response, they are undoubtedly jumping for joy at this stroke of good fortune and will strive to protect it.

I WAS WRONG ABOUT THE CHEN AFFAIR

I am in the unenviable position of having to say I was wrong and am sorry. This is in relation to the issue of US diplomacy vis a vis China as relates to Chinese dissident Chen Guangcheng. In case anybody has forgotten, I wrote a rather harsh article toward the US government, by the State Department, conduct within 24 hours or so of it hitting the news wires:

> Hillary Clinton, and the State Department under President Obama, have been far from perfect, to be sure; but, overall, one of the stronger, if not strongest, departments in Obama's cabinet. But this is way ugly, and ought to, by all rights, leave a very permanent mark. It is a stain fairly earned in every sense of the word. Hard to imagine a more cravenly constructed pile of PR bullshit since the Jessica Lynch affair. Yet here it is in living steaming brownish color. All painted with Madame Secretary conveniently in Beijing, China. Awkward!

In a nutshell, I was extremely critical of the entire show, and especially the press manipulation component thereof.

I was wrong. I still have pretty strong issues with the opportunistic way in which the press was contacted by Chen on the way from the embassy to the hospital, which was completely aided and abetted by the US diplomatic officials with him, but this is, at this point, kind of a minor quibble it seems. And, heck, who knows, maybe it was even part of the plan.

Whatever, it seems to have worked out.

Here is today's lead from the Washington Post:

> Blind legal activist Chen Guangcheng, who had been at the center of a diplomatic row between the U.S. and Chinese governments, left Beijing on Saturday afternoon on a United Airlines flight bound for Newark and an uncertain life in the United States, after Chinese officials and American diplomats worked out of the public view to arrange for him and his family to travel out of the country.
>
> In the past two weeks, while waiting for movement on the Chinese side, senior staff in the State Department had been

> laying the groundwork for Chen's departure, including the logistics of his transportation, according to a senior administration official who was not authorized to give his name.

Listen, this is still very far from ideal in a number of respects, and it will be a long time, if ever, before we know all the facts and circumstances surrounding this mess. But fair is fair, my initial criticism, even if correct in some lesser elements, was dreadfully wrong overall.

Hat's off to Hillary Clinton, the State Department and the Obama Administration. It is far from perfect, but it is looking pretty good. I was wrong to be too critical, too soon.

UPDATE: The Washington Post has a pretty fleshed out tick tock on the gig. It actually does look like fairly decent work by State. Would love to see an honest version of the same on the flip side, from the Chinese perspective. That would be fascinating.

CHEN GUANGCHENG: THE HOLLOW CORE OF A PRESS MANIPULATION PRESIDENCY

I live in the Pacific time zone, a full three hours behind the news makers and breakers on the east coast. I woke up early yesterday, by my time, and found an apparent great story occupying my Twitter stream: Chinese dissident and activist Chen Guangcheng had not only, through the miracle that is United States benevolence, been sheltered in the US Embassy (as had been theorized) from his daring blind man's escape from house arrest, but had been represented in a breathtakingly humanitarian deal with the oppressive Chinese government that resulted in his proper medical care, reunion with his family and a safe and fulfilling life from here on out.

The proverbial "and everybody lived happily ever after".

By the time I got my second eye open, and focused, I realized what I was reading something more akin to a Highlights Magazine "What's Wrong With This Picture?" puzzle.

And so it was. What a difference a day makes. The initial report I read this morning at the source Washington Post article appears to be pushed aside from their website, supplanted by a more honest report.

