

# 19 YEARS ON

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few



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

Now that Rayne has you all festive for the holidays, I am gonna leave you with one more little nugget of joy. Trump really is planning on not leaving even if he loses badly to Biden. I have kind of poo poohed this kind of talk, but

this morning on Morning Joe, there was a discussion with former Colorado Senator Tim Wirth and Tom Rogers, a journalist and original founder of both CNBC and MSNBC. These are two very smart and credible people, and they are pretty convincing. If you can find a video clip of their appearance, post the link and I'll add it in to the post, it is harrowing.

But they have an article out together now in Newsweek entitled "How Trump Could Lose the Election—And Still Remain President". Also harrowing, and they are convinced that this is really Trump's plan.

Wirth and Rogers lay out two paths they expect Trump to take. The first is the obvious one pretty much everybody is aware of, severe voter suppression and goon poll watchers challenging voters pretty much anywhere and everywhere, along with claiming fraud as to the vote by mail. But it is the second path that is truly frightening.

This spring, HBO aired *The Plot Against America*, based on the Philip Roth novel of how an authoritarian president could grab control of the United States government using emergency powers that no one could foresee. Recent press reports have revealed the compilation by the Brennan Center at New York University of an extensive list of presidential emergency powers that might be inappropriately invoked in a national security crisis. Attorney General William Barr, known for his extremist view of the expanse of presidential power, is widely believed to be developing a Justice Department opinion arguing that the president can exercise emergency powers in certain national security situations, while stating that the courts, being extremely reluctant to intervene in the sphere of a national security emergency, would allow the president to proceed unchecked.

...

With this, Trump has begun to lay the groundwork for the step-by-step process by which he holds on to the presidency after he has clearly lost the election:

1. Biden wins the popular vote, and carries the key swing states of Arizona, Wisconsin, Michigan and Pennsylvania by decent but not overwhelming margins.

2. Trump immediately declares that the voting was rigged, that there was mail-in ballot fraud and that the Chinese were behind a plan to provide fraudulent mail-in ballots and other "election hacking" throughout the four key swing states that gave Biden his victory.

3. Having railed against the Chinese throughout the campaign, calling Biden "soft on China," Trump delivers his narrative claiming the Chinese have interfered in the U.S. election.

4. Trump indicates this is a major national security issue, and he invokes emergency powers, directing the Justice Department to investigate the alleged activity in the swing states. The legal justification for the presidential powers he invokes has already been developed and issued by Barr.

5. The investigation is intended to tick down the clock toward December 14, the deadline when each state's Electoral College electors must be appointed. This is the very issue that the Supreme Court harped on in *Bush v. Gore* in ruling that the election process had to be brought to a close, thus forbidding the further counting of Florida ballots.

6. All four swing states have Republican control of both their upper and lower houses of their state legislatures. Those state legislatures refuse to allow any Electoral College slate to be

certified until the “national security” investigation is complete.

7. The Democrats will have begun a legal action to certify the results in those four states, and the appointment of the Biden slate of electors, arguing that Trump has manufactured a national security emergency in order to create the ensuing chaos.

8. The issue goes up to the Supreme Court, which unlike the 2000 election does not decide the election in favor of the Republicans. However, it indicates again that the December 14 Electoral College deadline must be met; that the president’s national security powers legally authorize him to investigate potential foreign country intrusion into the national election; and if no Electoral College slate can be certified by any state by December 14, the Electoral College must meet anyway and cast its votes.

9. The Electoral College meets, and without the electors from those four states being represented, neither Biden nor Trump has sufficient votes to get an Electoral College majority.

10. The election is thrown into the House of Representatives, pursuant to the Constitution. Under the relevant constitutional process, the vote in the House is by state delegation, where each delegation casts one vote, which is determined by the majority of the representatives in that state.

11. Currently, there are 26 states that have a majority Republican House delegation. 23 states have a majority Democratic delegation. There is one state, Pennsylvania, that has an evenly split delegation. Even if the Democrats were to pick up seats in Pennsylvania

and hold all their 2018 House gains, the Republicans would have a 26 to 24 delegation majority.

