THE CHALLENGE TO RICHARD CORDRAY NOT BEING DISCUSSED

The internets are alive with the sound of excitement over the appointment today by President Obama of Richard Cordray to be Director of the Consumer Finance Protection Bureau (CFPB). And, as Brian Buetler correctly points out, by doing it today, the first day of the new legislative session, Obama (assuming he gets re-elected) has provided Cordray with the longest term possible to serve as a recess appointee:

> By acting today, with session two of this Congress technically under way, Obama has given Cordray the rest of this session and the full next session of the Senate to run the bureau. Cordray could potentially serve through the end of 2013.
>
> The Congressional Research Service outlined this in a recent report (PDF) — and the White House and Senate leaders of both parties confirm the analysis.
>
> If Obama loses in 2012, that could shorten Cordray's tenure — and of course Cordray can leave early if he wants to. But this move makes it much more likely that the CFPB will truly take root.

Most of the banter so far has been on the viability of Obama's move to recess appoint in this manner. I have looked at this issue for years, going back to early in the Dawn Johnsen imbroglio, and find no reason to believe this was not a proper exercise of Presidential power and prerogative.

The long and short of it is, there is no restriction on timing of recess appointments by a President pursuant to Article II, Section 2 of

the Constitution. Both the “10 day rule”, which got narrowed to the “3 day rule” were practices and, at best were based on non-binding dicta from an early 90s DOJ memo; they are not now, nor have they ever been, binding law or rule. Legally, they are vapor. The issue was actually litigated in the 2004 11th Circuit case of *Evans v. Stephens*.

> And when the President is acting under the color of express authority of the United States Constitution, we start with a presumption that his acts are constitutional.2 See United States v. Allocco, 305 F.2d 704, 713 (2d Cir. 1962) (Recess Appointments Clause case); see also U.S. v. Nixon, 94 S.Ct. 3090, 3105 (1974) (observing “In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”).
> …….
> The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President’s appointment power under the Recess Appointments Clause. And we do not set the limit today.

And there you have it. There is no minimum time. Also, somewhat significant, is that Evans was decided by the full 11th Circuit, not a three judge panel, and SCOTUS considered a full cert application, and denied it, leaving the 11th Circuit decision standing as good law and citable precedent.

Oh, and if you wonder if SCOTUS has a real hard on for Presidential recess appointments, the answer would appear to be no. During the oral argument in *New Process Steel v. NLRB* last year, Chief Justice Roberts scoldingly asked Deputy Solicitor General Neal Katyal “And the recess

appointment power doesn't work why?" I am not sure the blustering Republicans like McConnell and Boehner will find quite as receptive an ear from the Roberts Court as they think.

Well, as Beutler notes, things should be all rosy and good to go for Cordray and CFPB, right? Not so fast, there is another issue not receiving any attention by the chattering classes.

The CFPB was promulgated by a pretty bizarre act – The Dodd Frank Act – bizarre, specifically, in how it structures and empowers the CFPB in its various duties. Notably, several of the key powers flow not necessarily through the agency, but through the "confirmed director" of CFPB. If there is no director, the bureau is run in the interim by the Treasury Secretary. Yep, good 'ole Turbo Tax Timmeh Geithner. Specifically, Section 1066 provides:

> The Secretary is authorized to perform the functions of the Bureau under this subtitle until the **Director of the Bureau is confirmed by the Senate** in accordance with section 1011. (emphasis added)

So, in all this meantime, and despite the White House trying to put the patina on that Liz Warren was running the CFPB, it has actually been Geithner. And the problem with this has been (remember I said the enabling language was bizarre??) that not all of the full powers of the CFPB vest, nor can they be exercised, until there is a director.

A director "confirmed by the Senate" according to the literal wording of the Dodd Frank Act.

If I were speculating on legal challenges to Cordray, rather than focusing solely on Obama's ability to so appoint him (which, again, I think stands up), I might be more concerned about the issue of whether Cordray has full powers to lead and operate CFPB because he is not "confirmed by the Senate". That should be a stupid argument

you would think, but the words “confirmed by the Senate” in the enabling act make it at least a very cognizable question.

Normally a confirmed appointee and a recess appointee have the same legal authority and powers but, to my knowledge, there is no other situation in which substantive power for an agency flows only through its specific “confirmed” director. If I were going to attack Cordray, I would certainly not restrict it to the propriety of Obama’s recess appointment, I would also attack his scope of authority since he was not “confirmed”. I would like to think such a challenge fails, but Congress sure left a potential hidden boobytrap here.

UPDATE ON THE SIGNING OF THE NDAA

Many people have been wondering what happened regarding the signing of the 2012 NDAA containing the critical, and much criticized, detention provisions. The House of Representatives passed the conference report of the bill on December 14th, with the Senate approving it by a 86 to 13 margin the following day, December 15th. Interest then turned to whether the President would veto it (he won’t) and when he will sign the legislation.

Most seemed to think that meant the bill must be signed by yesterday, which would have been the tenth day, excluding Sundays, after passage pursuant to Article I, Section 7 of the Constitution, which provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it,

> but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

But Obama has not yet signed the NDAA, so what gives? Presentment. A bill coming out of Congress must be formally presented to the President for signature. Sometimes, if the subject matter is deemed urgent, the presentment process is accelerated remarkably and happens on

an emergency basis quite quickly. But, normally, it is a time honored deliberate process also governed by statute. 1 USC 106 and 107 require an enrolled bill passed by both chambers of Congress be printed on parchment or paper “of suitable quality” and “sent” to the President; this is the “presentment” process. 1 USC 106 does allow for alternate accelerated means for a bill emanating during the last six days of a session, and the OLC, in a little known opinion from May 2011, has decreed that electronic transmission is even acceptable (basically, the thing can be emailed).