The first report at the WaPo depicted an incoming call to the reporter from US Ambassador to China, Gary Locke:

> What I was not prepared for was when Locke said, "I'm here with Chen Guangcheng. Do you speak Chinese? Hold

> on.”
>
> And then passed the phone over.
>
> “Hello, this is Chen Guangcheng,” came a matter-of-fact, almost cheerful voice.
>
> I introduced myself in halting Chinese, using my Chinese name and the Chinese name for The Washington Post. I asked how Chen was, and where. I asked him to speak slowly, to make sure I could understand.
>
> “Washington Post?” Chen repeated, his voice sounding generally happy. Chen said he was fine and was in the car headed to the hospital, Chaoyang Hospital. He repeated the name slowly, three times.
>
> And that was it. Chen handed the phone back to the ambassador, who said they were stuck in traffic, but promised a full briefing later.
>
> Following the old “two source” rule for journalists, I definitely had my story. Chen was indeed under U.S. diplomatic protection, as we and other news outlets had been reporting. He was now leaving the embassy on his way to the hospital. In a vehicle with the American ambassador. The first word would go out soon after that, in a blast to our overnight editors, and via my Twitter account.
>
> I learned later that I was just one in a succession of calls U.S. diplomats made from the van at Chen’s request – they also spoke to Chen’s lawyer and to Secretary of State Hillary Rodham Clinton, recently arrived in Beijing for an important two-day summit.

That was the “happily ever after” story which was too good to be true.

It was indeed too good to be true. A mere twelve hours later, and even the Washington Post reports a far different tale:

> The blind legal activist Chen Guangcheng left the refuge of the U.S. Embassy in Beijing for a hospital on Wednesday, but he was quickly cordoned off by Chinese police and reportedly seized by misgivings about his decision, as an apparent diplomatic triumph risked dissolving into a potentially damaging episode in U.S.-China relations.
>
> After four days of secret negotiations, U.S. diplomats on Wednesday initially touted then later scrambled to defend their role in forging an agreement that they said contained extraordinary Chinese promises to allow Chen — a self-taught lawyer known for criticizing Chinese policies on abortion — to move his family to Beijing, where he would begin a new life as a university student.
>
> Chinese officials, by contrast, broke their official silence on Chen by firing a broadside complaining about U.S. interference in China's internal affairs. The Foreign Ministry demanded an apology, which State Department officials declined to give.
> ….
> But activists' fears over Chen's fate mounted, and they expressed increasing alarm — fueled by a series of Twitter updates — that what seemed like a human rights victory was spiraling quickly into a worst-case scenario.
>
> Chen was no longer under U.S. protection, they noted, and it was not clear whether he had left on his own free will or under coercion. While U.S. officials said they had been promised access to Chen in the hospital, Britain's Channel 4 news quoted a

> conversation with him in which he seemed confused and upset that no American diplomats were around.
>
> “Nobody from the [U.S.] embassy is here. I don’t understand why. They promised to be here,” Channel 4 quoted Chen as saying.
>
> Bob Fu, president of the advocacy group ChinaAid, said he was concerned that “the U.S. government has abandoned Chen” and that the Chinese government is “using his family as a hostage.”

Quite a difference, no? And that, quite frankly, appears to be the sanitized version from the Washington Post, who has a dozen eggs on their face. But nowhere near the eggage the Obama Administration, and State Department, has on their collective face.

Hillary Clinton, and the State Department under President Obama, have been far from perfect, to be sure; but, overall, one of the stronger, if not strongest, departments in Obama’s cabinet. But this is way ugly, and ought to, by all rights, leave a very permanent mark. It is a stain fairly earned in every sense of the word. Hard to imagine a more cravenly constructed pile of PR bullshit since the Jessica Lynch affair. Yet here it is in living steaming brownish color. All painted with Madame Secretary conveniently in Beijing, China. Awkward!

Such are the vagaries of policy by press manipulation though. The ass biting incidents such as the aforementioned Jessica Lynch, the dishonor of the man that was Pat Tillman, to the broken promises of Barack Obama on warrantless wiretapping and war crime accountability, to the false hope of Cairo, to the greasy and uncomfortable election politicization of the SEAL’s takedown of Osama bin Laden a year ago, to Chen Guangcheng.