12. This vote would enable Trump to retain the presidency.

Is this nuts? Sure. Is it possible? Yes, given who and what Trump and Barr are, it may well be.

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

In the wake of yesterday's NYT story revealing damning details about John Bolton's book manuscript, his lawyer, Charles Cooper, released the letter sent on December 30 laying out what they expected from the pre-publication review.

In it, Cooper (who while he was at the Office of Legal Counsel wrote at least one opinion laying the foundation for the unitary executive, one that helped cover up Iran-Contra) suggests there is only one basis on which the White House can object to the content of his client's manuscript: classification.

I appreciate your assurance that the sole purpose of prepublication security review is to ensure that SCI or other classified information is not publicly disclosed. In keeping with that purpose, it is our understanding that the process of reviewing submitted materials is restricted to those career government

officials and employees regularly charged with responsibility for such reviews.

Cooper leaves unstated his assertion that the White House cannot object to material in the book on Executive Privilege grounds, or any Absolute Immunity grounds that Pat Cipollone might dream up.

Such an assertion is wholly inconsistent with Cooper's previous assertion (made for his other client, Charles Kupperman but which Bolton adopted by association) that the White House has any say over whether Bolton must respond to a dually authorized Congressional subpoena. Normally, a subpoena can overcome Executive Branch demands that the subpoenaed person not testify, if they want to testify. Here, Cooper is suggesting that the only restriction that the White House can impose on Bolton's non-subpoenaed speech is classification review.

I get why he said it. He was trying to lay the groundwork for the statement he released last night, in which he suggested the White House had circulated Bolton's manuscript outside those career civil servants who are entitled to review it.

But it will make it far harder to ignore future subpoenas, whether from the Senate, the House, or SDNY (in a Rudy Giuliani investigation).

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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

*Happy Birthday to me! To us! To the emptywheel community!*

*On December 3, 2007, emptywheel first posted as a distinct website. That makes us, me, we, ten*

today.

*To celebrate, over the next few days, the emptywheel team will be sharing some of our favorite work from the last decade. I'll be doing 4 posts featuring some of my most important or – in my opinion – resilient non-surveillance posts, plus a separate post bringing together some of my most important surveillance work. I think everyone else is teeing up their favorites, too.*

*Putting together these posts has been a remarkable experience to see where we've been and the breadth of what we've covered, on top of mainstays like surveillance. I'm really proud of the work I've done, and proud of the community we've maintained over the years.*

*For years, we've done this content ad free, relying on donations and me doing freelance work for others to fund the stuff you read here. I would make far more if I worked for some free-standing outlet, but I wouldn't be able to do the weedy, iterative work that I do here, which would amount to not being able to do my best work.*

*If you've found this work valuable – if you'd like to ensure it remains available for the next ten years – please consider supporting the site.*

## **2013**

### **What a Targeted Killing in the US Would Look Like**

Amid now-abandoned discussions about using the FISA court to review targeted killing, I pointed out that a targeted killing in the US would look just like the October 28, 2009 killing of Imam Luqman Abdullah.

## **Article II or AUMF? “A High Level Official” (AKA John Brennan) Says CIA Can Murder You**

When the second memo (as opposed to the first 7-page version) used to authorize the killing of Anwar al-Awlaki, it became clear that OLC never really decided whether the killing was done under Article II or the AUMF. That’s important because if it’s the latter, it suggests the President can order anyone killed.

## **John Brennan Sworn in as CIA Director Using Constitution Lacking Bill of Rights**

I know in the Trump era we’re supposed to forget that John Brennan sponsored a whole lot of drone killing and surveillance. But I spent a good deal of the Obama Administration pointing that out. Including by pointing out that the Constitution he swore to protect and defend didn’t have the First, Fourth, Fifth, and Sixth amendment in it.

