GOING ASTRAY – OBAMA AND NATO BOMBINGS IN LIBYA

EW and probably bmaz as well will likely have more to say on this one when they free up.

Charlie Savage reported on Friday that Obama rejected advice from both Jeh Johnson (Pentagon general counsel) and, even more significantly, Caroline Krass (the acting head of DOJ's Office of Legal Counsel) when he availed to himself the power to continue bombings and killings in Libya, under the assertion that he's, well, he's just not being all that hostile in his bombing campaign.

Like Nixon in Cambodia, Obama did find supporters for his decisions about Libya. Ex-Yale Dean, current assassination proponent, Harold Koh (legal advisor for the State Department) apparently assured Obama that the bombings just do not rise to the level of being "hostilities" for which Obama needs Congressional permission. Robert Bauer, Obama's White House counsel, reportedly provided his own version "yeah buddy" for Obama.

Just as Bush found it convenient to get his White House Counsel, Alberto Gonzales, to opine that as long as Bush designated his torture victims as being "illegal enemy combatants" (whatever the ultimate facts) he was exempt from war crimes prosecutions, Obama's White House counsel is equally eager to tell Obama that, as long as he doesn't call them "hostilities," Obama can bomb any nation for any period of time.

Most importantly – all of this is being done in derogation of the Office of Legal Counsel opinion that the President has exceeded his authority. At issue, according to White House Spokesman Eric Shultz (Dan Pfeiffer was tied up) isn't the very same, age old, typical power grab of any unchecked sovereign, but instead the age

of the War Powers resoluton.

> "It should come as no surprise that there would be some disagreements, even within an administration, regarding the application of a statute that is nearly 40 years old to a unique and evolving conflict," Mr. Schultz said. "Those disagreements are ordinary and healthy."

The Obama theory is that with 10 years of Bush-Obama battering of the psyches and vocabularies of of Americans and with some very dedicated government propaganda processes to boot, the meaning of the term "hostilities" has changed to exclude American or American led NATO bombings. And this is "ordinary and healthy."

Apparently the words "ordinary" and "healthy" have changed some over the last 40 years as well. For those civilian residents in Tripoli who were killed or maimed by NATO's bombing run today, there is no translation dictionary or program current enough to convert their descriptions of the outcome of the NATO bombing into the words "ordinary" and "healthy." NATO provided an assist though – what happened wasn't a bombing of civilians, but rather a strike on an unintended target.

> "[I]t appears that one weapon did not strike the intended target and that there may have been a weapons system failure which may have caused a number of civilian casualties."

Cue up Obama's spox to explain to us how words like "civilian casualties" have also changed a lot over the last few decades – in an ordinary and healthy way. Maybe they'll even bring on Henry Kissinger to help with the explanation.

I don't completely buy Glenn Greenwald's take that Bush had "better" lawyers, because [now starts my paraphrase of Glenn's point] some were prepared to threaten to quit over the NSA program (which they demanded be revised into an

equally unconstitutional format) and others were prepared to blindly follow the lead without even knowing anything about why they'd be resigning, still, I will say that Bauer and Koh can easily fill the shoes of Gonzales and Bellinger.

Bush and "torture." Obama and "hostilities." The one thing that we can rely upon is that the meaning of the phrase "Executive Power" has changed over the years. Unchecked, it will continue to change at an ever-increasing rate. And for those of us who remember Obama's "stern face" as he promised during primaries and camaigns to "restore the rule of law" we can only wonder when that phrase went so far astray as to encompass the things the Obama administration has done over the last few years.

RAYMOND DAVIS: DIPLOMATIC IMMUNITY V. US IMPUNITY

What happens with the Raymond Davis case, in the end, will likely not have very much to do with the Vienna Conventions. For that matter, we likely will never have enough of the unadulterated facts to know what should happen under the Vienna Conventions. But let's suspend reality and see where an examination of the Vienna Conventions and the competing facts in the Davis case might take us.

As several reports have pointed out, there are numerous Vienna Conventions and the two that are likely to apply to Davis are the Vienna Convention of 1961 on Diplomatic Relations and the Vienna Convention of 1963 on Consular Relations. The VCs get wrapped in and out of discussions of passports and visa – so let's separate and reassemble.

Diplomatic Passport. Our State Department issues passports needed for travel to other countries. Because of the State Department's sole control over this document, it is looked at skeptically by Pakistanis in the Davis matter. The US says that, while it was not on him when he was captured and while it may have some discrepancies with other documents, Raymond Davis has a US issued diplomatic passport. Some have gone so far as to make this the equivalent of having diplomatic immunity, without anything more.

But that's not how it works. Diplomatic immunity is derived, under VC 1961, by being validly attached to the embassy (mission) of a nation in which the "diplomat" is located. A diplomatic passport has no effect to attach someone to an embassy or mission. For example, a diplomat validly attached to the embassy in Iraq could travel to Germany on a diplomatic passport, but would not have immunity in Germany if they were not validly attached to the German embassy. So the question isn't whether or not Davis had a diplomatic passport (or whether, if so, it was issued to an alias or issued after the fact), but whether he was validly attached to the US embassy at the time of his altercation in Pakistan.

Attachment to the US Mission/Embassy. For someone other than the head of mission, the general rule is that the sending nation (US) can "freely appoint" diplomats to its mission staff (Article 7), with a few caveats, and are then merely required to notify the receiving nation's foreign ministry of the appointment/addition. The first caveat, also in Article 7, is that if the person being appointed is a military attaché, "the receiving State may require their names to be submitted beforehand, for its approval." Until recently you could have said that no one has been saying that Davis is anything but ex-military, however, some of the stories now being circulated include rumors that he is a part of American Task Force 373 black operations. (No comment on how reliable any of

it is – most things are likely not reliable, but just to show the way in which the VCs might be impacted by differing facts). So for military personnel being appointed to the embassy, the receiving state is supposed to get names in advance and have the thumbs up or down.

Another caveat is the "birther" issue. Article 8 specifies that diplomats attached to an embassy should be of the nationality of the sending state. If they are not, consent to their attachment and coverage as a diplomat may be withdrawn at any time by the receiving nation. This is one storyline we haven't heard anything on yet, but just wait – I'm betting with so many security services and diplomatic extensions with so many competing interests involved, someone, somewhere, will float this one too – that Davis is not an American national.

Then there is the *non grata* designation laid out in Article 9. While not as immediate as a withdrawal of consent under Article 8, under Article 9 someone can be declared *non grata* even in advance of being presented. So if, for example, Davis was already on a *non grata* list from Pakistan before he arrived in Pakistan, or if Davis is not his name and under his other name he is listed as non grata, then he could never have been validly attached. If he was not on a *non grata* list before he was attached, but he was then put on one, then the sending State is supposed to recall them and presumably has a reasonable amount of time to accomplish that recall.

Article 11 also allows the receiving state to bar certain categories (not just persons – under the non grata designation) of officials, as long as it is done on a non-discriminatory basis. So, for example, mercenaries or intelligence officers might be barred. The VC 1961 doesn't really speak to someone being attached under a false name – another assertion that has been made in the Davis case.

