Obama Doesn't Know Why the Fuck He's Entitled to Kill Al-Awlaki, He Just Is, Damnit

By: emptywheel Saturday September 25, 2010 11:54 am

The most striking aspect of the government's motion to dismiss the ACLU/CCR lawsuit challenging the use of targeted killing is that the government does not commit to the basis for its authority to kill an American citizen like Anwar al-Awlaki with no review.

This starts as soon as the filing tries to lay the ground work for unchecked authority under the AUMF. It doesn't commit to whether Al Qaeda in the Arabian Peninsula **is part of** al Qaeda itself, or is instead just **closely enough associated** to count under the AUMF.

> The United States has further determined that AQAP is an organized armed group that is either part of al-Qaeda, **or** is an associated force, or cobelligerent, of al-Qaeda that has directed armed attacks against the United States in the noninternational armed conflict between the United States and al-Qaeda that the Supreme Court recognized in Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006).
>
> [snip]
>
> Furthermore, as noted above, the Executive Branch has determined that AQAP is an organized armed group that is either part of al-Qaeda **or, alternatively**, is an organized associated force, or cobelligerent, of al-Qaeda that has directed attacks against the United States in the noninternational armed conflict between the United States and al-Qaeda that the Supreme Court has recognized (see Hamdan, 548 U.S. at 628-31). [my emphasis]

Though note the gigantic slip here: the AUMF only declares war against those "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided **the terrorist attacks that occurred on September 11, 2001**, or harbored such organizations or persons" (when AQAP didn't exist in its current form), not those who have attacked us since. This "either/or" statement only claims that AQAP is part of the same war, not that it had any role in 9/11, so it's totally bogus in any case, even without the betrayal of their lack of confidence in both of these claims with the either/or construction.

Presumably to tie AQAP more closely to the AUMF, the government then notes that the Treasury declared AQAP a terrorist organization (not noting that that happened eight months after al-Awlaki was first targeted for assassination), which in turn relies upon a Presidential declaration issued roughly around the same time as the AUMF.

> Based in part on this information, on July 16, 2010, the U.S. Department of the Treasury issued an order designating Anwar al-Aulaqi a "Specially Designated Global Terrorist" (SDGT) for, inter alia, "acting for or on behalf of al-Qaeda in the Arabian Peninsula (AQAP) . . . and for providing financial, material or technological support for, or other services to or in support of, acts of terrorism[.]" Designation of ANWAR AL–AULAQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233, 43234 (July 23, 2010).1
>
> 1 This designation was issued pursuant to the President's authority under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-06. After the terrorist attacks of September 11, 2001, the President issued Executive Order No. 13224 ("E.O. 13224"), 66 Fed. Reg. 49,079 (2001), effective September 24, 2001, declaring a national emergency with respect to the "grave acts of terrorism . . . and the continuing and immediate threat of further attacks on United States nationals or the United States." See E.O. 13224, Preamble. The Secretary of State previously designated AQAP as a Foreign Terrorist Organization on January 19, 2010, pursuant to her powers under the Antiterrorism and Effective Death Penalty Act, 8 U.S.C. § 1189. (See http://www.state.gov/r/pa/prs/ps/2010/01/135364.htm).

Gosh! That's almost like AQAP was included in the AUMF back in 2001, the reliance on a declaration made just days after the AUMF itself.

Except it's not. (And the argument itself presumes that anyone Timmeh Geithner wants to call a terrorist can be killed with no due process, whether or not they have a tie to Al Qaeda.)

You can tell DOJ's lawyers recognize this to be a gaping hole in their argument, because they repeatedly claim–without providing any evidence–that they have been authorized by "the political branches" to use all means against the threat that Al-Awlaki is part of.