In the case of the critical 2012 NDAA, however, Congress (one would assume with the blessing of the White House) apparently made no attempt to accelerate the schedule as often occurs for end of session matters, and the NDAA was not formally presented to President Obama until December 21st. So, excluding intervening Sundays, the tenth day is, in fact, Monday January 2, 2012.

Why, then, is the White House and President stringing out the signing of the NDAA? Well, we know AG Eric Holder has indicated Obama would be attaching a signing statement to the executed NDAA. Although unconfirmed officially, the word I am hearing from DOJ, who was working with the White House on the signing statement, was that they were done late last week.

So, it is not clear why Obama has still not yet signed the NDAA. Maybe he and the White House optics shop realized what a sour pill it would be to sign such a perceived toxic hit on civil liberties right before Christmas? The better question might be whether they are planning on slipping this little gem in the end of the week pre New Years trash dump.

THE MATERIAL SUPPORT OF HILLARY CLINTON AND TAREK MEHANNA

18 USC 2339(A) and 18 USC 2339(B) proscribe the material support of terrorism and designated foreign terrorist organizations. In short, it is the "material support" law:

> the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

During oral argument on the now seminal defining case as to the astounding reach of this statute, Holder v. HLP, now Supreme Court Justice Elena Kagan argued, as Solicitor General, that even humanitarian lawyers could be charged and convicted under the wide ranging provisions:

> JUSTICE KENNEDY: Do you stick with the argument made below that it's unlawful to file an amicus brief?
>
> GENERAL KAGAN: Justice Kennedy —
>
> JUSTICE KENNEDY: I think I'm right in saying it that that was the argument below.
>
> GENERAL KAGAN: Yes, I think that would be a service. In other words, not an amicus brief just to make sure that we understand each other. The Petitioners can file amicus briefs in a case that

> might involve the PKK or the LTTE for themselves, but to the extent that a lawyer drafts an amicus brief for the PKK or for the LTTE, that that's the amicus party, then that indeed would be prohibited.

Kagan argued for an interpretation so broad that even the filing of an amicus brief would be violative of the material support prohibitions and the Supreme Court so held.

So, surely, the DOJ is going to heed the words and intent of the right honorable Justice Kagan over this report then, right?

> The Iraqi government has promised to shutter Camp Ashraf – the home of the Iranian dissident group Mujahedeen e-Khalq (MEK) – by Dec. 31. Now, the United Nations and **the State Department** are scrambling to **move the MEK** to another location inside Iraq, which just may be a **former U.S. military base.**
>
> The saga puts the United Nations and President Barack Obama's administration in the middle of a struggle between the Iraqi government, a new and fragile ally, and the MEK, a persecuted group that is also on the State Department's list of foreign terrorist organizations.
>
> **The Marxist-Islamist group, which was formed in 1965, was used by Saddam Hussein to attack the Iranian government during the Iran-Iraq war of the 1980s, and has been implicated in the deaths of U.S. military personnel and civilians.** The new Iraqi government has been trying to evict them from Camp Ashraf since the United States toppled Saddam in 2003. The U.S. military guarded the outside of the camp until handing over external security to the Iraqis in 2009. The Iraqi Army has since tried twice to enter Camp Ashraf, resulting in bloody

> clashes with the MEK both times. (emphasis added)

Well, no, there will be no prosecution for aiding and abetting *these* terrorists. Now, in all seriousness and fairness, Secretary of State Clinton is probably exempted under 18 USC 2339(B)(j) which provides:

> No person may be prosecuted under this section in connection with the term "personnel", "training", or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

Still, the point being the hypocrisy of the US Government who on one hand is willing to prose3cute even attorneys trying to give humanitarian legal assistance to alleged terrorist organizations to help reform them, but is on the other hand willing to actively and affirmatively work to provide a former US military base and accoutrements to shelter a known and designated violent terrorist group, one that has a history of killing Americans, both military and civilian.

While there may be an exemption for the State Department itself, there certainly is not for other US citizens and officials who have, for years, directly aided and abetted the MEK within the definition of "material support. Again, from Josh Rogin's report in FP's *The Cable* linked above:

> As part of its multi-million dollar lobbying effort, the MEK has paid dozens

> of top U.S. officials and former officials to speak on its behalf, sometimes at rallies on the State Department's doorstep. MEK supporters have been stationed outside the State Department non-stop for months now, and are even showing up at Congressional hearings.
>
> Their list of advocates, most who have admitted being paid, includes Congressman John Lewis (D-GA), former Pennsylvania Gov. Ed Rendell, former FBI Director Louis Freeh, former Sen. Robert Torricelli, Rep. Patrick Kennedy, former CIA Deputy Director of Clandestine Operations John Sano, former National Security Advisor James Jones, former Vermont Gov. Howard Dean, former New York Mayor Rudolph Giuliani, former Joint Chiefs Chairman Gen. Richard Myers, former White House Chief of Staff Andy Card, Gen. Wesley Clark, former Rep. Lee Hamilton, former CIA Director Porter Goss, senior advisor to the Romney campaign Mitchell Reiss, Gen. Anthony Zinni, former Pennsylvania Gov. Tom Ridge, former Sen. Evan Bayh, and many others.