Was Davis validly attached to embassy staff? One thing that the US and Pakistan seem to agree

upon is that there was some kind of an effort to place Davis with the Islamabad staff prior to his shoot out. His name was supposedly submitted to the foreign ministry on January 20, 2011. Then something happened. Perhaps someone noticed the similarity to the name of a deceased General, Raymond Gilbert Davis, but more likely there was something else going on.

In any event, the Pakistan Foreign Ministry didn't go along with the designation of Davis from the US and apparently the US response was to pull him from the designated staff. On January 25, 2 days before the shooting, Davis' name was not on a list of embassy staff submitted to the FM. It wasn't until a day after the shooting that a new list was produced that included his name. And in the interim, the Pakistan FM was refusing to go along with the US designation that Davis was a diplomat assigned to the the embassy. After tremendous pressure from the US on many fronts, the FM, Qureshi, has now been replaced but he is still adamant (without giving details as to why) that Davis was not validly placed on embassy staff and has said he will testify if called upon.

Was Davis validly attached to the embassy? We don't know – we don't know the answer to questions such as Davis' real name (if not Davis); what happened on January 20 when his name was submitted; whether he is military; whether he is a US national; whether he (under this or another name) was on a non grata list; or whether he is a member of a class of officials that are all barred, etc. And even if we did, it does get more complicated.

Visa. In addition to a passport for getting into a country, in some nations our citizens need visas to travel within the country. Being a diplomat attached to an embassy does not allow them to travel freely elsewhere in the countryside. Davis apparently had a business visa on him when he was captured. Whether the decision to accept a business visa in order to be able to travel in the country has an affect

on underlying diplomatic status, if it had existed, is beyond my scope and capabilities – you need a real international law expert like Jack Goldsmith or the Johns – Yoo and Bellinger – for that. Or not.

Consulate attachment. In addition to Davis' name not appearing on the Jan. 25th list, the US embassy on the day of the shooting indicated that he was attached to the US consulate in Lahore, and documents on Davis' person indicated that he was attached to the US Consulate in Peshawar. If he was a consular employee, instead of attached to the embassy in Islamabad, then he would be covered by the VC 1963, which provide immunity for consular employees, but a more limited immunity (to consular employees engaged in consular activities and only if there is no "grave crime" at issue.

How the arguments would be made that Davis was on consular activities (for which consulate, at which point in time, and doing what) when captured with his guns, disguises, etc. remains to be seen but the argument for no grave crime being at issue will obviously revolve around the story of self defense in a robbery attempt. If someone could prove out that the actions were self defense and that Davis was engaged in appropriate consular activity, even under the Vienna Convention of 1963, he might be entitled to immunity, but there would need to be a much more extensive amount of hearings (involving all facts and circumstances of the shootings) than those under a claim of immunity under the Vienna Convention of 1961, and those would get into any number of things that likely everyone involved would want to avoid.

So this would be how immunity would work, and all the unresolved issues, if things like the Conventions and law mattered. The one thing that a succession of US supported dictatorships, corrupted democracies, and the Bush and Obama governments have proven, though, is that the thing that will matter the very least, in the end, are treaties, conventions and laws.

IT STARTS WITH: “HELLO. I AM A PROSECUTOR IN NIGERIA …

[Ed. note: Mary provides some background on what may be up with Nigeria’s announced plan to charge Dick Cheney.]

… ready to sue your Vice President. Please send 130 Million Dollars by reply mail to …”

After the news about charges against Dick Cheney relating to the Nigerian bribery scandal it may be worthwhile to sip some coffee and swap clues on what the heck might (or might not) be going on. Let’s start with a little background on one sliver of a very complicated matter.

In 1995-2004, KBR was involved in a joint venture in Nigeria that included KBR/Halliburton; a Dutch subsidiary *Snamprogetti Netherlands B.V*/Italian parent *ENI S.p.A*. (aka *Snamprogetti, ENI*), a Paris-based oilfield engineering company *Technip S.A*., and a Japanese company, *JGC*. The joint venture set up some special purpose corporations (not that unusual when companies joint venture) in Portugal (okay, maybe they don’t always use Portugal). The business entities and structures are pretty much oversimplified here, but since these pretty much track the pleas deals the Department of Justice worked out, let’s not make it more complicated.

This joint venture wanted to split up some liquefied natural gas (LNG) contracts in Nigeria that were going to be worth around $6 billion to them. Those kinds of big contract almost always get split up, for various (and some actually pretty darn good) reasons. When the “TSKJ” group was trying to get the liquefied natural gas (LNG) contracts, their bidding rival was

another consortium, BCSA (Bechtel, Chiyoda, Spibat, Ansaldo).

Not to jump around, but for context, you need to know how the Nigeria scandal (arrangements to bribe Nigerian officials to get the LNG contract) was "exposed." A former "Director General" of Technip, Georges Krammer, was accused of wrongdoing in a different deal (involving France's Elf) and argued that he was just following company policy. Supposedly, Technip hung him out to dry and he decided to return the favor by offering up info against Technip, regarding deals that included the Nigerian LNG bribes. .

When the French began investigating, the Swiss and US and Nigeria also started investigations. If, by investigation, you mean the thing that happens when you throw a hunk of raw meat into a pen of well fed dogs and see which one grabs it and growls loudest, whether it plans on doing anything much with it or not.

At this point you get into a lot of finger pointing as to who authorized or pressured for what. The end result is that the TSKJ group ended up "hiring" a company called Tri-Star Investments, Ltd. that was being used by a UK-based lawyer, Jeffrey Tesler. Money meant for bribes to Nigerian officials went to Tesler and Tri-Star (about $180 million). They tried to paper over this arrangement as being something in the nature of PR payments to Tri-Star to help with their image in Nigeria. Another UK citizen, Wojciech Chodan, was an employee or consultant of Halliburton/KBR entities involved in the Nigerian deal and worked extensively with the Nigerian joint venture, reporting to a Halliburton/KBR guy named Jack Stanley who was in Houston, Texas.

You followed that? Really? Great.

So the U.S. has muscle, a statute (the Foreign Corrupt Practices Act), a person (Jack Stanley, located in Houston, TX), a market all the TSKJ group need, and a vice president who is

implicated. Guess which well-fed dog growls loudest?

A great blog, the FCPA blog, has a series of articles summarizing the deferred prosecution and plea deals that the U.S. cut with the companies involved. This article has links to articles in the series that discuss the U.S. guilty plea of KBR in February 2009 ($402 million fine) and Halliburton ($177 million disgorgement); and deals made by Snamprogetti, ENI ($365mill) and Technip ($338 million). Those deals all came after a deal made by KBR's former CEO, Jack Stanley.

Back in September of 2008, Stanley entered into a plea agreement (pdf) that laid out some interesting details. Not only was Stanley setting up bribes, he had received a $10.8 million kickback himself. And in September of this year, the DOJ had to go to court to explain why the wanted to keep Stanley free for now, despite his two-year old plea. At that time, it came out that the $182 million that the consortium had kicked in for bribes to Nigerian officials – well, it seems as if $130 million may not have made it into Nigerian hands after all. It might be sitting in a Swiss bank account the U.S. has managed to have frozen.

Nigerian watchers were pretty interested in that. The Nigerian story provides the hints on what might be going on with the decision to file charges against Cheney, since there is a $130 million account at stake.