> In particular, plaintiff's requested relief would put at issue the lawfulness of the future use of force overseas that Executive officials might undertake at the direction of the President against a foreign organization as to which the political branch**es** have authorized the use of all necessary and appropriate force.
>
> [snip]
>
> More broadly, the Complaint seeks judicial oversight of the President's power to use force overseas to protect the Nation from the threat of attacks by an organization against which the political branch**es** have authorized the use of all necessary and appropriate force, in compliance with applicable domestic and international legal requirements, including the laws of war. See Authorization for Use of Military Force (AUMF), Pub. L. No. 107 40, 115 Stat. 224 (2001) (Joint Resolution of Congress signed by the President). [my emphasis]

Last I checked, only one political branch has the authority to declare war, Congress. Not multiple political branches. That the Administration has even invoked political branches, plural, for their authority to use force–basically arguing "we and that rump organization better known as Congress have authorized this, so there!"–demonstrates the audacity of their claim to self-authorize using unlimited power.

Presumably to reinforce the magic power of this strange invocation of the political branches, the filing then argues that judges aren't equipped "to manage" the Executive Branch.

> The Judiciary is simply not equipped to manage the President and his national security advisors in their discharge of these most critical and sensitive executive functions and prescribe ex ante whether, where, or in what circumstances such decisions would be lawful. Whatever the limits of the political question doctrine, this case is at its core.

Of course, that's not what the suit asks the court to do at all. It asks the court to review the decisions of the Executive Branch, not least to see whether its actions comply with the terms which that other political branch–the one that actually has the authority to declare war–has laid out.

Review … manage.

What's the difference if an American citizen's life is at stake?

Of course, Courts review precisely the underlying question–whether the Executive can execute a citizen–all the time, but obviously it becomes a problem when the whole underlying premise is illegal. So to try to make this instance different, the filing repeatedly says the courts don't have the ability to review whether the targeting of an American citizen that was ordered over nine months ago is "imminent."

> For example, even assuming for the sake of argument that plaintiff has appropriately described the legal contours of the President's authority to use force in a context of the sort described in the Complaint, the questions he would have the court evaluate—such as whether a threat to life or physical safety may be "concrete," "imminent," or "specific," or whether there are "reasonable alternatives" to force—can only be assessed based upon military and foreign policy considerations, intelligence and other sources of sensitive information, and real-time judgments that the Judiciary is not well-suited to evaluate.

Obama's "imminent" just leapt past Clinton's word games with "is" as the most pathetic example of sophistry in modern politics.

Now, presumably recognizing that even right wing lawyers like John Bellinger and Jack Goldsmith can recognize their claim to be acting under the AUMF to be false, the filing then basically says, "and if you don't like our AUMF argument, here's another one!"

> In addition to the AUMF, there are other legal bases under U.S. and international law for the President to authorize the use of force against al-Qaeda and AQAP, including the inherent right to national self-defense recognized in international law (see, e.g., United Nations Charter Article 51).

But they don't even try to make the argument that this backup claim to authority holds. They just say, "well, if the first thing I threw at the wall doesn't stick, let me know if this one does."

Which ultimately gets them to arguing they can't explain why they have the authority to kill an American citizen with no due process. They just do, damnit.

> Accordingly, although it would not be appropriate to make a comprehensive statement as to the circumstances in which he might lawfully do so, it is sufficient to note that, consistent with the AUMF, and other applicable law, including the inherent right to self-defense, the President is authorized to use necessary and appropriate force against AQAP operational leaders, in compliance with applicable domestic and international legal requirements, including the laws of war.

“Judge, we don’t really want to explain why we think we have the authority to target American citizens with no due process, we just do.”

The real tell, though, is when they argue that the Executive Branch simply can’t be expected to operate under “generalized standards” and “general criteria.”

> Moreover, the declaratory and injunctive relief plaintiff seeks is extremely abstract and therefore advisory—in effect, simply a command that the United States comply with generalized standards, without regard to any particular set of real or hypothetical facts, and without any realistic means of enforcement as applied to the real-time, heavily fact-dependent decisions made by military and other officials on the basis of complex and sensitive intelligence, tactical analysis and diplomatic considerations.
>
> [snip]
>
> Enforcing an injunction requiring military and intelligence judgments to conform to such general criteria, as plaintiff would have this court command, would necessarily limit and inhibit the President and his advisors from acting to protect the American people in a manner consistent with the Constitution and all other relevant laws, including the laws of war.