The Department of Justice has just convicted a man, Tarek Mehanna, in Massachusetts for, in significant part, material support in the form of posting videos on the internet. Adam Serwer has a nice description of the parameters of the Mehanna case at Mother Jones that includes this analysis:

> "This case is being used by the government to really narrow First Amendment activity in dangerous new ways," says Nancy Murray of the Massachusetts branch of the American Civil Liberties Union. "It might be speech that horrifies people, but it's the nature of the First Amendment to protect that speech, unless it's leading

> to imminent lawless action."
>
> Civil liberties advocates say the case represents a slippery slope. In the 2010 case Holder v. Humanitarian Law Project, which decided whether or not providing nonviolent aid (such as legal advice) to terrorist groups constitutes material support for terrorism, the Supreme Court ruled that even protected speech can be a criminal act if it occurs at the direction of a terrorist organization. Based on that ruling, you could be convicted of materially supporting terrorism merely for translating a document or putting an extremist video online, depending on your intentions.

Adam's article is worth a full read to gain a glimpse of the fine line in material support cases.

Well, it is a fine line in some cases, not so much if it concerns *our* terrorists. You know, the *good terrorists* the US Government favors. Tarek Mehanna may think this a pretty inconsistent posture.

FUCK YOU TO JAMIE DIMON & HIS PLAINTIVE WAIL FOR THE 1%

Pardon me for the Taibbi like insolence, but this is just fucking amazing.

While most Americans are struggling to stay alive, employed, and their families fed and in their homes, much less celebrate a decent Christmas, the 1% Masters Of The Universe have gotten together for a group bitchfest of elitist assholes:

> Jamie Dimon, the highest-paid chief executive officer among the heads of the six biggest U.S. banks, turned a question at an investors' conference in New York this month into an occasion to defend wealth.
>
> "Acting like everyone who's been successful is bad and because you're rich you're bad, I don't understand it," the JPMorgan Chase & Co. (JPM) CEO told an audience member who asked about hostility toward bankers. "Sometimes there's a bad apple, yet we denigrate the whole."
>
> Dimon, 55, whose 2010 compensation was $23 million, joined billionaires including hedge-fund manager John Paulson and Home Depot Inc. (HD) co-founder Bernard Marcus in using speeches, open letters and television appearances to defend themselves and the richest 1 percent of the population targeted by Occupy Wall Street demonstrators.

Uh, fuck you Jamie Dimon and to the plaintive wail of the skimming, raping moneychangers.

Oh, and in case you had any question on what side of the 1%/99% divide Barack Obama and his Administration are on, yet another answer was given today with the announcement of their proposed selection for the critical "independent" seat on the Federal Deposit Insurance Corporation (FDIC):

> The Obama administration is considering nominating Jeremiah Norton, an executive

> director for JPMorgan Chase's investment bank, to sit on the FDIC's board of directors.

Who is Jeremiah Norton? Well, as this quote states, he executive director of the investment banking shop and one of Obama's buddy, Jamie Dimon's, right hand men. Oh, and before that, Norton was former Goldman Sachs honcho Henry Paulson's right hand man in the Bush Treasury Department and assisted Paulson in getting Goldman Sachs a backdoor bailout through AIG.

And, remember, if Barack Obama has to replace Turbo Tax Timmeh Geithner, Jamie Dimon is near the top of the list of replacements thought to be on the White House's list.

So, while OWS is out protesting and the majority of citizens are falling deeper in despair and many losing their homes and hopes, and Barack Obama duplicitously coos about feeling the pain of the 99%, this is what is going on where the rubber meets the actual road.

PS: Digby has pounded Dimon on this as well if you want more searing criticism.

DRONE WAR SECRECY AND KILL OR CAPTURE

As we stand on the doorstep of President Obama signing into law the new NDAA and its dreaded controversial provisions, there are two new articles out of interest this morning. The first is an incredibly useful, and pretty thorough, synopsis at Lawfare of the new NDAA entitled "NDAA FAQ: A Guide for the Perplexed". It is co-written by Ben Wittes and Bobby Chesney and, though I may differ slightly in a couple of areas, it is not by much and their primer is extremely useful. I suggest it highly, and it has condensed a lot of material into an easily digestible blog length post.

The second is a long read from the Washington Post on how secrecy defines Obama's drone wars:

> The administration has said that its covert, targeted killings with remote-controlled aircraft in Pakistan, Yemen, Somalia and potentially beyond are proper under both domestic and international law. It has said that the targets are chosen under strict criteria, with rigorous internal oversight.
>
> ….
>
> "They've based it on the personal legitimacy of [President] Obama — the 'trust me' concept," Anderson said. "That's not a viable concept for a president going forward."

The article goes on to state how the CIA, and the majority of voices in the White House, are fighting tooth and nail for continued utmost secrecy lest any of our enemies somehow discover

we are blowing them to bits with our drones. This is, of course, entirely predictable, especially now that the former head of the CIA leads the military and the former military chief for the greater Af/Pak theater which has long been ground zero for the drone kill program, Petraeus, is the head of the CIA.