There has been precious little return on the false hype from the Obama Administration;

instead, a wave of disappointment. And the press is, without saying, all too willing to serve as the tool of the string pullers in power, regardless of which political faction it may be at any given time. It is who they are, it is what they do. As Glenn Greenwald said recently of the willing press:

> They aren't nearly so substantive as to be driven by any sort of belief or ideology or anything like that. Their religion is the worship of political power and authority (or, as Jay Rosen says, their religion is the Church of the Savvy). Royal court courtiers have long competed with one another to curry favor with the King and his minions in exchange for official favor, and this is just that dynamic. Political power is what can give them their treats – their "exclusive" interviews and getting tapped on their grateful heads to get secret documents and invited to White House functions and being allowed into the sacred Situation Room – so it's what they revere and serve.

That is exactly the bogus and counterfeit relationship between Presidency and press that led to the unquestioning, and ultimately embarrassing, breathless buy in by the Washington Post on the spoon fed horse manure from the Obama Administration's Chinese Ambassador, Gary Locke, on Chen Guangcheng.

It is all a media manipulation now, and the media do not care who, or which side, are doing the manipulating. Presidency by press release. It doesn't matter if it is real or fabricated, it is all good if it sells. The distressing thing is that it does, indeed, sell.

WILLIAM WELCH LEAVING DOJ; MAIN JUSTICE CIRCLES THE ETHICAL WAGONS

Apparently the thrill is finally gone, or at least soon to be gone. Carrie Johnson at NPR has just reported:

> A federal prosecutor who led the elite public integrity unit when the case against the late Alaska Sen. Ted Stevens collapsed has told associates he will leave the Justice Department.
> ….
> A spokeswoman for the Justice Department and a representative for Welch had no comment on his departure, which one source said he characterized as a "retirement."
>
> Welch had been scheduled to lead a controversial prosecution later this year of former CIA official Jeffrey Sterling, who is accused of leaking secrets to New York Times reporter James Risen. That case has drawn widespread media attention because it could set important precedent on the issue of whether reporters enjoy some sort of legal privilege that could help them protect their sources.

This is interesting, actually fascinating news. As Carrie notes the Sterling matter is hanging in the lurch. In fact, it is waiting on an interlocutory appeal decision from the 4th Circuit over claims that the DOJ, once again led by Welch, played fast and loose with critical evidence disclosure. I do not, however, think that the impetus behind this somewhat surprising announcement. The 4th case appears to have completed briefing with the government's filing

of a redacted reply about six weeks ago; however, I don't think a decision is likely coming that fast and federal appellate courts are not that leaky. Although, to be fair, District and Circuit courts do, occasionally in media intensive cases, give the parties a heads up a decision is coming.

More likely, this is more fallout from the Ted Stevens case and the Schuelke report. In fairness to Welch, he was not one of the hardest hit DOJ attorneys in Schuelke's report, but he was blistered by Schuelke at Schuelke's testimony in front of the Senate Judiciary Committee in late March:

> Schuelke said tight deadlines before the lawmaker's October 2008 trial and a series of missteps within the Justice Department's public integrity unit where leaders William Welch and Brenda Morris "abdicated supervisory responsibility" contributed to the evidence sharing lapses. The failings prompted new Attorney General Eric Holder to abandon the case in 2009; Stevens died a year later in a plane crash after he had lost his Senate seat.

The odds are fairly good that the DOJ is putting the finishing touches on its long awaited OPR report on the Stevens fiasco and, after Schuelke, needs a sacrificial lamb. And Welch is a prime candidate to be sacrificed. But that would beg the question of what will they do about Brenda Morris, whose conduct in Stevens was much more egregious and central, as a supervisor, that even that of Welch. And it should not be forgotten that Brenda Morris was also smack dab in the middle of another catastrophic black eye for the DOJ, the Alabama bingo cases. So, there are some real questions for DOJ there.

As to William Welch though, with both the OPR report nearing completion, and the prospect of a House Judiciary inquiry looming later this week,

it would seem that Welch’s newfound desire for “retirement” has a bit of a forced edge to it.

One last thing should be kept in mind: the legislation proposed by Lisa Murkowski and having key bi-partisan backing after Stevens and the Schuelke Report, to reform federal evidence disclosure rules for the DOJ. The DOJ is literally, and cravenly, apoplectic about the proposed reform and has promised they have “learned their lesson” and that everybody should just “trust us”.