> A highly-placed source, who was central to the investigation, said: "During the trial of the ex-CEO of Halliburton, the US government traced about $130million to Tesler's account. It means that the $180 milion was not wholly disbursed.
>
> "After the conviction of the former Halliburton boss, the US Department of Justice succeeded in convincing the Swiss authorities to freeze access to the bribe sum by Tesler.

> "That is why the Commissioner of Police, Presidential Panel of Investigation, Amodu Ali and his team recommended the trial of the 15 suspects.
>
> "Nigeria can only have the $130 million repatriated, if only the bribe beneficiaries in Nigeria are tried and justice meted out."

The story discusses some of the tension between the U.S. and Nigeria in their efforts to get extradition of Tesler (and presumably Chodan, the UK-based employee-then-consultant). So, from a timeline standpoint, you have Nigeria finding out in September of this year that there's $130 million just sitting in an account (when the DOJ made it's pitch for Stanley, despite his plea deal back in 2008, to continue to stay free until at least January, 2011).

Earlier this year, in March and April respectively, Tesler and Chodan had lost initial rounds in UK courts fighting against extradition. But for some unknown reason, on November 8, Chodan gives up his fight against extradition. And a recent (Dec 1) Guardian article (I can't get the link to work – I get server messages – the title should be Retired UK businessman faces extradition to the U.S.) says he'll be here within 10 days. With the distinct implication that Tesler is coming right behind him. Competing with that story is the Nigerian roundups of various oil industry officials and the release that in addition to the 15 individuals and companies formerly indicted in Nigeria – it's adding Cheney to the list.

In the midst of all this, with the $130 million beckoning and Dick Cheney making his all too familiar gesture as well, off goes Eric Holder to Zurich with the ~~cover~~ story that he's there to bolster our pitch to get the World Cup (in 2022, which will be 6-10 years after Holder and Obama are long gone) by demonstrating in all kinds of ways that Bill Clinton (also on the delegation) can't, that the US will be able to

“safely” host the World Cup without terrorism threats. In addition to Holder, nothing says SCOOOOOOOOOOOOOORE like Bill Clinton.

The Gods of Irony love this so much that they make sure it comes a) at the same time leaked U.S. cables call Qatar “the worst” on counterterrorism in the Middle East, and b) it’s followed by the award of the World Cup to … you got it – Qatar.

Obama expects the press to buy the story that Holder is in Zurich to hit hard on that all important 2022 counterterrorism safety issue at the same time Qatar is walking off with the award. And no one bothers to ask Holder if he’ll be talking to officials in Zurich about the $130 million in the frozen Tesler account, especially now that Nigeria is indicting Cheney.

Obamaco is beginning to have the same elements of farce found in the Robert Ludlum “Road to” novels.

Apparently the Road to Obamaha leads through Zurich.

UNCONSTITUTIONAL SURVEILLANCE & UNITED STATES V. UNITED STATES DISTRICT COURT: WHO THE WINNER IS MAY BE A SECRET – PART 3

[Part 1 & Part 2 have been the conventional parts of the Keith case analysis. Now we are going to get into areas that involve less what has happened, and more what is happening and

opinion as to how what has happened might have an impact, depending upon the arguments raised to the court. So keeping in mind that on the opinion front, you get what you paid for, let's see where this takes us. To evaluate the impact of the Keith case in a states secrets context, we have to back up and look at the Reynolds case.]

Parameters of the State Secrets Privilege Recognized in the Reynolds' Case

The Reynolds' case, *United States v. Reynolds* took place during World War II. The Government was sued for negligence resulting in the crash of a B-29, killing three civilians. When the families brought a lawsuit for damages, the DOJ sought to block any access to information relating to the crash. After a failed claim that Air Force regulations made the information privileged from disclosure, the Secretary of the Air Force tried a different argument. He filed a document called a "Claim of Privilege" and, while he made the regulations argument again, this time he added another argument and a few carrots to the widows to try to win the court over:

> [The Secretary] then stated that the Government further objected to production of the documents "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." An affidavit of the Judge Advocate General, United States Air Force, was also filed with the court, which asserted that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." The same affidavit offered to produce the three surviving crew members, without cost, for examination by the plaintiffs. The witnesses would be allowed to refresh their memories

> from any statement made by them to the Air Force, and authorized to testify as to all matters except those of a "classified nature."

(emph. added)

The District Court ruled that the Government would have to show the court *in camera* why national security was at risk if the witnesses were given information on how their husbands died. The DOJ countered that it would make witnesses available to the widows to examine, but it was not going to produce documents. The District Court then ruled that the appropriate response to the obstruction of discovery was to treat the issue of negligence as being decided against the Executive. On appeal, the Circuit Court agreed.

Cut now to the Supreme Court.

The Supreme Court created a privilege (or if you believe in international law ;-) it recognized an exception used in other countries) for the Executive to protect military secrets even in cases where this meant that a litigant would lose their opportunity to pursue a claim against the government. The Court believed that the military testing nature of the information and the fact that we were currently in a state of war counterbalanced the rights of the litigants, especially since they were being provided with the alternative opportunity of interviewing witnesses.

> In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past war has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept

> secret if their full military advantage is to be exploited in the national interests.

The Court then described the procedures the Executive would need to follow to successfully raise the privilege.

> It is not to be lightly invoked.[18] There must be a formal claim of privilege, lodged by the head of the department which has control over the matter,[19] after actual personal consideration by that officer.[20] The court itself must determine whether the circumstances are appropriate for the claim of privilege,[21] and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[22]

If such a formal claim of privilege (here, a “Reynolds’ Affidavit”) was filed by the government in a civil setting and there was a chance that military secrets would be revealed, the Reynolds Affidavit procedure could be used to not only bar a court from demanding that the government turn over information, but to prevent the court from ruling that allegations against the government be deemed admitted in light of the failure to provide discovery. Emphasis on the “could” because the court went on to provide a preliminary standard for review for a Reynolds’ Affidavit that involved weighing various interests:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately

> satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail.

While the court on the one hand said that "even the most compelling necessity" is outweighed if military secrets are at stake, it still attempted to carve out as an exception cases where the use of the privilege would be "unconscionable," as in a criminal setting:

> Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free.[27] The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.

So the judicial review analysis from *Reynolds* (some of which was *dicta*, as it did not involve a case before the court)was that:

a) there is no privilege unless the Executive properly invokes it;

b) if the privilege is properly invoked, the court weighs necessity to the litigant (or, as I might argue later, to the judicial system) versus need for the privilege;

c) if military secrets in a time of war are involved, no amount of necessity can overcome the privilege (with a possible exception for

[unconscionable activity – edited]);

d) if necessity is "dubious" (as in Reynolds, since the widows were being given access to the witnesses) then a mere formal claim of privilege will prevail without further weighing the interests;

e) if the privilege is properly invoked, the court will not determine the non-disclosed facts against the government in civil litigation against it; but

e) if the privilege is properly invoked in a criminal case, then the government is required to release the defendant and drop the prosecution.

[In 2000, information relating to the Reynolds case was declassified, revealing that the crash resulted from a fire that started in the engine. Attempts were made to have the Supreme Court reopen the case by filing a writ of coram nobis (fraud on the court) but this was denied with no opinion. Plaintiffs then refiled in the lower courts, seeking to set aside the 50 year old settlement, but the Third Circuit decided that it did not believe that there had been a fraud on the court and that it might have been necessary to keep information about the workings of the B-29 secret or to keep details of the craft's mission secret]

Reynolds at Work in the Keith Case.

