

# 19 YEARS ON

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minutes ago it was exactly 19 years to the minute. The first plane hit the North Tower at 8:46 am EST. We now suffer a 9/11 every couple of days in the US thanks to Trump's bungling of the Coronavirus response.

Fires are decimating some of the most beautiful parts of the country on the west coast. Corona is almost certainly set to rage again with the great "re-opening".

But let's take a minute to remember what happened 19 years ago, and how the nation came together and responded then. Imperfectly, and sometimes tragically, from the Bush/Cheney regime. It has all been covered here on these pages. The moment could have created a lasting unity and, instead, was exploited to the opposite. But for a couple of days, it felt different. Let us remember why.

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## MAYBE TRUMP REALLY IS NEVER GOING TO LEAVE

Tim Wirth and Tom Rogers lay out a frightening, and convincing, scenario where Trump plans to remain in the Presidency irrespective of how badly he loses to Biden.

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# **CHARLES COOPER'S LETTER ABOUT PRE- PUBLICATION REVIEW DISCOUNTS ANY EXECUTIVE PRIVILEGE CLAIMS**

In December, Bolton lawyer Charles Cooper made an argument that will make it harder for his client to avoid testifying, anywhere, going forward.

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## **THE SCO STATEMENT AND WHY COHEN SHOULD NOT TESTIFY FEB. 7**

Marcy wrote a great post this morning titled "Peter Carr Speaks". I agree with almost all of it, if not all of it, but feel compelled to add a couple of things.

As to what the motivation of Carr and Mueller was, it is, at this date, unclear, despite the high handed and dismissive sudden reactive reportage of Devlin Barrett, Zapotsky and Demerjian at WaPo and Ken Dilanian of NBC/MSNBC. They have shown even less sources and credibility than Buzzfeed that they now conveniently and eagerly dismiss. Maybe the Mueller statement is a tad more nuanced and unknown than that.

As to what the target of the Mueller/Carr statement was, when Marcy says:

But I suspect Carr took this step, even more, as a message to SDNY and any other Agents working tangents of this case. Because of the way Mueller is spinning off parts of this case, he has less control over some aspects of it, like Cohen's plea. And in this specific case (again, presuming I'm right about the SDNY sourcing), BuzzFeed's sources just jeopardized Mueller's hard-earned reputation, built over 20 months, for not leaking. By emphasizing in his statement what happened in "the special counsel's office," "testimony obtained by this office," Carr strongly suggests that the people who served as sources had nothing to do with the office.

Yes, this looks almost certain from where I stand. Wasn't the only aim of Carr's arrow on behalf of Mueller, but was a rather large one.

Secondly, and since many media outlets and commenters are clacking about how the proof of Trump directly telling Cohen to lie is the end all and be all as to necessity for discussion, that is just wrong.

The record before the BuzzFeed article already established, through signed and accepted court filings, that Cohen indeed lied to Congress with the express intent of supporting the lies Trump was fostering.

That is not in dispute at this point. As to whether Trump personally ordered Cohen to do so, face to face, (and there is still a decent shot of that being true, but we do not know), that is not the end of the discussion legally.

First off, if those around Trump, (think lawyers and family, if not Trump himself), discussed and encouraged Cohen to lie to Congress, that is a huge problem for Trump. Let me remind people of one of the most basic definitional provisions in

the criminal code, 18 USC §2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

So, all of the nonsense by Rudy Guliliani is simply nonsense. That is without even considering conspiracy law and implications thereof.

So, sure, the SCO hit on Buzzfeed hurt the narrative in the press. Did it really hurt the narrative legally? No, not so much.

Lastly, I would like to address the upcoming House Oversight Committee hearing Cohen is scheduled for on February 7. He was voluntarily appearing after restrictions Cummings and the Committee agreed to, purportedly, with Mueller. The ground has changed. Frankly, I think the hearing this quickly was ill considered and premature grandstanding to start with, but now strikes me as nuts given the changed circumstances after the Buzzfeed piece, SCO brushback and Trump's direct threats to Cohen's extended family.

Given the aggressive nature of Trump's followers, there is a credible threat to Cohen and his family. But, more than that, there is a threat to his credibility and usability as a witness in the future. The ranking member on the House Oversight Committee is the odious Jim Jordan. His other GOP minority members will undoubtedly fall in line to attack Cohen, especially after the vague pushback comment of Carr/Mueller last night. It is set up now as a clown show.