DOJ had been fighting disclosure reform hard for quite a long time; but there will never be better momentum than is present now, and they know it. Any seasoned criminal defense attorney will confirm that the far more open and reciprocal discovery rules found at the state level in several more enlightened jurisdictions (I can vouch for this in Arizona, which is one of them) work far better than the archaic disclosure rules extant in federal court. It would be a huge benefit to fairness in the criminal justice process, and it IS an attainable goal. And that, too, may be why we are seeing the sacrifice of William Welch.

REQUIEM FOR ACA AT SCOTUS & LEGITIMACY OF COURT AND CASE

The Patient Protection and Affordable Care Act (ACA), otherwise popularly known as "Obamacare" had a bit of a rough go of it this week at the Supreme Court. Jeff Toobin called it a train wreck (later upgraded to plane wreck). Kevin Drum termed it a "debacle" and Adam Serwer a "Disaster".

Was it really that bad? Considering how supremely confident, bordering on arrogant, the Obama Administration, and many of the ACA's plethora of healthcare "specialists", had been going into this week's arguments, yes, it really was that bad. Monday's argument on the applicability of the tax Anti-Injunction Act (AIJA) went smoothly, and as expected, with the justices appearing to scorn the argument and exhibit a preference to decide the main part of the case on the merits. But then came Tuesday and Wednesday.

Does that mean the ACA is sunk? Not necessarily; Dahlia Lithwick at Slate and Adam Bonin at Daily Kos sifted through the debris and found at least a couple of nuggets to latch onto for hope. But, I will be honest, after reading transcripts and listening to most all of the audio, there is no question but that the individual mandate, and quite possible the entire law, is in a seriously precarious lurch.

Unlike most of my colleagues, I am not particularly surprised. Indeed, in my argument preview piece, I tried to convey how the challenger's arguments were far more cognizable than they were being given credit for. The simple fact is the Commerce Clause power claimed by Congress in enacting the individual mandate

truly is immense in scope, – every man, woman and child in the United States – and nature – compelled purchase of a product from private corporate interests. Despite all the clucking and tut tutting, there really never has been anything like it before. The Supreme Court Justices thought so too.

I have no idea what kind of blindered hubris led those on the left to believe the Roberts Court was going to be so welcoming to their arguments, and to be as dismissive of the challengers' arguments, as was the case. Yes, cases such as *Raich* and *Wickard* established Congress could regulate interstate commerce and *Morrison* and *Lopez* established there were limits to said power. But, no, none of them directly, much less conclusively, established this kind of breathtaking power grant as kosher against every individual in the country.

Despite the grumbling of so many commentators that the law was clear cut, and definitively established in favor of the mandate, it wasn't, and isn't. And I was not the only one on the left who found the challenging arguments serious, Professor Jonathan Turley did as well (see here and here).

There is no particular need to rehash *all* the different arguments, and iterations of them by the scores of commentators (not to mention the participants in the case, of course), that has already been done elsewhere, actually everywhere, ad nauseum. There is one area I do want to touch on, at least briefly, though. Limitations of power. This is an important concept in Commerce Clause law, which is why I tried to focus on it in the argument preview article.

Simply put, the the question is, if the federal government can, via the Article I Congressional authority, stretch the reach of the Commerce Clause to every individual in the US, willing or not, as they did in the "ACA Individual Mandate" is there any power over the individual and/or the states, that is still out of bounds? Are

there any limitations left on the ability of the federal to consume individual determination? What the Supreme Court looks for in such an inquiry are “limiting principles” that could constrain the power in the future. Another term of art used in the law is, is there any way to “cabin”, i.e. constrain, the power?

In addition to the preview post, I also asked colleagues on Twitter (here and here) to describe proper concepts that would accomplish the goal. For over a day, until the reality that – gasp – this was also the concern of the justices, there was literally no discernible response. Once that reality, forced by the Court, set in however, attempts came fast and furious. Nearly all were rationalizations for why the ACA/mandate was necessary and/or desirable, but were not actual limiting principles.