In the Keith case, Attorney General Mitchell filed an affidavit that met the Reynolds' requirements. As the head of the Department of Justice, who had control over the warrantless surveillance program and who had given personal consideration to and authorized the surveillance, Mitchell filed a formal claim that the information from the surveillance could not be released to a criminal defendant because of national security interests, despite *Alderman* (which had not involved a formal invocation of the privilege) and despite the *Reynolds dicta* that criminal cases involving a claim of

national security privilege would be required to be dismissed.

Mitchell's claims went well beyond what the *Reynolds dicta* had contemplated and asked that the court look beyond "legality" of surveillance in a criminal setting and instead elevate national security above the Fourth Amendment in the area of "intelligence" surveillance. This is where the Keith case and how the Supreme Court handled that case offers insight into the states secrets privilege. Mitchell and the DOJ were claiming that the Executive's "national security" function was so separate and severable from its law enforcement function that when it said it was acting for national security purposes, its actions were not reviewable by the judiciary and law enforcement cases could not be impeded based upon the acts of the Executive in pursuing its "national security" function.

Justice White and the "on the statute" Argument.

I think here the most interesting place to start is the separate concurrence of Justice White. Justice White wanted to handle the *Keith* case, not on Fourth Amendment grounds, but rather as a case of conflict between the Reynolds' Affidavit Mitchell had given, and the requirements of the Congressional statute. Trevor Morrison, in an article found at the Columbia Public Law and Legal Theory Working Papers site, The Story of (*United States v. United States District Court (Keith)*: The Surveillance Power expands on the context of the *Keith* case. In this draft (beginning on page 22), Morrison describes Supreme Court bargaining involving the *Keith* case opinions. In part, he discloses that Justice White's position originally had support from Justices Burger and Blackmun as well.

Justice White's "on the statute" argument was that, because of the fairly recent Congressional statute governing wiretaps, which spelled out what was required to be exempt from the statute, an affidavit invoking "national security" was not enough to sustain privilege. Rather, the

Attorney General was required, because of the statute, to affirm within his affidavit the specific exemption provided by Congress and that the Executive's actions fell within that exemption.

Morrison notes in his discussions that the Justice White approach could have reduced the *Keith* case to being about drafting rather than about the underlying issue of warrantless surveillance, and would have been followed quickly by a new affidavit from the Attorney General.

> A statutory holding would simply tell future Attorneys General that their affidavits must more closely track the language in Title III's disclaimer provision. It would amount to little more than a lesson in affidavit drafting.

p. 23.

I believe, though, that Morrison sells the drafting requirements a bit short with that analysis. In *Reynolds*, neither Congress nor the Constitution had spoken as to the government actions (military test flights) at issue. By contrast, in the Keith case, both Congress and the Constitution had spoken, at least in some fashion, to the government actions (seizing and searching private communications) at issue. In the *Keith* case, the Court was looking at a comprehensive statutory scheme that provided some exemptions for Executive "security" actions, but only limited exemptions.

White argued was that the first analysis should be whether the Attorney General affirme compliance with the statute.

Congress had established two branches of Executive action that it said was exempt from the statutory wiretap requirements. The first branch involved possible or potential hostile acts by foreign powers, collecting foreign intelligence essential to the national security

or protecting national security information against foreign intelligence. The second branch involved overthrow of government and dangers to the structure and existence of government. The affidavit provided in the *Keith* case failed to specifically claim that the Executive's warrantless surveillance of Plamdon, and hence its national security claim, fell under either branch of exemption.

Justice White's opinion layered a second level of requirements on the national security privilege when there was a Congressional statute on point. The first level was *Reynolds* and applied for military secrets and in the absence of Congressional input. The second test, per Justice White's approach, involves requiring the Executive to affirm compliance with applicable statutes including recitations as to the exemptions that applied if exmptions were relied upon. Under Justice White's approach, where Congressional statutes sspeak to activities the Executive is using to "collect intelligence," then the Executive would be required to comply with both tests.

However, since Justice White's opinion was only a separate concurrence, though, let's look at the impact of the majority opinion on the invocation of states secrets.

The Powell Decision Impact on State Secrets.

Powell and the majority of the court met the Executive branch's warrantless surveillance of Americans with a constitutional, rather than statutory, argument. The focus of the opinion was that (unlike *Reynolds)* the *Keith* case involved a set of government conduct that was specifically covered by the Constitution. The Powell majority argued that even if Congress had authorized the Executive's warrantless surveillance by statute, it would not matter because the Constitution and Fourth Amendment controlled over both Congressional statute and Executive national security claims.

In the case before it, the Court's only remedy

for the unconstitutional behavior was to affirm Judge Keith's right to retain the illegal surveillance records and require that they be turned over to the defense, even over a national security interest claim by Mitchell. This aspect of Keith gets lost, but its clear holding was that when a procedurally proper *Reynolds* invocation attempts to apply a state secrets privilege to actions barred by the Constitution, it fails.

But Powell was obviously troubled by the need for the government to at times engage in domestic surveillance for a domestic security need separate from law enforcement. The Powell majority collectively engaged in *dicta* to speculate as to how *Congress (*not the Executive internally) migh address the warrant requirement in a domestic security situation. That *dicta* is worth examining for its impact on states secrets invocations as well.

While the Powell majority dismissed the impact of Congressional acts if they attempted to overcome the requirements of the Fourth Amendment, it did want to encourage Congress to act to authorize domestic surveillance in a way that would be consistent with the Fourth Amendment and the Court's judicial review holding in *Keith*. The warrantless Plamondon surveillance was held clearly unconstitutional, but Powell speculated that wide latitude might be shown for surveillance involving only "foreign powers" or their agents: "We have not addressed and express no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents." Powell signaled, as had lower courts, that where there was no Congressional effort to address surveillance involving only foreign powers, that kind of surveillance would likely fall within Executive power and outside of the Fourth Amendment.

Powell then went on to discuss more generically *domestic security* intelligence surveillance v. criminal surveillance and provided a speculative

list of actions that Congress might attempt to create a situation whereby the Executive could engage in domestic security intelligence surveillance in a manner that would allow that intelligence surveillance to be in compliance with the Fourth Amendment and exempt from *Alderman* production during a criminal trial.

> Congress may wish to consider protective standards for the [domestic security surveillance] which differ from those already prescribed for specified crimes
>
> …
>
> It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of [criminal surveillance warrant applications] but should allege other circumstances more appropriate to domestic security cases; that the request for prior court authorization could, in sensitive cases, be made to any member of a specially designated court (*e. g.*, the District Court for the District of Columbia or the Court of Appeals for the District of Columbia Circuit); and that the time and reporting requirements need not be so strict as those in [criminal surveillance warrant applications.]
>
> . . . We do not attempt to detail the precise standards for domestic security warrants … We do hold, however, that prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe. (emph. added)

The takeaway from the Powell decision is that, even under a claim of national security

privilege, the Fourth Amendment required prior judicial approval for the Court to hold that such surveillance for domestic security purposes was constitutional. The Court felt Congress might be able to come up with a statutory scheme which could provide for prior judicial approval of domestic security surveillance and that the Court might deem such a judicially authorized seizure and search of communications based on less than criminal probable cause to comply with the Fourth Amendment.