The law–all laws–are precisely that: general standards that limit the actions of all citizens. So to translate this last passage, the “constitutional lawyer” President’s lawyers just argued that asking the military and intelligence services to conform to general criteria like rule of law would inhibit the President from acting consistent with a set of laws including the Constitution.

This is not a court filing. It’s a “choose your own adventure novel” for the judge:

1. Is AQAP part of al Qaeda? (if yes, then go to dead al-Awlaki)
2. Is AQAP an “organized associated force of al Qaeda”? (if yes, then go to dead al-Awlaki)
3. Do Presidents get to self-authorize going to war (if yes, then go to dead al-Awlakil; if no, go to “alternatives to the AUMF”)
4. What do you think of the “inherent right to self defense”? (if yes, then go to dead al-Awlaki)
5. To abide by the Constitution and other laws, the President can’t be bound by “generalized standards.” The End. (go to dead al-Awlaki)

And mind you, we’ve set off on this “choose your own adventure in tyranny novel” even before we’ve gotten to the government’s invocation of state secrets. Just in case you had any doubts about their claim to unlimited power…

Update:

Here are the other documents submitted yesterday.

Notice of Leon Panetta’s secret filing, and his public one, consisting entirely of boilerplate.

Notice of James Clapper’s secret filing, and his public one, consisting entirely of boilerplate.

Notice of Robert Gates’ secret filing, and his public one, asserting something called “the military and state secrets privilege,” which I’ve never heard of.

NCTC head Michael Leiter’s Congressional testimony from earlier this week, not even tailored for this argument about why the Executive Branch can assassinate citizens with no due process.

A copy of the state secrets policy Holder enacted last year, promising that, honest, they won’t abuse the state secrets privilege.

Update: Glenn focuses on the state secrets invocation. As he points out, this means Obama is officially to the right of hack lawyer and Presidential power cheerleader David Rivkin.

142 Comments Spotlight
Tags: Eric Holder, ACLU, Leon Panetta, Anwar al-Awlaki, James Clapper, Robert Gates, CCR
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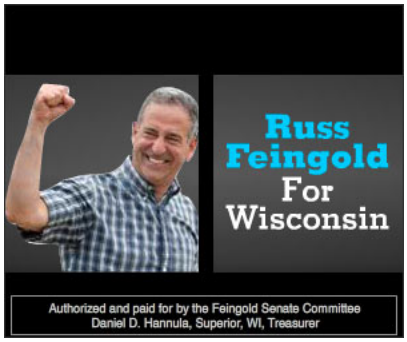

142 Responses to "Obama Doesn't Know Why the Fuck He's Entitled to Kill Al-Awlaki, He Just Is, Damnit"

PJEvans September 25th, 2010 at 12:04 pm
1

I hope the judge can tell them where to put this piece o'crap filing. And that he or she makes sure that it is, in fact, put there. Permanently. And as publicly as possible.

Reply
Arbusto September 25th, 2010 at 12:17 pm
2

Has the DoJ expanded their intern program to include first year Regent University law students to write motions?

Reply
themomcat September 25th, 2010 at 12:20 pm
3

Using "state secrets" is now a reason to get away with targeted assassination. The crimes continue with Obama. Just fucking outrageous.

Reply
themomcat September 25th, 2010 at 12:21 pm
4
In response to Arbusto @ 2

They probably secretly rehired Yoo and consulted with Bybee

Reply
emptywheel September 25th, 2010 at 12:25 pm
5
In response to Arbusto @ 2

Anthony Coppolino, the same guy who has had the lead in al-Haramain, wrote this. He's sort of like a Regent U person, just w/ more experience.

Reply
bmaz September 25th, 2010 at 12:33 pm
6
In response to emptywheel @ 5

Yeah, I think Coppolino is above Regent level; say maybe Chapman material.