But then the Post piece brings up our old friend, the OLC:

> The Justice Department's Office of Legal Counsel has opposed the declassification of any portion of its opinion justifying the targeted killing of U.S. citizen Anwar al-Awlaki in Yemen this year. Awlaki, a propagandist for the Yemen-based al-Qaeda affiliate whom Obama identified as its "external operations" chief, was the first American known to have been the main target of a drone strike. While officials say they did not require special permission to kill him, the administration apparently felt it would be prudent to spell out its legal rationale.
> ….
> Under domestic law, the administration considers all three to be covered by the Authorization for Use of Military Force that Congress passed days after the Sept. 11, 2001, attacks. In two key sentences that have no expiration date, the AUMF gives the president sole power to use "all necessary and appropriate force" against nations, groups or persons who committed or aided the attacks, and to prevent future attacks.
>
> The CIA has separate legal authority to conduct counterterrorism operations under a secret presidential order, or finding, first signed by President Ronald Reagan more than two decades ago. In 1998, President Bill Clinton signed an amendment, called a Memorandum of Notification, overriding a long-standing

> ban on CIA assassinations overseas and allowing “lethal” counterterrorism actions against a short list of named targets, including Osama bin Laden and his top lieutenants. Killing was approved only if capture was not deemed “feasible.”
>
> A week after the Sept. 11 attacks, the Bush administration amended the finding again, dropping the list of named targets and the caveat on “feasible” capture.
>
> “All of that conditional language was not included,” said a former Bush administration official involved in those decisions. “This was straight-out legal authority. . . . By design, it was written as broadly as possible.”

This brings us back to the notable October 8, 2011 article by the New York Times’ Charlie Savage on his viewing of the Awlaki targeting memo relied on by the Obama White House for the extrajudicial execution of Anwar al-Awlaki. Marcy, at the time discussed the incongruity of the collateral damage issue and the fact Samir Khan was also a kill in the targeted Awlaki strike.

I would like to delve into a second, and equally misleading, meme that has been created by the self serving and inconsistent secret law Obama has geometrically expanded from the already deplorable Bush/Cheney policy set: the false dichotomy in the kill or capture element of the Awlaki kill targeting.

It has become an article of faith that Awlaki could neither have been brought to justice in Yemen nor, more importantly, captured in Yemen and brought to justice in an appropriate forum by the United States. It has been a central point made in the press; here is the New York Time’s Scott Shane in early October:

> The administration's legal argument in the case of Mr. Awlaki appeared to have three elements. First, he posed an imminent threat to the lives of Americans, having participated in plots to blow up a Detroit-bound airliner in 2009 and to bomb two cargo planes last year. Second, he was fighting alongside the enemy in the armed conflict with Al Qaeda. **And finally, in the chaos of Yemen, there was no feasible way to arrest him.** (emphasis added)

Shane was relying on Bobby Chesney, a University of Texas law professor, and granted an expert in the field who also is a principal at Lawfare Blog. It is the same meme propounded by not only other reporters, but by other leading experts. Here is Ben Wittes in Lawfare stating the assumption as a given fact. Here is Jack Goldsmith (also of Lawfare) espousing the same in a widely read Times Editorial. Here is Peter Finn and the venerable Washington Post doing the same.

Just how does this meme set in and become the common wisdom and fact of such wise men (and I mean that term literally; these are smart people)? Because, of course, that is what the US government tells them, as well as us. With nothing but the self-serving, selective dribble leaking by the Administration of supposedly classified information, there is no specific factual basis from which to dissect the truth. And that is the way the Administration likes it; it always gets messy when citizens actually *know* what their government is doing in their name.

On the Awlaki targeted execution, it was not only desirable for people to believe the government's stated basis, it was critical. Because the house of cards falls otherwise without the necessity element, and it becomes no more than a convenience kill wherein Mr. Obama was too lazy and hamstrung by his own political considerations to do otherwise. Here is how Charlie Savage describes the predicate element

in the Awlaki OLC memo in his, so far, seminal report:

> The Obama administration's secret legal memorandum that opened the door to the killing of Anwar al-Awlaki, the American-born radical Muslim cleric hiding in Yemen, found that it would be lawful only if it were not feasible to take him alive, according to people who have read the document.
> …
> **The [OLC] lawyers were also told that capturing him alive among hostile armed allies might not be feasible if and when he were located**. (emphasis added)

In fairness to Mr. Savage, he more than touches on the import of the issue by including a question from Samir Khan's father:

> "Was this style of execution the only solution?" the Khan family asked in its statement. "Why couldn't there have been a capture and trial?"

And Charlie himself posits the following:

> The memorandum is said to declare that in the case of a citizen, it is legally required to capture the militant if feasible — raising a question: was capturing Mr. Awlaki in fact feasible?
>
> It is possible that officials decided last month that it was not feasible to attempt to capture him because of factors like the risk it could pose to American commandos and the diplomatic problems that could arise from putting ground forces on Yemeni soil. Still, the raid on Osama bin Laden's compound in Pakistan demonstrates that officials have deemed such operations feasible at times.

So Obama Administration "officials decided last month that it was not feasible to attempt to capture" Awlaki. Most everybody has taken that on faith, but should they? The US had had Awlaki under intense surveillance for quite some time. The US also claims to be strong strategic partners with Pakistan. It is doubtful Yemen really cared all that much about Awlaki, as he was a noisy American. Who says there was no way between the combined capabilities of the US and Yemen Awlaki could not at least be attempted to be captured?