The combined takeaway from the White and Powell opinions is that every member of the Court who considered the case believed the Reynolds invocation of national security interests failed – Justice Powell and the majority because it did not comply with Constitutionally required prior judicial approval; Justice White because the Reynolds affidavit did not clearly state, on its face, compliance with Congressional statutes or exemptions (which he wanted to resolve before looking at the Constitutional argument).

Next up – Congressional efforts with FISA to first rein in, and now reel out, Executive power while avoiding judicial review and options that may still be open .

UNCONSTITUTIONAL SURVEILLANCE & UNITED STATES V. UNITED STATES DISTRICT COURT: WHO THE WINNER IS MAY BE

A SECRET – PART 2

[Given the current surveillance state situation in America, the Keith case, formally known as United States v. United States District Court, is one of the most important cases from our recent past. But I don't really believe you can understand or know the law of a case, without really understanding the facts. The Keith case doesn't have simple facts, but they are fascinating and instructive. So bear with me – this is going to take awhile, and will be laid out over a series of four posts. In Part I we went into the background, predicate facts and surrounding circumstances of the Keith case. Today in Part 2 we will discuss the actual court goings on in more detail. – Mary]

District Court Judges Deal with the Mitchell Doctrine in *Smith* & *Sinclair.*

Before we can get to the actual Keith case, where the DOJ filed a mandamus against Judge Keith, we have to look at what Judge Keith did with the DOJ arguments in the Sinclair case. In his Memorandum Opinion, Judge Keith summarized the DOJ's position:

> The position of the Government in this matter, simply stated, is that the electronic monitoring of defendant Plamondon's conversations was lawful in spite of the fact that the surveillance was initiated and conducted without a judicial warrant. In support of this position, the Government contends that the United States Attorney General, as agent of the President, has the constitutional power to authorize electronic surveillance without a court warrant in the interest of national security.

Judge Keith then went on to list several cases, one from the Fifth Circuit and two others from

District Courts in Kansas and Illinois, respectively, where the government had been successful in a similar argument.

However, not every case had gone DOJ's way and Judge Keith chose to focus on "the exceptionally well-reasoned and thorough opinion of the Honorable Judge Warren Ferguson of the Central District of California. *United States v. Smith*, 321 F. Supp. 424 (C.D.Cal.1971)." Judge Ferguson bucked the Mitchell Doctrine in very clear and even prescient terms. The opinion isn't long and it's well worth the read. Judge Ferguson deals very swiftly with the Omnibus Act argument and moves on to the Fourth Amendment issues, finding that whatever exceptions you may and may not find in a statute, they do not create an exemption from the application of the Constitution.

DOJ argued (and its an argument that those involved in illegal surveillance still mouth today, largely unchallenged) that the Fourth Amendment isn't really about interposing independent magistrates and warrants, it's about … being reasonable. DOJ argued that the Executive branch only had to be reasonable in its surveillance and that they can best decide, based on all the complex issues of national security, if they've been reasonable. Judge Ferguson, quoting from a prior Supreme Court case, exposed that this argument would mean that the Fourth Amendment evaporates.

Interestingly, the Smith case also delves pretty deeply into another of the DOJ's argument (again, one that persists today) that the warrantless wiretaps were legal because *everyone else did it too.* It makes for very interesting reading and attaches prior Presidential directives on warrantless wiretapping.

Beyond dealing with the Mitchell Doctrine Judge Ferguson had the insight and foresight to identify the problems presented by the inability of the courts to punish illegal Executive action other than by the Exclusionary Rule and also

by the fact that under the DOJ's, there was nothing that required the President to delegate this warrantless wiretap authority to the Attorney General. Rather than a delegation to the highest law enforcement officer of the nation who was required to specifically designate each person for surveillance, Judge Ferguson worried that under the DOJ's argument the President could, instead, delegate such warrantless wiretap power to anyone and they could target without particularity. Judge Ferguson didn't specifically mention night supervisors at the NSA or a massive program where the Attorney General turns the NSA loose to allow massive interceptions at the options of low level NSA operatives — interceptions without individual authorizations and without even an ability for the Attorney General to track, in filings to a secret court, who has been illegally surveilled. But he knew what men do with no oversight and no checks — he knew who Haydens were and what they would do.

But back to Judge Keith's case. After invoking a striking image, the "uninvited ear" Judge Keith goes on to side with Judge Ferguson and make his own indelible contribution.

> In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our existing form of government. If democracy as we know it, and as our forefathers established it, is to stand, then "attempts of domestic organizations to attack and subvert the existing structure of the Government" (see affidavit of Attorney General), cannot be, in and of themselves, a crime.

The DOJ Files Against Judge Keith

Rather than complying with Judge Keith's order, the DOJ insisted it was right and would not turn

over the information. It was not at a juncture where it could appeal, so it filed a mandamus action against Judge Keith, asking superior courts to order that the Judge turn over the surveillance logs and not disclose them to the defendants. A mandamus action exists when an officer or lower court is refusing to do something where it has a clear duty. Here, DOJ was claiming that the clear duty was to return the logs to DOJ and not disclose them (we'll come back to this — but this is the state's secret aspect of the Keith case).

Now, the Executive branch had used its prosecutorial power to make Judge Keith a defendant and it looked to the Sixth Circuit to rein in the District Court Judge. The Sixth Circuit, however, sided with Judge Keith. The scene was set for a truly remarkable case to be heard by the Supreme Court.

DOJ Searches for a Good Argument While the Supreme Court Takes the Case.

Now that the DOJ was going before the Supreme Court, it had several difficulties — one of the foremost being just what argument it really wanted to sell hardest to the Court. It wanted to argue that of course the President could do "anything" when national security was involved, but it didn't really want to argue forthrightly that the President was exempt from law. Except, it was willing to make that argument if it had to — but it didn't want to have to. All of which made for a curious dance leading up to the filings and oral argument in the case.

The Supreme Court had two new members when the case went up, Justices Rehnquist and Powell. Justice Rehnquist (who had been working on the surveillance case briefs from the DOJ's Office of Legal Counsel) recused. Justice Powell, though, was largely seen as being a "win" for the Government's case, having written aggressively in favor of the Executive's power in national security settings. And since the lower courts and Justice Powell had both seemed favorably inclined to find that there was

power to wiretap foreign powers, DOJ tried to pull in foreign power aspects to the case as well.