The hearing should either be affirmatively postponed by Cummings or withdrawn from by Cohen personally. There is nowhere near enough good that can come from Cohen's appearance, and a lot to lose for both him and Mueller given the shitshow that the GOP members will bring to the affair. Cancel that February 7 hearing and testimony. Just do not do it.

[For the record, I originally lodged this as a comment on Marcy's post, but for unrelated reasons, thought the points about criminal liability and conspiracy needed to be included in a separate post, and did not wish to step on hers at the time.]

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## **THE NY TIMES, SEKULOW AND DOWD'S SOPHISTRY AND TRUMP'S KING LIKE VIEWPOINT**

I have obligations that I seriously must run out the door for, but this need to be posted so that it can be dissected. The inestimable crew of Haberman, Schmidt et. al have posted a rather amazing letter 20 page letter issued on behalf of Trump by his attorneys at the time, Jay Sekulow and John Dowd. There is a minimum of mockery of the effort, which I will attribute to the contributions of Charlie Savage and Matt Apuzzo, who have the curious, too often for the Times, habit of actually appropriately reading legal things with an eye to what they really represent.

This "letter" is one of the most ridiculous pieces of legal sophistry I have ever seen in my life. It, without an iota of shame or self

reflection, brazenly place Trump as not just a King, but a God like entity that far outstrips the importance of the rule of law or separation of powers the Founders intended.

So, I am leaving this here until either Marcy or I come back to it later. Read the damn thing. Weep for your country and the shreds of its Constitution before Trump and his lackeys burn what's left.

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## **10 YEARS OF EMPTYWHEEL: KEY NON- SURVEILLANCE POSTS 2013-2015**

Some key non-surveillance posts from 2013 through 2015.

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## **AS WE FACE OUR CURRENT EMERGENCY LET'S NOT FORGET HOW (AND WHO) OUR LAST ONE CONTRIBUTED TO THIS ONE**

In which Michael Hayden, a guy who has attacked the press plenty, becomes a First Amendment absolutist.

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# JOHN YOO WISHES TRUMP ABUSED EXECUTIVE AUTHORITY MORE EFFECTIVELY

John Yoo says Trump has gone too far. But mostly he says Trump isn't abusing Executive Authority effectively enough.

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# 9/11: A STORY OF ATTACKS, HORROR, VICTIMS, HEROES AND JINGOISTIC SHAME

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, 2001 is now 15 years in the mirror of life. Like the two Kennedy assassinations, the Moonshot and a few other events in life, it is one of those "yeah I remember where I was when..." moments. Personally, being on west coast time, I was just waking up thinking all I had was a normal morning court calendar. When my wife, who gets up far earlier than I, shouted at me to rub out the cobwebs and watch the TV because

something was seriously wrong in New York City. She was right. It was a hell of a day, one of unspeakable tragedy and indescribable heroism. It was truly all there in one compact day, unlike any other, save maybe December 7, 1941.

2,996 people lost their lives, and their families and history were forever altered in the course of hours on an otherwise clear and beautiful day in Manhattan. Most were simply innocent victims, but many were the epitome of heroes who charged into a hellscape to try to salvage any life they could. There were other heroes that altered their lives in response, and either died or were forever changed as a result. One was a friend of mine from South Tempe, Pat Tillman.

No one can speak for Pat Tillman, and, save for his family, those who claim to only prove they never met the man. All I can say is, I wish he were here today. The one thing that is certain is he would not give the prepackaged trite partisan reaches you are likely to hear today. It would be unfiltered truth. Which the US did not get from its leaders after September 11, 2001, and is still missing today.

Instead of rallying and solidifying the oneness of the American citizenry that was extant immediately after September 11, 2001, the Bush/Cheney Administration and GOP told us to go shopping and that we needed to invade Iraq, who had nothing whatsoever to do with 9/11. It was a fools, if not devil's, errand and a move that threw away an opportunity for greatness from the country and exploited it in favor of war crimes and raw political power expansion and consolidation.

Instead of getting the United States to make ourselves better as the "Greatest Generation" did sixty years before, America was wholesale sold a bill of goods by a determined group of unreformed and craven Neo-Con war criminals left over from the Vietnam era, and we were led down the path to a war of aggression that was an unmitigated disaster we have not only not



recovered from today, but are still compounding.