Now, I am not saying it is clear Awlaki could have been captured and brought to trial, just that it is not a given that it was impossible. Who makes those decisions, and on what exact basis and criteria? Anwar Awlaki, for everything you want to say about him, had *never* been charged with a crime, much less convicted of one, and he retained Fourth, Fifth and Sixth Amendment rights as a US citizen. If the precedent for extrajudicial execution of American citizens is being set at the whim of the President, then American citizens should know how and why.

So, hats off to Charlie Savage for having raised the critical question on necessity; problem is, however, it was only a question. There was, and is, no more specific information for him, or us, to go on from the Administration. Which leaves the remainder of the citizenry and chattering classes effectively working off of the glittering generalities and assumptions propounded by the government. And, in case you did not notice, there was effectively no discussion of the kill or capture paradigm in all the hubbub of the recent NDAA discussion. So, we are no further along in this regard than we were when Awlaki was terminated with prejudice. I will likely come back to the kill or capture paradigm at a later date, because it is a fascinating discussion in terms of history and protocols.

Which brings us back to where we started here.

These are life and death matters for those, like Awlaki (and Samir Khan too, as it is quite likely the US had reason to know he was in Awlaki's "collateral damage" radius), that are placed on the President's kill list and, to the rest of us, are of rude foundational importance to the very existence of American rule of law and constitutional governance. For all the sturm and drang surrounding the release of the torture memos, the resulting discussion has been sober, intelligent, and important. The publication of the torture memos has provided a template not only showing how it can be done, but proving that it can and should be done.

The same as was the case with the OLC torture memos holds true in regards to the OLC kill list targeting memo for Anwar al-Alawki and the related memos the Obama Administration is relying on. The documents should be released by the Obama administration with no more than the absolute minimal redaction necessary to truly protect means and methods.

If the Obama administration insists on hiding such critical knowledge and information necessary for the knowing exercise of democracy within the United States, then Mr. Obama and his administration should have the intellectual consistency and honesty to investigate and prosecute those within his administration responsible for the serious leaks to Charlie Savage and the New York Times of classified information that has previously been deemed in court and under oath to be "state secrets". If you can prosecute Bradley Manning, surely there should be some effort to bring Savage's leaker to justice. Except there will be none of that, because it was almost certainly ordered by the White House as a selective propaganda ploy to bolster their extrajudicial killing program.

As hard as it is to believe, I, at the time, contacted the Obama Department of Justice and they oficially stated "no comment" when these questions were propounded. In light of the fact the leak almost certainly came from extremely

high up within the Obama administration, and was done with the express knowledge and consent of Mr. Obama himself to crow and take political advantage of his kill, it is hard to say that this is shocking. And, again, this is exactly the problem when the United States government plays self-serving games with its own classified information – the people, and the democracy they are tasked with guiding, all lose.

[The forever classic Emptywheel "Killer Drone" graphic is, of course by the one and only Darkblack]

JAMIE DIMON OWNS OBAMA'S TESTICLES

Jamie Dimon owns Barack Obama's testicles. That's the only explanation I can think of for why, rather than firing his JP Morgan Exec Chief of Staff for being incompetent, Obama simply shifted him over to serve as the public face of his Administration.

> Ten months into his tenure as chief of staff, [Bill] Daley's core responsibilities are shifting, following White House missteps in the debt-ceiling fight and in its relations with Republicans and Democrats in Congress.
>
> On Monday, Mr. Daley turned over day-to-day management of the West Wing to Pete Rouse, a veteran aide to President Obama, according to several people familiar with the matter. It is unusual for a White House chief of staff to relinquish part of the job.
>
> [snip]
>
> The new set-up effectively makes Mr. Rouse the president's inside manager and

> Mr. Daley his ambassador, roles that appear to better suit both men's talents.

As you recall, Daley was hired as a sop to the banks, who thought endless bailouts weren't enough bounty from this and the prior Administration and successfully demanded having one of their own in the White House gatekeeper position. And so, after fucking up the debt ceiling, and fucking up the introduction of Obama's jobs push (and overseeing the passage of three trade agreements that will send jobs overseas), Daley has been moved into a figurehead role.

Here's a snapshot of the kind of people whom Daley is sucking up to as "Ambassador": the architect of the housing bubble-and-crash, the embodiment of corruption in the GSEs, and a guy who helped pass a law that will help his wife's insurance company, only to leave to work for the Chamber of Commerce and a private equity firm.

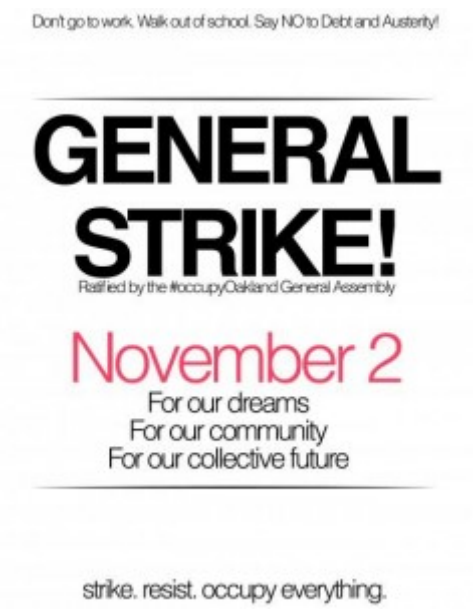
> Lately, Mr. Daley has been trying out his new role, deploying his back-slapping persona in Washington social circles. He recently held a private reception at his Ritz Carlton residence for a small group of D.C. elites, including former Fed Chairman Alan Greenspan, former Fanne Mae Chief Executive Jim Johnson and Yousef Al Otaiba, the United Arab Emirates ambassador to the U.S.
>
> Former Sen. Evan Bayh (D., Ind.) said an invitation to lunch with Mr. Daley in his West Wing office was the first time he had heard from him.