As reported in March 6, 1972 Time article titled, ” *The Law: Turmoil on Taps*”

> The tap was perfectly legal, [DOJ] said, even though it had been installed without a judicial warrant, because warrants are not necessary in cases involving a threat to “national security.” This is true not only for the traditional danger from a foreign power, the Justice Department maintains, but also for the security threat posed by the current radical protest movement.
>
> …
>
> In his argument to the Supreme Court last week, U.S. Solicitor General Erwin Griswold (sic) insisted that radical protests within the U.S. are “interrelated” with security threats from abroad. The Government was merely gathering intelligence to protect the nation, he said, not deliberately seeking evidence for criminal prosecutions. If each case had to be submitted to a judge to get a warrant, Griswold added, “the Government would have to disclose sensitive and highly secret information.” Judges, he said, are not as qualified as the Attorney General to make the “subtle inferences” involved. Even though the Attorney General might abuse his power, that “is not a valid basis for denying [him] the authority.” emph added

The Time’s article reference to Griswold, above, is incorrect. The Solicitor General , a former Harvard law dean (but otherwise unlike an Elena Kagan) actually refused to argue the case although his name was on the briefs. Not having a Paul Clement available, Robert C. Mardian was

asssigned to handle the arguments. So, while no one knew it at the time, both the Attorney General (Mitchell) who authorized the illegal taps and the deputy Solicitor General, Mardian, who argued the case to the court, would later become indicted in matters relating to the Watergate wiretaping, a case made possibly only by the appointment of an actual, independent prosecutor (something the Bush and Obama DOJs have shunned).

The Supreme Court Rules.

After Mardian's oral argument, the DOJ was less enthused with their prospects for success and they had a right to be. The Justices were beginning to align in two camps, but neither camp gave DOJ the win. At least one Justice was inclined towards a very limited decision, one that would focus on the Omnibus Act and merely find that the Reynold's type affidavit (we'll get to that later) offered by the DOJ and Mitchell was insufficent under the Omnibus Act's requirements — in other words, that a "national security" argument from the government could be trumped by … bad drafting. That Justice, though, was Justice White (who ended up issuing a separate concurrence on this theory), not Justice Powell. In the other camp, to the surprise of many, was newly appointed Justice Powell.

The same Powell who had argued for government powers of surveillance before coming to the court (and is thought of as the father of the think tank approach to corporate activism to shape legislation) was now being given the assignment of writing the opinion for the majority of the court, a court that agreed 8-0 that the DOJ could not order the District Court Judge to return evidence in the case, with only a split on how narrowly they would issue their opinion. The Powell opinion took Madrian's argument that the Attorney General (much less night supervisors on an NSA shift) was better qualifed than the courts to determine if and when the Fourth Amendment should apply and stood

it on its uninvited ear.

With respect to the Omnibus Act argument, Powell wrote:

> At most, this is an implicit recognition that the President does have certain powers in the specified areas.
>
> …Rather than stating that warrantless presidential uses of electronic surveillance "shall not be unlawful" and thus employing the standard language of exception, subsection (3) merely disclaims any intention to "limit the constitutional power of the President."
>
> …In view of these … carefully specified conditions, it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act.

Now on to the DOJ's Mitchell Doctrine argument. Powell restricts the decision to not include a case where there had been authorized surveillance leaving open, in part, what might be required to be turned over if the surveillance had been legal (ed. although cases such as Jencks and Brady presumably would still have application in such a case, especially since Jencks, too, involved DOJ arguments of "national security") and also leaving open the issue of whether surveillance involving a foreign power for foreign intelligence would have been legal. With those caveats, he went on to deal with the Mitchell Doctrine for surveillance of US "dissidents."

> History abundantly documents the tendency of Government — however benevolent and benign its motives — to

> view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. … The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

Pointing out that the warrant clause of the Fourth Amendment is not "dead language" Powell dismisses the argument that the Executive branch is only required to be subjectively "reasonable" and recites a long history of cases finding that the Fourth Amendment is not intended to be entrusted to an Executive's secret and subjective decision of reasonableness. Despite the pragmatic force lent to the government's arguments by bombed out buildings and civil unrest, Powell found that the President's role with respect to domestic security has to be exercised within the bounds of the Fourth Amendment.

> Thus, we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney

> General, this inconvenience is justified in a free society to protect constitutional values. Nor do we think the Government's domestic surveillance powers will be impaired to any significant degree. A prior warrant establishes presumptive validity of the surveillance and will minimize the burden of justification in post-surveillance judicial review. By no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.
>
> As the surveillance of Plamondon's conversations was unlawful, because conducted without prior judicial approval, the courts below correctly held that *Alderman v. United States*, 394 U.S. 165 (1969), is controlling and that it requires disclosure to the accused of his own impermissibly intercepted conversations. As stated in Alderman, "the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect."

So now we have some of the picture that was partly completed with the Keith case. Uncertainty as to what is intended on the domestic v. foreign intelligence front, uncertainty as to delegation powers of the President, some certainty as to domestic groups or persons and even "intelligence" surveillance of such groups. There is a rule for full (not limited by relevancy) revelation of illegally obtained information to a criminally accused. How does that apply to a capriciously, or even "reasonably" detained person who has not had pre- or post- detention due process or to a militarily detained person "on a battlefield" that is argued to include the United States, even though courts are open and operating here?

How does it apply to innocent Americans who were granted civil enforcement rights under FISA and yet were routinely subjected to warrantless, non-particularized, surveillance and storage of their personal information?

Many of the unanswered questions are, after all, questions the Supreme Court would just as soon not have to answer, if for no reason other than the one pointed out by Judge Ferguson – that no matter what egregious government behavior the court is faced with, the courts have little power to remedy that situation. I would argue, though, that there is more power than Judge Ferguson had available to him. After the Church commission findings that many peaceful Americans and journalists and even politicians were wiretapped, the Foreign Intelligence Surveillance Act was passed. FISA put limits on the government's ability to claim that it had legally engaged in foreign surveillance, requires oversight by a court – even if it is a secret court, and recognized the problems with relying on the same prosecutors who were violating the law to prosecute themselves or their superiors by creating a direct action by citizens against the illegal and uninvited ears.

To date, no court has allowed any American citizen to avail themselves of the FISA civil penalties in connection with the massive warrantless government programs, despite the fact that those penalties written specifically to address the problem Judge Ferguson pointed out and to allow for a remedy when the Executive runs amok. One reason they have not done so is that they have consistently agreed that petitioner in a case under FISA could not have access to the very information that the Keith case required to be made available to defendants in the criminal cases there. And they have denied such access based on the same kind of Reynolds affidavit that even Justice White found insufficient in a case, such as the Keith case, where there was a statutory scheme that made non-compliant government action criminal .

These aspects of the Keith case (or at least my take on these being aspects) – the Reynolds affidavit, Justice White's concurrence in the Keith case, duties of the Federal intelligence Surveillance Court under Alderman, and the FISA civil penalties overlay – those may have to wait for a part III. ;)

UNCONSTITUTIONAL SURVEILLANCE & UNITED STATES V. U.S. DISTRICT COURT: WHO THE WINNER IS MAY BE A SECRET – PART 1

Given the current surveillance state situation in America, the Keith case, formally known as United States v. United States District Court, is one of the most important cases from our recent past, and has profound implications on our present and future. The Keith case doesn't have simple facts, but they are fascinating and instructive. So bear with me as we go though them – this is going to take awhile, and will be laid out over a series of four posts.

A WAY TOWARDS THE RULE OF LAW – AN ANSWER TO CAP'N JACK

Justice, what do you care about justice. You don't even care whether you've got the right men

or not. All you know is you've lost something and someone's got to be punished. The Ox-Bow Incident.