## **2014**

## **The Day After Government Catalogs Data NSA Collected on Tsarnaevs, DOJ Refuses to Give Dzhokhar Notice**

I actually think it’s unreasonable to expect the government’s dragnets to prevent all attacks.

But over and over (including with 9/11), NSA gets a pass when we do reviews of why an attack was missed. This post lays out how that happened in the Boston Marathon case. A follow-up continued that analysis.

## **A Guide to John Rizzo's Lies, For Lazy Journalists**

Former CIA General Counsel John Rizzo lies, a lot. But that doesn't seem to lead journalists to treat his claims skeptically, nor did it prevent them from taking his memoir as a statement of fact. In this post I summarized all the lies he told in the first 10 pages of it.

## **Obama to Release OLC Memo after Only 24 Congressional Requests from 31 Members of Congress**

Over the year and a half when one after another member of Congress asked for the OLC memos that authorized the drone execution of Anwar al-Awlaki, I tracked all those requests. This was the last post, summarizing all of them.

## **The West's Ideological Vacuum**

With the rise of Trump and the success of Russia intervening in US and European politics, I've been talking about how the failures of US neoliberal ideology created a vacuum to allow those things to happen. But I've been talking about the failures of our ideology for longer than that, here in a post on ISIS.

# **KSM Had the CIA Believing in Black Muslim Convert Jihadist Arsonists in Montana for 3 Months**

There weren't a huge number of huge surprises in the SSCI Torture Report for me (indeed, its scope left out some details about the involvement of the White House I had previously covered). But it did include a lot of details that really illustrate the stupidity of the torture program. None was more pathetic than the revelation that KSM had the CIA convinced that he was recruiting black Muslim converts to use arson in Montana.

## **2015**

### **The Jeffrey Sterling Trial: Merlin Meets Curveball**

A big part of the Jeffrey Sterling trial was CIA theater, with far more rigorous protection for 10 year old sources and methods than given to 4 year old Presidential Daily Briefs in the Scooter Libby trial. Both sides seemed aware that the theater was part of an attempt, in part, to help the CIA gets its reputation back after the Iraq War debacle. Except that the actual evidence presented at trial showed CIA was up to the same old tricks. That didn't help Sterling at all. But neither did it help CIA as much as government prosecutors claimed.

### **The Real Story Behind**

# **2014 Indictment of Chinese Hackers: Ben Rhodes Moves the IP Theft Goal Posts**

I've written a lot about the first indictment of nation-state hackers – People's Liberation Army hackers who compromised some mostly Pittsburgh located entities, including the US Steel Workers. Contrary to virtually all the reporting on the indictment, the indictment pertained to things we nation-state hack for too: predominantly, spying on negotiations. The sole exception involves the theft of some nuclear technology from Westinghouse that might have otherwise been dealt to China as part of a technology transfer arrangement.

# **Obama's Terrorism Cancer Speech, Carter's Malaise Speech**

In response to a horrible Obama speech capitulating to Republican demands he treat the San Bernardino attack specially, as Islamic terrorism, I compared the speech to Jimmy Carter's malaise speech. Along the way, I noted that Carter signed the finding to train the mujahadeen at almost the exactly moment he gave the malaise speech. The trajectory of America has never been the same since.

# **Other Key Posts Threads**

10 Years of emptywheel: Key Non-Surveillance Posts 2008-2010

10 Years of emptywheel: Key Non-Surveillance Posts 2011-2012

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

All over Twitter yesterday, people introduced this Michael Hayden tweet decrying Trump's "assault on truth, a free press or the first amendment" by emphasizing that he served as CIA and NSA Director.



**Joy Reid**  @JoyAnnReid  
Former CIA and NSA director:

01:40

**Gen Michael Hayden** @GenMhayden  
Replying to @jmcclaughlinSAIS  
If this is who we are or who we are becoming, I have wasted 40 years of my life. Until now it was not possible for me to conceive of an American President capable of such an outrageous assault on truth, a free press or the first amendment.