So at a time when Obama's campaign wants to pretend he's taking a tough line with the 1%, he's refusing to fire 1%er Bill Daley when he proves to be incompetent. Does this mean the banksters will effectively retain their own

personal gate-keeper?

And FWIW, I believe Pete Rouse was and will be the best of the three Chiefs of Staff Obama has had, so I approve of that move. Though I question the wisdom of making the move just in time for another government shutdown, which is due up in the next few weeks.

A RANCID FORECLOSURE FRAUD SETTLEMENT TRIAL BALLOON, HERBERT OBAMAVILLES, WHAT DIGBY SAID & THE IMPORT OF THE OCCUPY MOVEMENT



I do not usually just post simply to repeat what another somewhat similarly situated blogger has said. But late this afternoon/early this evening, I was struck by two things almost simultaneously. Right as I read Gretchen Morgenson's latest article in the NYT on the latest and most refined parameters of the foreclosure fraud settlement, I also saw a post by Digby. The intersection of the two was

crushing, but probably oh so true.

First, the latest Foreclosure Fraud Settlement trial balloon being floated by the "State Attorney Generals". There have been several such trial balloons floated on this before; all sunk like lead weights. This is absolutely a similar sack of shit; from Morgenson at the NYT:

> Cutting to the chase: if you thought this was the deal that would hold banks accountable for filing phony documents in courts, foreclosing without showing they had the legal right to do so and generally running roughshod over anyone who opposed them, you are likely to be disappointed.
>
> This may not qualify as a shock. Accountability has been mostly A.W.O.L. in the aftermath of the 2008 financial crisis. A handful of state attorneys general became so troubled by the direction this deal was taking that they dropped out of the talks. Officials from Delaware, New York, Massachusetts and Nevada feared that the settlement would preclude further investigations, and would wind up being a gift to the banks.
>
> It looks as if they were right to worry. As things stand, the settlement, said to total about $25 billion, would cost banks very little in actual cash — $3.5 billion to $5 billion. A dozen or so financial companies would contribute that money.
>
> The rest — an estimated $20 billion — would consist of credits to banks that agree to reduce a predetermined dollar amount of principal owed on mortgages that they own or service for private investors. How many credits would accrue to a bank is unclear, but the amount would be based on a formula agreed to by the negotiators. A bank that writes down a second lien, for example, would

> receive a different amount from one that writes down a first lien.
>
> Sure, $5 billion in cash isn't nada. But government officials have held out this deal as the penalty for years of what they saw as unlawful foreclosure practices. A few billion spread among a dozen or so institutions wouldn't seem a heavy burden, especially when considering the harm that was done.
>
> The banks contend that they have seen no evidence that they evicted homeowners who were paying their mortgages. Then again, state and federal officials conducted few, if any, in-depth investigations before sitting down to cut a deal.
>
> Shaun Donovan, secretary of Housing and Urban Development, said the settlement, which is still being worked out, would hold banks accountable. "We continue to make progress toward the key goals of the settlement, which are to establish strong protections for homeowners in the way their loans are serviced across every type of loan and to ensure real relief for homeowners, including the most substantial principal writedown that has occurred throughout this crisis."

Read the full piece, there is much more there.

Yes, this is certainly just a trial balloon, and just the latest one at that. But it is infuriating, because it is the same old sell out crap repackaged and trying to be shoved down the public's throat yet again. And who wants to sell this shit sandwich the most? Barack Obama and his band of Masters of the Universe, that's who. It is also, of course, the fervent desire of Wall Street and their bought and paid for pols like Chuck Schumer.

Which is exactly why elected state Attorney

General politicians (Hi Tom Miller), who are also generally on the political make, are so focused on getting a craven deal done, no matter how badly it screws the public and economy. If anybody has ever had any doubt as to why California AG Kamala Harris has been so slow, and so weak, in the matter this is exactly why. Harris is a political climber, and her fortunes and fame ride with the 1% and the politicians like Obama and Schumer that they control like circus monkeys.

Which brings me back to what Digby said. Digby, playing a notably tin-eared editorial by the Los Angeles Times off of a scathing comment on the American elite by Frank Rich, said:

> That the LA Times is clutching its pearls over fig trees and grass while nearly 3,000 people have been arrested at Occupations all over the country world says just about everything you need to know about disconnect between elites and everybody else.

Yeah, that about sums it up. Do go read the full description of the “Hoovervilles” and what they really comprised, because it is far too close to home with the current time and place we occupy. By the same token, it is hard for many in the comfortably ensconsed traditional middle class to see just how heinous the situation is, and how necessary the “Occupy” movement may really be.

Trust me. I know, I am one of the uncomfortable. My natural predilections are within the system and rules. That, however, is no longer perhaps enough. Many of you reading this post may not be on Twitter, and thus may not have seen it; but I have in the last couple of days straightened out more than one pundit on the, and sometimes unfortunately so, real protection reach of the 1st Amendment. It is far less a prophylactic protection than most, and certainly the vocal proponents of the Occupy Movement, think.