Nine years after September 11 and eight years after the CIA provided a memorandum to the White House explaining that at a minimum, one-third of the detainees at GITMO were "mistakes" who had been purchased in bounty transactions. Nine years after the Department of Justice covertly elevated the President of the United States as a power above the Constitution and the laws of the United States and seven years after the Department of Justice assisted in allowing the torture of Ibn al Shaykh al-Libi to be laundered through Colin Powell to the UN and to America. So many years after so many incidents, our nation is still being flimflammed over what to do with so-called terrorist detainess.

Enter Jack Goldsmith with his recent op ed titled, "A way past the terrorist detention gridlock." While Marcy and Spencer have already weighed in, I whined until Marcy let me have my own go at this too, because I wanted to provide an alternative route to deal with the "gridlock."

Goldsmith's advice to Obama is to: (i) keep GITMO open because closing it is hard, (ii) forget civilian criminal actions because they are hard, (iii) forget military commissions because they have no international crediblity and are hard, (iv) get Congress to give the President unchecked and unsupervised powers to engage in forever detentions without respect to guilt or innocence, and (v) use the reality of forever detentions for the innocent as well as the guilty and other coercion to get detainees to offer up confessions and plea deals and thereby get around the hard parts of civilian criminal suits. Part (v) includes the caring-compassionate touch of only being recommended if Obama takes the death penalty off the table.

Despite such awesome[ly bad] advice, GITMO has not proved hard to close because there are not enough coerced confessions and coerced plea

deals. GITMO has proved hard to close because current and ex-Department of Justice lawyers, as well as current and ex-Presidents and their intelligence apparatus, have found it too politically dangerous to tell the truth. It's worth noting that throughout Goldsmith's piece the one thing he never mentions is innocence. He offers up a lot of advice, but none of it even begins to contemplate the innocent and how they can be protected and released.

While Goldsmith stops short of saying that our country has a long and celebrated history of lynchings that could be used when trials are hard, he does pretty much advocate that if trials are hard, you just do something else — preferably something that bars any judicial review. Something like putting human trafficking victims in forever military detention; expanding from the Strawberry Fields (forever) detention facilities we already have to ever expanding concentrated population camps necessitated by his long term solution of granting the President unchecked powers for extra-judicial detentions. For this foray into solving "detainee gridlock" WaPo stops the presses.

Well, let me offer up a counterpoint to Goldsmith's argument that it is the "abundant dysfunctions in our system for incapacitating terrorists" that has led to not only GITMO (and let's not forget Bagram) but also to an increase in "targeted" killings and in outsourced renditions which are not "optimal." He's wrong. It has never been the dysfunction of our system that was the problem; rather, it has been the dysfunction ofour Department of Justice and our Presidents that have created GITMO and the "gridlock" associated with it.

The solutions to the dysfunction are the same now as they were eons ago, and for that matter the same as when we were in kindergarten. We have to face the truth, tell the truth and take responsibility. So here is a short review of a "pragmatic" approach that would

begin to address the “detainee gridlock” that perturbs Goldsmith, by using truth and accountability – a way towards the rule of law as opposed to a bypass around law, with no off ramps.

First, the White House has to acknowledge what much of the world, although not necessarily much of America, knows to be true. Obama needs to publically explain to this nation that, despite the rhetoric that GITMO was a facility reserved for the “worst of the worst” terrorists, it has been, in fact, a destination for many innocent people who were sold to the US or mistakenly captured by the US. He needs to admit we comingled people who had plotted and supported the 9/11 attacks with innocent chefs from London. He needs to admit the White House has had this information since at least August, 2002 when it was provided by the CIA after a review of the detainees at Guantanamo. He needs to release that memo, which has already been mentioned in at least one habeas decision. The “difficulty” dealing with GITMO will never, ever, be diminished until we tell the truth about detainees who were not invovled in 9/11and take responsibility for what has been done to them.

Second, Obama needs to lay out that in addition to having kidnapped and purchased people who were not involved with 9/11 , the treatment of the guilty and the innocent detainees alike has involved war crimes. He needs to reference and support the findings of Susan Crawford that detainees at GITMO were tortured. He needs to explain that interrogators were sent out with the direction that “no one leaves GITMO innocent” and he needs to explain that under the Geneva Conventions, it is a war crime to transport innocent civilians out of country, to a destination like GITMO or to destinations like our CIA blacksites. He needs to say that our tribunals can never have international credibility without recognizing that we have committed war crimes against some detainees and that we have innocent detainees who are entitled

to reparations and apologies.

Third, the President needs to explain to the nation that it is because we have picked up innocent people as well as terrorists involved in plotting 9/11 and we have treated both in ways that are shameful, that we must have full, fair and transparent trials of anyone we are claiming had something to do with 9/11. He needs to explain that if we can't do that – if we can't allow the innocent to have access to courts and we can't make a public case against the guilty – then the terrorists have won because they have rendered America unable to live up to its Constitution and its international commitments.

Fourth, Obama needs to explain that in addition to innocent people and terrorists involved in 9/11, we also have captured people who were not involved in 9/11 but who fought back against invasion of their countries (or who responded to the invasion of a Muslim country) by outside forces and also people who are far from innocent (like drug lords) but who had nothing to do with 9/11. These people need to be returned to their sites of capture, in Afghanistan or Iraq respectively. In Iraq, they need to be handed over to the Iraqi government and in Afghanistan, they need to be turned over to the Afhgan government or to be held at Bagram until our forces return home next year (at which time they should be handed over to the Afghan government the way our thousands of Iraqi detainees were). Those who were fighting back against invasion need to be given all proper prisoner of war status and treatment while they are held in Bagram. Those who are drug lords or were captured while they were engaged in crimes need to be treated as civilian criminals.

Fifth, those who had nothing to do with 9/11 and were not captured in Iraq or Afghanistan are going to be a problem that requires another set of revelations – that we operated in many countries other than Iraq and Afghanistan and those operations included kidnapping or buying

humans for a bounty without any proof that they were inovled with 9/11. Obama needs to explain that we have a duty to these people who had not committed acts against the United States, but who may have been refugees from totalitarian regimes and who cannot be returned now.

Sixth, the canard of the worldwide battlefield needs to be addressed. Obama needs to explain that while the US is going to fight terrorism and terrorists everywhere, it is a sign of failure and a lack of understanding of U.S. law to suggest that the "world" is a battle theatre, because our U.S. courts have defined that term to mean a place where there is no civilian law. He needs to absolutely and completely reject any argument that terrorists have forced the closure of our courts or robbed America of the rule of law. We fought for it, died for it and it lives. And he needs to say that America is not so fearful that it needs to make up peculiar interpretations of civilian or military laws to transform a cook or a driver into a terrorist or war crimnal. He needs to say that there are many Americans dead and injured and over two million Iraqi refugees that stand as a living testament to why America should not make life and death decisions based on evidence that was coerced from someone being buried alive or waterboarded.

Seventh, Obama as Commander in Chief and as chief law enforcement officer of the nation, needs to assert that if Congress fails to provide full and open and transparent trials, it puts our nation at risk. America is strong and once, faced with the truth, it has many, many more than just a few good men who can handle that truth.