The 2000's will prove to be a decade of American shame when history is written decades from now. Not from the attacks, but from our craven response thereto. So, pardon me if I join Colin Kaepernick and choose not to join, every Sunday, just because the Madison Avenue revenue generating NFL of Roger Goodell cravenly exploits it, the jingoistic bullshit of rote dedication to a racist National Anthem. Also, too, shame on opportunistic and Constitutionally ignorant whiny police unions who scold free speech and threaten to abandon their jobs in the face of it.

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No. The Neo-Cons are unrepentant and still trying to advance themselves on the lie that their once and forever war justifies more than their prosecution and conviction in The Hague. Here is a belligerent and unrepentant Dick Cheney passing the torch of evil to his spawn Liz Cheney in the august pages of the Wall Street Journal:

We are no longer interrogating terrorists in part because we are no longer capturing terrorists. Since taking office, the president has recklessly pursued his objective of closing the detention facility at Guantanamo by releasing current detainees—regardless of the likelihood

they will return to the field of battle against us. Until recently, the head of recruitment for ISIS in Afghanistan and Pakistan was a former Guantanamo detainee, as is one of al Qaeda's most senior leaders in the Arabian Peninsula.

As he released terrorists to return to the field of battle, Mr. Obama was simultaneously withdrawing American forces from Iraq and Afghanistan. He calls this policy "ending wars." Most reasonable people recognize this approach as losing wars.

Times may change, but the bottomless pit of Cheney lies and evil do not. As Charlie Savage pointed out on Twitter, the two terrorists the Cheneys refer to were actually released back to the "field of battle" by Bush and Cheney, not Obama. Was Obama involved in the story? Yes, he would be the one who actually tracked them down and killed them.

And then there is the failure to learn the lessons of the failed torture regime Bush and Cheney instituted as the hallmark of the "War on Terror". Our friend, and former colleague, Spencer Ackerman has a must read three part series over the last three days in The Guardian (Part One, Part Two and Part Three) detailing how the CIA rolled the Obama Administration and prevented any of the necessary exposure, accountability and reform that was desperately needed in the aftermath of the torture regime and war of aggression in Iraq. It will take a while, but read all three parts. It is exasperating and maddening. It is also journalism at its finest.

And so, as we glide through the fifteenth anniversary of September 11, what are we left with from our response to the attacks? A destabilized world, an ingraining of hideous mistakes and a domestic scene more notable for jingoism and faux patriotism than dedication to the founding principles that America should

stand for.

That is not what the real heroes, not only of 9/11 but the totality of American history, died to support and protect. In fact, it is an insult to their efforts and lives. If America wants to win the “War on Terror”, we need to get our heads out of our asses, quit listening to the neocons, war mongers, and military industrial complex Dwight Eisenhower warned us about, and act intelligently. This requires a cessation of adherence to jingoistic and inane propaganda and thought, and a focus on the principles we are supposed to stand for.

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## ON THE PASSING OF DAVID MARGOLIS, THE DOJ INSTITUTION

David Margolis was a living legend and giant at the Department of Justice. Now he has passed. Just posted is the following from DOJ:



**Statements From Attorney General Loretta E. Lynch and Deputy Attorney General Sally Q. Yates on the Passing of Associate Deputy Attorney General David Margolis**

Attorney General Loretta E. Lynch and

Deputy Attorney General Sally Q. Yates released the following statements today on the passing of Associate Deputy Attorney General David Margolis, senior-most career employee at the Department of Justice.

Statement by Attorney General Lynch:

"David Margolis was a dedicated law enforcement officer and a consummate public servant who served the Department of Justice – and the American people – with unmatched devotion, remarkable skill and evident pride for more than half a century. From his earliest days as a hard-charging young prosecutor with a singular sense of style to his long tenure as one of the department's senior leaders, David took on our nation's most pressing issues and navigated our government's most complex challenges. To generations of Justice Department employees, he was a respected colleague, a trusted advisor and most importantly, a beloved friend. We are heartbroken at his loss and he will be deeply missed. My thoughts and prayers are with David's family, his friends and all who loved him."

Statement by Deputy Attorney General Yates:

"David Margolis was the personification of all that is good about the Department of Justice. His dedication to our mission knew no bounds, and his judgment, wisdom and tenacity made him the "go-to" guy for department leaders for over 50 years. David was a good and loyal friend to all of us, and his loss leaves a gaping hole in the department and in our hearts."

I am sure Mr. Margolis was a kind, personable and decent chap to those who knew and worked

with him. I can be sure because there have been many voices I know who have related exactly that. He was undoubtedly a good family man and pillar of his community. None of that is hard to believe, indeed, it is easy to believe.