It was a bit of a trick question, because the best lawyers in the government and amici did not do so hot in that regard either. Out of all I have seen, the one that struck me as fairly easily the best was propounded by Professor Jack Balkin:

> **The Moral Hazard/Adverse Selection Principle**
> Congress can regulate activities that substantially affect commerce. Under the necesary and proper clause, Congress can require people to engage in commerce when necessary to prevent problems of moral hazard or adverse selection created by its regulation of commerce. But if there is no problem of moral hazard or adverse selection, Congress cannot compel commerce. Courts can choose different standards of review to decide how much they want to defer to Congress’s conclusion.

Nice, tight and definable. Not bad. Still leaves a lot of ground – likely far too much – open to suit the apparent Supreme Court majority

forming. So, when you read, here or otherwise, discussion about “limiting principles” or “cabining”, this is what is being contemplated.

As usual, Justice Anthony Kennedy is the critical swing. And Kennedy’s general understanding (and consideration here) of liberty is instructive. The following lays it out quite well, using both quotes from last Tuesday’s oral argument and background, and comes via Adam Liptak at the New York Times:

> Paul D. Clement, representing 26 states challenging the law, had a comeback. “I would respectfully suggest,” he said, “that it’s a very funny conception of liberty that forces somebody to purchase an insurance policy whether they want it or not.”
> …..
> Justices tend to ask more questions of the lawyers whose positions they oppose, and Justice Kennedy posed six questions to Mr. Verrilli and just three to the two lawyers challenging the law.
>
> The questions to Mr. Verrilli were, moreover, mostly easy to read. They were crisp expressions of discomfort with the administration’s arguments.
>
> “Can you create commerce in order to regulate it?” Justice Kennedy asked.
>
> “This is a step beyond what our cases have allowed, the affirmative duty to act to go into commerce” he said. “If that is so, do you not have a heavy burden of justification?”
>
> “Can you identify for us some limits on the commerce clause?” he asked.
>
> Those questions fit neatly within one strain of Justice Kennedy’s understanding of liberty, one he discussed at length last year in an opinion for a unanimous court.

> Limiting federal power, he wrote, "protects the liberty of all persons within a state by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake."

There is a Constitutional desire, and instruction to, colloquially, have limitation on federal power and to reserve rights to states and liberties to individuals. The Supreme Court, and Justice Kennedy (and to a lesser extent Chief Justice Roberts), in the ACA arguments was grappling with these concepts. How they find them, and decide them, will determine the outcome on the mandate.

One way or another, the case on the mandate will be decided. In the preview post before oral arguments began, I predicted either a 6-3 decision to uphold the constitutionality of the mandate or a 5-4 decision against it. The odds on the latter have soared. At this point, I would rate the odds at 50:50 either way. But, sometime – likely near the end of June – there will be a decision and the victory dance by the winning side and caterwauling and demeaning of the "politicized Court" by the losers will commence. That pattern will play out regardless of which party wins, and which party loses.

As described in both the instant post, and the preview piece, the arguments are indeed contentious, but they are also quite real. There are fundamental differences, over fundamental interpretations of fundamental rights. And, despite the often PT Barnum like contentions of the ACA cheer squad on the left, and from the Obama Administration, the nature and reach of the mandate truly is unprecedented and never was "unquestionably constitutional" as so many

claimed. The left created their own self sustaining echo chamber and convinced themselves a truly controversial mandate was self fulfilling and golden.

The arguments against the mandate by the challengers are not wrong or silly simply because made by the “other side”. There IS merit to their concern, even if you ultimately believe the mandate should be upheld. Which has made it distressing, to be kind, to see the efforts of many of my colleagues on the left to demonize and degrade the questions and apparent inclination by the conservative bloc of the Roberts Court during oral arguments.