They seem to forget that, in the name of supporting expansive executive authority, Hayden lied to Congress, targeted Thomas Drake for his unclassified communications with the press about Hayden's support for profiteering contractors, and attacked journalists who have covered the Snowden leaks.

Also on Twitter, Ben Wittes wrote a long thread, advocating that "Americans do not need to be actively contesting right now across traditional left-right divisions" so long as "Americans of good faith collectively band together to face a national emergency."



In a thread that singles out the First Amendment (though not, predictably, the Fourth), Wittes imagines two main entities that might conduct investigations into Trump: law enforcement and “men and women of the bureaucracy who are courageous enough to come forward and assist,” though he follows quickly with a generalized profession that this non-partisan truce he has unilaterally declared also involves supporting the spooks.

 **Benjamin Wittes**  @benjaminwittes 11:15  
Replying to @benjaminwittes  
[#IBelieve](#) in supporting investigations that will shine a searchlight onto the administration and its conduct. And [#IBelieve](#) in supporting the men and women of American law enforcement who are conducting those investigations. /9/

 **Benjamin Wittes**  @benjaminwittes 11:15  
Replying to @benjaminwittes  
[#IBelieve](#) in supporting the men and women of the bureaucracy who are courageous enough to come forward and assist those investigations. /10/

 **Benjamin Wittes**  @benjaminwittes 11:16  
Replying to @benjaminwittes  
[#IBelieve](#) in the work of our intelligence community in the performance of its professional duties. [#ISupport](#) the men and women who are doing that work. /11/

Having declared a truce on “important foreign policy questions,” he then emphasizes we have to keep our promises abroad.

 **Benjamin Wittes**  @benjaminwittes 11:19  
Replying to @benjaminwittes  
[#IBelieve](#) in respecting America’s alliances and in keeping our word. When the USA promises something, that promise must have meaning. That’s true promises to our abroad. It’s also true of promises to individuals of protection and sanctuary and rights. /13/

And also we have to keep promises about rights.

The two, together, have set off a debate about what our national emergency really is – where Trump came from.

Remarkably, I've seen few pointing back to this remarkable Adam Serwer piece on the whiteness that got Trump elected. As he lays out, Trump got elected because white voters cared more about restoring "traditional" race, sex, and class roles than about all the horrible things Trump espoused.

Trump's great political insight was that Obama's time in office inflicted a profound psychological wound upon many white Americans, one that he could remedy by adopting the false narrative that placed the first black president outside the bounds of American citizenship. He intuited that Obama's presence in the White House decreased the value of what W. E. B. Du Bois described as the "psychological wage" of whiteness across all classes of white Americans, and that the path to their hearts lay in invoking a bygone past when this affront had not taken place, and could not take place.

That the legacy of the first black president could be erased by a birther, that the woman who could have been the first female president was foiled by a man who confessed to sexual assault on tape—these were not drawbacks to Trump's candidacy, but central to understanding how he would wield power, and on whose behalf.

Americans act with the understanding that Trump's nationalism promises to restore traditional boundaries of race, gender, and sexuality. The nature of that same nationalism is to deny its essence, the better to salve the conscience and spare the soul.

Serwer's piece is absolutely required reading.

But his exposition largely focuses on the domestic aspect of white supremacy. This paragraph is one of the few that focuses on the *last emergency* people like Wittes and Hayden screamed un-self critically about, the never-ending war on terror.

In the meantime, more than a decade of war nationalism directed at jihadist groups has shaped Republican attitudes toward Muslims—from seeing them as potential Republican voters in the late 1990s to viewing them as internal enemies currently. War nationalism always turns itself inward, but in the past, wars ended. Anti-Irish violence fell following the service of Irish American soldiers in the Civil War; Germans were integrated back into the body politic after World War II; and the Italians, Jews, and eastern Europeans who were targeted by the early 20th century's great immigration scare would find themselves part of a state-sponsored project of assimilation by the war's end. But the War on Terror is without end, and so that national consolidation has never occurred. Again, Trump is a manifestation of this trend rather than its impetus, a manifestation that began to rise not long after Obama's candidacy.