The way out of "detainee gridlock" isn't more power to a dilettante White House and dysfunctional Department of Justice and more statutes provding Congressional support for detentions on Executive whim. It isn't collecting a worldwide assortment of human specimens to hold in the belief that the rest of

the world will at some point become a Borg colletive that supports the US in its every action without dissent. That “way past” won’t provide international credibility. That “way past” won’t protect the innocent. That “way past” won’t require leadership from the Presidency. That “way past” will guarantee more and more who hate the US. That “way past” will weaken rather than strengthen America. That “way past” buries facts and disinforms our citizenry. That “way past” relies on the destruction of the rule of law.

The law’s a lot more than words you put in a book … it’s everything people ever have found out about justice and what’s right and wrong; it’s the very conscience of humanity. There can’t be any such thing as civilization unless people have a conscience. The Oxbow Incident.

******UPDATED As bobschact has noted @ 27 I probably need to clarify the seventh item. Congress has actively blocked funding for closing GITMO and Senators have been working hard to defund civilian trials and transport for those trials. This, despite the Democratic majorities in both Houses.

FINAL JEOPARDY ANSWER: SOMETHING THAT DOESN’T OBSTRUCT OR IMPEDE JUSTICE

Alex, I’m going with – “What is getting a prosecutor fired for not complying with your political agenda?”

The investigation (not of the U. S. Attorney firings despite misleading headlines) into the

Iglesias firing is done. bmaz is ready to change his name to Carnac and Holder's Department of Justice has shot off a letter-ary masterpiece to the House Judiciary Committee (HJC). As per ~~Carnac's~~ bmaz's predictions, no charges.

What bmaz could not have predicted, but did link to in his post, is the actual content of the letter sent to Conyers. I don't think anyone would have predicted the cavalier way in which Holder's DOJ reaches its seemingly predetermined decision, while providing a roadmap to other legislators who'd also like to get a prosecutor fired for political convenience. Dannehy and Holder explain to Members of Congress — if a Federal prosecutor isn't filing or refraining from filing the cases you want, feel free to covertly conspire to get him fired. As long as you don't make any misguided attempt to "influence" him before you get him fired, you're good to go. Oh, and btw, phone calls to him at home to fume over his handling — not to worry, those doesn't count as an attempt to influence.

Stripped and shorn, Holder and Dannehy have said —

1. We aren't gonna investigate anything but Iglesias and we aren't saying why: "The investigative team also determined that the evidence did not warrant expanding the scope of the investigation beyond the removal of Iglesias."

WHAT EVIDENCE? They freakin didn't expand the scope of the investigation to see what evidence there was, then they decide, *oh well, we don't have any of the evidence we didn't look for so we shouldn't look for it since we don't have it* … whatever.

2. Hey, yeah, Domenici DID make a contact to smack on Iglesias about the handling of a matter currently in front of the USA's office but: "The evidence about the call developed in the course of Ms. Dannehy's investigation, however, was insufficient to establish an attempt to pressure Mr. Iglesias to accelerate his charging

decisions."

So similar to the lack of intent to torture — I mean, if Domenici in good faith thought he was just gathering intel on the status of political prosecutions … um, let's move on.

3. Instead of trying influence Iglesias, Holder and Dannehy think that Domenici *just* got Iglesias fired for not pursuing political bias in his prosecutions. "The weight of the evidence established not an attempt to influence but rather an attempt to remove David Iglesias from office, in other words, to eliminate the possibility of any future action or inaction by him."

4. This, they say, is fine. Seriously. They say there's nothing DOJ can do about it. It's no problem for politicians to get DOJ lawyers fired for not being political lapdogs. But to be fair, they then finish up by saying both, "In closing, it is important to emphasize that Attorney General Holder is committed to ensuring that partisan political considerations play no role in the law enforcement decisions of the Department" and (bc that wasn't really the closing after all) "The Attorney General remains deeply dismayed by the OIG/OPR findings related to politicization of the Department's actions, and has taken steps to ensure those mistakes will not be repeated."

HUH? They've just said it is perfectly legal for politicians to get USAs who won't do their political bidding fired by covert contacts with the WH, but Holder is "committed" to ensuring partisan political considerations play no role at DOJ? WTH? I guess if you put those two concepts together and held them in your mind for long, you'd end up committed too.

5. Anyway, they pull all of this off by giving a Bybee-esque review of "18 U.S.C. § 1503 [that] punishes anyone [at least, anyone the DOJ selectively decides to prosecute] who '*corruptly* . . . influences, obstructs, or impedes, or *endeavors to influence, obstruct, or impede*, *the*

due administration of justice." It's a simple thing — according to Holder and Dannehy, Domenici didn't try to "influence" Iglesias, he just had Iglesias fired. Which obviously isn't an attempt to obstruct or impede. I mean, there's nothing that *doesn't impede* a case like getting the prosecutor handling it fired.

They also explain to us that they can't go after Domenici for trying to get, then getting, Iglesias fired — at least, not under 18 USC 1503, because that section "penalizes only forward-looking conduct." So Domenici would have to be doing something that would involve forward-looking conduct. And after all, as they just said (see 3 above) Domenici wasn't trying "in other words, to eliminate the possibility of any future action or inaction by [Iglesias]." Oh, except for, you know, they actually say in the letter that's exactly what Domenici WAS doing. Trying to affect future action or inaction — in a forward-looking way with his forward-looking conduct.

This clarifies so many things. Who knew, until now, that the only person who got things right during the Saturday Night Massacre was Robert Bork?

Nixon wrote the first act in DOJ's current play (which is only fair, since he also wrote their anthem that it's not illegal if the President does it) when he arranged for the firing of prosecutors who were bugging him, but in response to a livid Congressional response, using words like impeachment and obstruction, said:

> "…[I]n all of my years of public life, I have never obstructed justice. And I think, too, that I can say that in my years of public life that I've welcomed this kind of examination, because people have got to know whether or not their President's a crook. Well, I'm not a crook!"

And now Dannehy and Holder have made that chapter and verse – nothing wrong with firing some prosecutors if they aren't playing politics. Poor Karl Rove – so much trouble could have been avoided if he had just known that a Democratic administration's DOJ would take the position that it would be perfectly ok for him to get Bush to fire Fitzgerald (something that apparently made even Buscho lawyers Gonzales and Miers flinch) – no obstruction, no impeding – as long as Rove never tried to "influence" the prosecutor first.

And now DOJ prosecutors now know exactly how things work. It's been spelled out. No one will try to influence them. It's just that if they aren't making Obama's favorite politicians and fundraisers happy, well – their career may have a little accident.

With AGeewhiz's like Holder, we can rest easy. Gonzales may have been afraid to come out and state DOJ's policy plainly. He never quite coughed out the admission that it is DOJ policy that Republican Senators who conspire with the Republican WH to get prosecutors fired for not carrying out the Republican Senator's political agenda are acting well within their rights. Holder is not nearly so timid. He's spelled it out. Prosecutors are fair game for Congresspersons, at least those with the right WH ties.

I guess we should be grateful he hasn't handed out paintball guns to Democratic legislators and encouraged them to mark the weak links in his legal herd – the ones that haven't been compliant enough to keep their jobs.

At least, not yet.

And besides, haven't we already learned what Holder just told Conyers in that letter?

Firing the Republicans in 2006 and 2008 didn't impede or obstruct the attacks on the rule of law one little bit.

Update: On the good news front – Happy Day

fatster!