Sally Yates is spot on when she says Margolis' "dedication to our [DOJ] mission knew no bounds". That is not necessarily in a good way though, and Margolis was far from the the "personification of all that is good about the Department of Justice". Mr. Margolis may have been such internally at the Department, but it is far less than clear he is really all that to the public and citizenry the Department is designed to serve. Indeed there is a pretty long record Mr. Margolis consistently not only frustrated accountability for DOJ malfeasance, but was the hand which guided and ingrained the craven protection of any and all DOJ attorneys for accountability, no matter how deeply they defiled the arc of justice.

This is no small matter. When DOJ Inspectors General go to Congress to decry the fact that there is an internal protection racket within the Department of Justice shielding even the worst wrongs by Department attorneys, as IG Glen Fine did:

Second, the current limitation on the DOJ OIG's jurisdiction prevents the OIG – which by statute operates independent of the agency – from investigating an entire class of misconduct allegations involving DOJ attorneys' actions, and instead assigns this responsibility to OPR, which is not statutorily independent and reports directly to the Attorney General and the Deputy Attorney General. In effect, the limitation on the OIG's jurisdiction creates a conflict of interest and contravenes the rationale for establishing independent Inspectors General throughout the government. It also permits an Attorney General to assign an investigation

raising questions about his conduct or the conduct of his senior staff to OPR, an entity reporting to and supervised by the Attorney General and Deputy Attorney General and lacking the insulation and independence guaranteed by the IG Act.

This concern is not merely hypothetical. Recently, the Attorney General directed OPR to investigate aspects of the removal of U.S. Attorneys. In essence, the Attorney General assigned OPR – an entity that does not have statutory independence and reports directly to the Deputy Attorney General and Attorney General – to investigate a matter involving the Attorney General's and the Deputy Attorney General's conduct. The IG Act created OIGs to avoid this type of conflict of interest. It created statutorily independent offices to investigate allegations of misconduct throughout the entire agency, including actions of agency leaders. All other federal agencies operate this way, and the DOJ should also.

Third, while the OIG operates transparently, OPR does not. The OIG publicly releases its reports on matters of public interest, with the facts and analysis underlying our conclusions available for review. In contrast, OPR operates in secret. Its reports, even when they examine matters of significant public interest, are not publicly released.

Said fact and heinous lack of accountability for Justice Department attorneys, not just in Washington, but across the country and territories, is largely because of, and jealously ingrained by, David Margolis. What Glen Fine was testifying about is the fact there is no independent regulation and accountability for DOJ attorneys.

They are generally excluded from the Department IG purview of authority, and it is rare, if ever, courts or state bar authorities will formally review DOJ attorneys without going throughout the filter of the OPR – the Office of Professional Responsibility – within the Department. A protection racket designed and jealously guarded for decades by David Margolis. Even when cases were found egregious enough to be referred out of OPR, they went to....David Margolis.

In fact, attuned people literally called the OPR the “Roach Motel”:

“I used to call it the Roach Motel of the Justice Department,” says Fordham University law professor Bruce A. Green, a former federal prosecutor and ethics committee co-chair for the ABA Criminal Justice Section. “Cases check in, but they don’t check out.”

If you want a solid history of OPR, and the malfeasance it and Margolis have cravenly protected going back well over a decade, please go read “The Roach Motel”, a 2009 article in no less an authority than the American Bar Association Journal. It is a stunning and damning report. It is hard to describe just how much this one man, David Margolis, has frustrated public transparency and accountability into the Justice Department that supposedly works for the citizens of the United States. It is astounding really.

As I wrote back in 2010:

But just as there is an inherent conflict in the DOJ’s use of the fiction of the OPR to police itself, so too does David Margolis have issues giving the distinct appearance of impropriety. Who and what is David Margolis? A definitive look at the man was made by the National Law Journal (subscription required):

"Taking him on is a losing battle," says the source. "The guy is Yoda. Nobody fucks with the guy."

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Margolis cut his teeth as an organized-crime prosecutor, and he often uses mob analogies in talking about his career at the Justice Department. When asked by an incoming attorney general what his job duties entailed, Margolis responded: "I'm the department's cleaner. I clean up messes."

The analogy calls to mind the character of Winston Wolfe, played by Harvey Keitel in the 1994 film "Pulp Fiction." In the movie, Wolfe is called in by mob honchos to dispose of the evidence after two foot soldiers accidentally kill a murder witness in the back of their car.