It took Jonathan Chait at New York less than a day after the fateful oral arguments to start salting the thought the court was somehow illegitimate:

> The spectacle before the Supreme Court this week is Republican justices seizing the chance to overturn the decisions of democratically-elected bodies. At times the deliberations of the Republican justices are impossible to distinguish from the deliberations of Republican senators.

Chait’s fellow dedicated ACA supporter, Jonathan Cohn at The New Republic quickly weighed in with his hyperbolic joinder:

> Before this week, the well-being of tens of millions of Americans was at stake in the lawsuits challenging the Affordable Care Act.
>
> Now something else is at stake, too: The legitimacy of the Supreme Court.

Even Dahlia Lithwick and Professor Richard Hasen, both of whom I respect somewhere beyond immensely, in separate articles at Slate, joined the chorus of casting stones of Court legitimacy degradation.

Please, folks, just stop. The question on the mandate is legitimate, and the other side believes their position every bit as much as you do yours. While there is certainly case precedent in the general area, there is just as certainly none directly on point with the way the "commerce" in *this* mandate is framed and "regulated".

The Supreme Court is inherently a political body, at least in that its Justices are politically appointed. Presidential candidates of both stripes campaign on the type of Justices they would appoint if given the opportunity. Further, the Supreme Court is the final arbiter of the most controversial questions, that habitually involve mixed issues of politics and law, and has been ever since *Marbury v. Madison*.

Charges against the legitimacy of the Supremes have also been extant since the time of *Marbury v. Madison*, and continue into the modern set of decades with cries by the right against the Warren Court, to the bookend cries by the left against the Burger and Rehnquist Courts. The Supreme Court survived all those, and is still ticking after *Bush v. Gore* and *Citizen's United.* It will survive this too.

And, as David Bernstein pointed out, why in the world would the left undermine the Court's legitimacy when it is one Presidential appointment away from taking over the ideological majority? No kidding. I respectfully urge my colleagues on the left to step back, take a breath of air, and rethink the idea of degrading the Court over this case.

Those, however, are not the only reasons Democrats and the left should take a step back and rethink how they are reacting to the SCOTUS consideration of the ACA mandate. I pointed out in the ACA/SCOTUS preview post that progressives and conservatives were both, strangely, arguing contrary to type and ideology on the mandate. In a really bright piece of counterintuitive and intelligent thought, Jon Walker points out just how true that was:

> If Conservatives get their way and the Supreme Court strikes down the individual mandate to buy health insurance, it would be a real victory for them; but in the end, the last laugh may be with actual progressives. While in this case an individual mandate was used to expand health coverage, similar individual mandates are the cornerstone for corporatist plans to unravel the public social insurance systems created by the New Deal/Great Society.
>
> The basic subsidies, exchanges and individual mandate design that defines the ACA are at the heart of many corporatists' attempts to destroy/privatizes the programs progressives support the most.
>
> There are are two main ways for the government to provide universal public goods. The first and normally best way is to have the government raise money through taxes and then use that money to directly provide the service to everyone. The other option is to create an individual mandate forcing everyone to buy the service from private corporations while having the government subsidize some of the cost. These needless middlemen mostly just increases costs for regular people and the government. This is why corporations love this setup and push hard for it.
> ….
> If the Supreme Court rules against this individual mandate in a way that basically makes it legally impossible to replace most of our current public insurance systems with mandated private systems, that should be seen as a big silver lining for progressives.

Go read the entire piece by Jon Walker, as it contains specific instances and discussions that are important.

In closing, I would just like to say it is NOT the case that the conservatives are definitely right in their challenge to the individual mandate in Obamacare, but it is a lot closer case than liberals make out, and liberals are being blind to the potential downside of it being upheld. All of these factors make the situation different than has been relentlessly painted; there are legitimate arguments on both sides and the Supreme Court will make a tough decision. Whatever it is, that will be their decision. It was a flawed law when it got to the Supremes, and they will still maintain legitimacy and respect when it leaves, regardless of how they sort the hash they were served.

[Article updated to reflect author Jon Walker for the last link, not David Dayen]