Without belaboring the minutiae, the clear law of the land for over 70 years, ever since the Supreme Court handed down its decision in *Cox v. New Hampshire*, is:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.
> …..
> If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right.

There is a long line of cases that ultimately extend the ability of cities and municipalities right to reasonably regulate time and place of free speech expression, so long as said regulation is content neutral, to public parks and all other sorts of publicly controlled spaces.

But those are “the rules”. When the politicians and corporate masters no longer are willing to play by the rules, how much longer can the “99%” afford to honor them? When the so called leaders will not abide by the norms and constricts of law, why should the average man still be held to

the same?

Again, I fully admit just how much I struggle with saying the above. I really do; it is uncomfortable and discomfiting. I could go on, but my own thoughts pale in comparison with those similarly situated who have experienced first hand what the import and truth of the Occupy movement is.

I ask, indeed implore, you read this long, but telling, account from The Awl by Lili Loofbourow entitled *"The Livestream Ended: How I Got Off My Computer And Onto The Street At Occupy Oakland"*. There is literally too much to excerpt, and it would take away from the critically important slow progression the writer lays out for you, the reader.

So, while "the rules" may militate otherwise, and while "our Constitutional rights" go nowhere near as far as the psyched up Occupiers cry, there is something raw and necessary about the "Occupy" movement. It is necessary because the rules and "adults in the room" have sold their souls, and our lives, down the river of greed.

If not "the 99%", then who? If not now, then when? It is time.

THE COORDINATED LEAKY DRIPS IN THE WHITE HOUSE

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

disingenuous ploy to a new art form.

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

> Rahm was famous for calling reporters, do you call reporters? I ask.
>
> "I call; I'm not as aggressive leaking and stroking," Daley says. "I'm not reflecting on Rahm, but I'm not angling for something else, you know? Rahm is a lot younger [Emmanuel is 51], and he knew he was going to be doing something else in two years or four years or eight years, and I'm in a different stage. I'm not going to become the leaker in chief."
>
> You've got others for that, I say.
>
> "Yeah, and **hopefully in some organized leaking fashion," Daley says, laughing. "I'm all for leaking when it's organized**."

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

For citizens like Tom Drake, the "most transparent administration in history" will come down on his head like a ton of nuclear bricks even when they embarrass themselves in so doing.

But they are more than willing to exploit and leak to self serve their own interests. What is good for the king is not appropriate for the commoner.

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

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

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

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

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

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

GITMO: THE SAME OLD NEW OPAQUE TRANSPARENCY

Last week we wondered what the appointment of the "new and improved" Gitmo Commander, Army Brig. Gen. Mark Martins, would mean for the military commission system and upcoming big terror trials for the likes of al-Nashiri and KSM, and what it meant for the press coverage. Well, predictably, it appears to be rendering the same old same old.

Carol Rosenberg brings us the latest:

> The website was unveiled last month to rehabilitate the reputation of the Guantanamo war court. So far it's a hodgepodge of secrecy _ and still a work

> in progress, according to Defense Department officials, while clerks, lawyers and the intelligence community haggle behind the scenes over what the public can see.
>
> It's been more than a year in the making and the Pentagon has yet to reveal its cost. Every screen bears the slogan "fairness, transparency, justice."
>
> But a review of the content has found that it pointedly leaves out some of the key controversies that have bedeviled the war crimes trials, from allegations of torture to a comparison of the Seminole Indian tribe to al Qaida.

Disappointing, to say the least, but par for the course for the Gitmo experience. And, let's be clear, it is not that they just haven't had time to "work the kinks out" as this project has been underway for well over a year. And there is fantastic experience to draw from in the way of the Federal Court system's PACER system. There are simply not that many detainees in total, much less defendants, to be entered into the system. The still dysfunctional and unusable system is the result of indifference, if not outright intent. As there will be no trials until next year at the earliest, maybe the situation can be remedied in time; but that will require the actual intent to do so. And that seems in short supply.

What I suspected would be the case has now been confirmed, namely that the "broadcast" of the commission trials will be a restricted joke. Again from Carol and the Miami Herald:

> Pohl, the chief military commissions judge, assigned himself to the case, according to Defense Department sources, and chose the late October date to give the government time to finish a close-circuit feed site at Fort Meade, Md., outside Washington, D.C.

> Up to 100 reporters could watch the Guantánamo arraignment on a 40-second delay under the new Fort Meade hook-up being inaugurated with the Cole trial to ease demand on a crude media tent city at the remote Navy base in southeast Cuba, which can accommodate 60 journalists.

There also will reportedly be a feed for a select few of the victims' families. But zilch for the broader press, and nothing for the public. Just as with the suggested benefits and propriety of transparency on the targeting of American citizens for assassination, it would place the United States on a higher moral plane and demonstrate resolve and ethics to demonstrate to its citizens, and those of the world, that it is indeed providing a fair and just trial process for the detainees.

Necessary steps can easily enough shield that which must be, there is no reason not to show what this country stands for. Open and public justice is the best justice. Unless, that is, what we really stand for is not particularly just.