And there's no mention of white supremacy's foreign counterpart, American exceptionalism, which has long led (white male) Americans to believe America had somehow earned its wealth and prestige without, at the same time, hurting the well-being of others around the world, one which has made Trump's instinct to demand capitulation from other countries so popular.

Both are, after all, about assuming the capitulation of brown people is the natural order we deserve, whether in our neighborhoods

or on the other side of the world.

I raise all this because, in addition to the whiteness problem Serwer lays out, I do think the exceptionalism and expansive executive power that Hayden and Wittes have championed are part of what created this emergency as well. Those who created and sustained that last emergency – those who insisted we needed exceptional measures the last time, exceptional measures that gave Trump far more tools with which to violate norms and persecute enemies – want us to divorce this emergency from their own actions that contributed to it and may make it harder to recover from.

By all means, those who newly admit problems with expansive executive power are welcome to join those of us who've long been fighting it. But I'm not sure why everyone wants them to take the lead.

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## **JOHN YOO WISHES TRUMP ABUSED EXECUTIVE AUTHORITY MORE EFFECTIVELY**

At the end of a John Yoo critique of Donald Trump's abuses that a lot of people are misreading, he says this:

A successful president need not have a degree in constitutional law. But he should understand the Constitution's grant of executive power. He should share Hamilton's vision of an energetic president leading the executive branch in a unified direction, rather than viewing the government as the enemy. He should realize that the Constitution channels the president toward protecting

the nation from foreign threats, while cooperating with Congress on matters at home.

Otherwise, our new president will spend his days overreacting to the latest events, dissipating his political capital and haphazardly wasting the executive's powers.

John Yoo is not stating that, across the board, Trump has overstepped his authority. Indeed, the areas where Yoo suggests Trump has or will overstep his authority – exiting NAFTA and building a wall – are things Trump has not yet put into place. His concern is prospective. The only thing Trump has already done that Yoo believes abused power was firing Sally Yates, and that because of his explanation for firing her.

Even though the constitutional text is silent on the issue, long historical practice and Supreme Court precedent have recognized a presidential power of removal. Mr. Trump was thus on solid footing, because attorneys general have a duty to defend laws and executive orders, so long as they have a plausible legal grounding. But the White House undermined its valid use of the removal power by accusing Ms. Yates of being “weak on borders and very weak on illegal immigration.” Such irrelevant ad hominem accusations suggest a misconception of the president's authority of removal.

Yoo doesn't, for example, complain about Trump's Executive Order on Dodd-Frank, which may have little effect.

But what Yoo is worried about is not abuse, per se, but that Trump will “waste the executive's powers.”

That's important given Yoo's critique of Trump's

Muslim ban.

Immigration has driven Mr. Trump even deeper into the constitutional thickets. Even though his executive order halting immigration from seven Muslim nations makes for bad policy, I believe it falls within the law. But after the order was issued, his adviser Rudolph Giuliani disclosed that Mr. Trump had initially asked for “a Muslim ban,” which would most likely violate the Constitution’s protection for freedom of religion or its prohibition on the state establishment of religion, or both – no mean feat. Had Mr. Trump taken advantage of the resources of the executive branch as a whole, not just a few White House advisers, he would not have rushed out an ill-conceived policy made vulnerable to judicial challenge.

Yoo is saying that Trump could have implemented this policy if only he had gotten better advice about how to hide the fact that it was a Muslim ban, in the same way firing Yates would have been fine had Trump offered another explanation for it.

There’s a big rush among those who’ve abused executive authority in the past to rehabilitate themselves by seeming to criticize Trump. Many of them – including Yoo – are mostly complaining that Trump’s bad execution of abuse of executive power might give it a bad name.

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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.



But  
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, nee the world, to a forever war on the wings  
of a craven lie is universally recognized,  
condemned and scorned, right?

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.”

...

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.