"The Cleaner" Mr. Margolis considered himself, while fastidiously sanitizing gross malfeasance and misconduct by DOJ attorneys, all the while denying the American public the disinfectant of sunshine and transparency they deserve from their public servants (good discussion by Marcy, also from 2010).

Perhaps no single incident epitomized Margolis' determination to be the "cleaner" for the Department of Justice and keep their dirt from public scrutiny and accountability than the case of John Yoo (and to similar extent, now lifetime federal judge Jay Bybee). Yoo as you may recall was the enlightened American who formally opined crushing innocent children's testicles would be acceptable conduct for the United States to engage in. Yoo and Bybee, by their gross adoption of torture, literally personally



soiled the reputation of the United States as detrimentally as any men in history.

So, what did David Margolis do in response to the heinous legal banality of evil John Yoo and Jay Bybee engendered in our name? Margolis cleaned it up. He sanitized it. Rationalized it. Ratified it. Hid it. To such an extent architects of such heinous war crimes are now lifetime appointed federal judges and tenured professors. Because that is what "The Cleaner" David Margolis did. "Protecting" the DOJ from accountability, at all costs, even from crimes against humanity, was simply the life goal of David Margolis, and he was depressingly successful at it.

So, less than 24 hours in to the passing of The Cleaner, is it too early to engage in this criticism? Clearly other career officials at the DOJ think discussing the pernicious effects of Margolis on accountability and transparency are out of bounds.

I wonder what the late Senator Ted Stevens would say in response to the "too soon" mandate of Steven Bressler? Because thanks to the efforts of The Cleaner Margolis, Stevens died without the public knowing what an unethical and craven, if not downright criminal, witch hunt attorneys in the Department of Justice ran on him. Even after Stevens was long gone from office and dead, there was Margolis "cleaning" it all up to protect his precious Justice Department when even the internal OPR found gross misconduct:

Following the Justice Department's agreement in 2009 to vacate the convictions it obtained of former Alaska Senator Ted Stevens, it conducted an internal probe into the conduct of its senior lawyers and—surprise!—exonerated them and itself. It then refused to make the report public. However, at the time the conviction was voided, the presiding judge in Stevens's case, Emmet Sullivan, appropriately wary of the department's ethics office, appointed a special

prosecutor, Henry F. Schuelke, III, an eminent Washington attorney and former prosecutor, to probe the DOJ's conduct. Late last week, Schuelke's 525-page report was released, over the loud objections of DOJ lawyers. The report revealed gross misconduct by the prosecutorial team, stretching over the entire course of the case and reaching into the upper echelons of the department. It concluded there had been "systematic concealment of significant exculpatory evidence which would have independently corroborated [Stevens's] defense."

Having laid out the above bill of particulars as to David Margolis, I'd like to return to where we started. As I said in the intro, "I am sure Mr. Margolis was a kind, personable and decent chap". That was not cheap rhetoric, from all I can discern, both from reading accounts and talking to people who knew Mr. Margolis well, he was exactly that. Ellen Nakashima did a fantastic review of Margolis in the Washington Post last year. And, let's be honest, the man she described is a guy you would love to know, work with and be around. I know I would. David Margolis was a man dedicated. And an incredibly significant man, even if few in the public understood it.

Say what you will, but Mr. Margolis was truly a giant. While I have no issue delineating what appear to be quite pernicious effects of David Margolis' gargantuan footprint on the lack of accountability of the Department of Justice to the American citizenry, I have some real abiding respect for what, and who, he was as a man. Seriously, read the Nakashima article and tell me David Margolis is not a man you would love to kill some serious beers with by a peaceful lake somewhere.

But David Margolis, both the good and the bad, is gone now. Where will his legacy live? One of our very longtime friends here at Emptywheel,

Avattoir, eruditely said just yesterday:

Focus instead on the institution, not the players. The players are just data points, hopefully leading to greater understanding of the institutional realities.

Those words were literally the first I thought of yesterday when I received the phone call David Margolis had passed. They are true and important words that I, and all, need to take heed of more frequently.

David Margolis, it turns out from all appearances and reports, was a complex man. Clearly great, and clearly detrimental, edges to him. So what will his legacy be at the Department of Justice? Will the closing of the Margolis era, and it was truly that, finally bring the institution of the Department into a modern and appropriate light of transparency, accountability and sunshine?

Or will the dirty deeds of David Margolis' historical ratification and concealment of pervasive and gross misconduct by Department of Justice attorneys become permanently enshrined as a living legacy to the man?

We shall see.