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

The targeted execution of Anwar al-Awlaki struck different people along the political spectrum in the United States in many different ways, but it has been heartening most all have recognized it as a seminal moment worthy of dissection and contemplation. Despite all the discussion afforded the execution of Awlaki in the last few days, it cannot be emphasized enough how impossible it is to have a completely meaningful discussion on the topic due to the relentless blanket of secrecy imposed by the United States government. Before I get into the substantive policy and legal issues surrounding the targeting and assassination of American citizens, which I will come back to in a separate post, a few words about said secrecy are in order.

The first to note, and complain of, the strange secrecy surrounding not just the kill listing of Awlaki, but the entire drone assassination program, was Marcy right here in Emptywheel. Within a couple of hours of the news of the Awlaki strike, she called for the release of the evidence and information serving as the Administration's foundation for the extrajudicial execution of an American citizen and within a couple of hours of that, noted the ironic inanity of the pattern and practice of the one hand of the Obama Administration, through such officials as Bob Gates, James Clapper and Panetta trotting out "state secrets" to claim drone actions cannot even be mentioned while the other hand, through mouthpieces such as John Brennan are out blabbing all kinds of details in order to buck up Administration policy.

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

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

> I agree that the administration should release a redacted version of the opinion, or should extract the legal analysis and place it in another document that can be released consistent with restrictions on classified information.
>
> I have no doubt that Obama administration lawyers did a thorough and careful job of analyzing the legal issues surrounding the al-Aulaqi killing. The case for disclosing the analysis is easy. The killing of a U.S. citizen in this context is unusual and in some quarters controversial. A thorough public explanation of the legal basis for the killing (and for targeted killings generally) would allow experts in the press, the academy, and Congress to scrutinize and criticize it, and

> would, as Harman says, permit a much more informed public debate. Such public scrutiny is especially appropriate since, as Judge Bates's ruling last year shows, courts are unlikely to review executive action in this context. In a real sense, legal accountability for the practice of targeted killings depends on a thorough public legal explanation by the administration.

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

> We know the government can provide a public legal analysis of this sort because presidential counterterrorism advisor John Brennan and State Department Legal Advisor Harold Koh have given such legal explanations in speeches, albeit in limited and conclusory terms. These speeches show that there is no bar in principle to a public disclosure of a more robust legal analysis of targeted killings like al-Aulaqi's. So too do the administration's many leaks of legal conclusions (and operational details) about the al-Aulaqi killing.
>
> A full legal analysis, as opposed to conclusory explanations in government speeches and leaks, would permit a robust debate about targeted killings — especially of U.S. citizens — that is troubling to many people. Such an analysis could explain, for example,

> whether the government believed that al-Aulaqi possessed constitutional rights under the First, Fourth, Fifth or other amendments, and (assuming the government concluded that he possessed some such rights) why the rights were not implicated by the strike. It could also describe the limits of presidential power in this context.
>
> The Obama administration frequently trumpets its commitment to transparency and the rule of law. The President and many of his subordinates were critical of what they deemed to be unnecessarily secretive Bush administration legal opinions, and they disclosed an unprecedented number of them, including many classified ones. Now is the time for the administration to apply to itself a principle that it applied to its predecessor.

Again, exactly right. From Marcy Wheeler, to Gang of Eight members, to Jack Goldsmith, the voice is both clear and consistent: The Obama Administration needs to come clean with as much of the legal and factual underpinnings as humanly possible short of compromising "means and methods" that truly are still secret. That would be, by almost any account, a lot of information and law with which the American public, indeed the world, could not only know and understand, but use to gauge their votes and opinions on. Doing so would make the United States, and its actions, stronger and more sound.

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

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

> First, it is wrong, as Ben notes, for the government to maintain technical covertness but then engage in continuous leaks, attributed to government officials, of many (self-serving) details about the covert operations and their legal justifications. It is wrong because it is illegal. It is wrong because it damages (though perhaps not destroys) the diplomatic and related goals of covertness. And it is wrong because the Executive branch seems to be trying to have its cake (not talking about the program openly in order to serve diplomatic interests and perhaps deflect scrutiny) and eat it too (leaking promiscuously to get credit for the operation and to portray it as lawful). I do not know if the leaks are authorized in some sense or not, or where in the executive branch they come from, or what if anything the government might be doing to try to stop them. But of course the president is ultimately responsible for the leaks. One might think – I am not there yet, but I understand why someone might be – that the double standard on discussing covert actions disqualifies the government from invoking technical covertness to avoid scrutiny.
>
> Second, there is no bar grounded in technical covertness, or in concerns about revealing means and methods of intelligence gathering, to revealing (either in a redacted opinion or in a separate document) the legal reasoning supporting a deadly strike on a U.S. citizen. John Brennan and Harold Koh

> have already talked about the legality of strikes outside Afghanistan in abstract terms, mostly focusing on international law. I don't think much more detail on the international law basis is necessary; nor do I think that more disclosure on international law would do much to change the minds of critics who believe the strikes violate international law. But there has been practically nothing said officially (as opposed through leaks and gestures and what is revealed in between the lines in briefs) about the executive branch processes that lie behind a strike on a U.S. citizen, or about what constitutional rights the U.S. citizen target possesses, or about the limitations and conditions on the president's power to target and kill a U.S. citizen. This information would, I think, matter to American audiences that generally support the president on the al-Aulaqi strike but want to be assured that it was done lawfully and with care. The government could easily reveal this more detailed legal basis for a strike on a U.S. citizen without reference to particular operations, or targets, or means of fire, or countries.

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

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