Reply
earlofhuntingdon September 25th, 2010 at 12:34 pm
7

It seems pretty obvious that the executive branch cannot manage itself – or comply with its constitutional obligations to enforce the Constitution and laws enacted consistent with it. So, reasons the executive branch

with a blinding lack of awareness, no other branch of government could possibly "manage" the executive branch by performing its constitutional role of hemming in the executive branch when it fails to comply with such duty and such laws.

The DoJ seems to have long ago abandoned its proper role as the chief enforce of federal laws and adopted one as legally arrogant as this administration: chief defense counsel for the executive branch. It's not news that lawyers are as infamous as medical doctors and accountants in their inability to police themselves. The administration's logic here, however, lowers the bar to constitutionally unacceptable depths.

When a frustrated parent resorts to an equally inarticulate, "Because I said so," the action the parent is thereby defending often has some basis in common sense and legitimate, residual parental authority. That analogy doesn't apply here, no matter how much this frequently inarticulate, dumb-struck, lowest-common-denominator administration wishes it would.

Reply
bobschacht September 25th, 2010 at 12:35 pm
8

EW,
Thanks for this brilliant, if snarky, deconstruction of the Gummint's Brief. It is, and deserves to be called, moronic.

But "sophism"? I would have used "sophistry" there, if I were half as clever as you. Good to see that cept used here; it could be used a lot for the Gummint's legal briefs.

Bob in AZ

Reply
MadDog September 25th, 2010 at 12:38 pm
9
In response to emptywheel @ 5

I was going to note Coppolino's name as well.

For folks that don't know or remember, Anthony Coppolino handled/handles all of the NSA Spying cases for the government using States Secret Privileg against EFF.

Reply
emptywheel September 25th, 2010 at 12:39 pm
10
In response to bobschacht @ 8

Ah, thanks, you're right.

Reply
bmaz September 25th, 2010 at 12:40 pm
11
In response to bobschacht @ 8

Hey Bob and Earl – hope you both are joining us tonight for the Sharktacular!

Reply
earlofhuntingdon September 25th, 2010 at 12:40 pm
12
In response to bobschacht @ 8

Nice distinction. The government is not thinking itself wise while being ignorant and therefore inadertently foolish. It is fully aware of its actions and their context. It is obfuscating that it is attempting to fashion a new, unrestricted, extra-constitutional role for itself – and hoping that no one "who matters" will take note while there is time to reject this aspiration before it becomes fixed in practice and therefore the law.

Reply
indianagreen September 25th, 2010 at 12:41 pm
13

Obama's extraordinary claim he has the power to order the assassination of any American, anytime, and anywhere puts him on a par with King George III, Ivan the Terrible, and other tyrants throughout history that held the power of life and death over their subjects.

Obama has set himself above the Constitution, as an American Barrack The Terrible, with the power to detain us indefinitely, torture us, and assassinate us at his will.

Obama is not like Bush, he is far worse: he is a tyrant and a threat to the American people.

Reply
earlofhuntingdon September 25th, 2010 at 12:42 pm
14
In response to bmaz @ 11

Is that a film about an obnoxious former prosecutor turned defense counsel, made by a once interesting actor turned caricature, or a 35th anniversay celebration that it's still not safe to go into the water? Whichever,

we're gonna need a bigger boat.

Reply
bmaz September 25th, 2010 at 12:45 pm
15
In response to earlofhuntingdon @ 12

It really does set up a completely unaccountable executive in anything the executive deems to be war or terror related. Because if the executive has unfettered ability to say what is and isn't, and can go so far as to kill Americans, that is pretty much everything.

Reply
bmaz September 25th, 2010 at 12:46 pm
16
In response to earlofhuntingdon @ 14

That's pretty close…..

Here is a Preview Post for it.

Reply
emptywheel September 25th, 2010 at 12:48 pm
17
In response to bmaz @ 15

And say that no judge can look at it because they have a golden ticket called SSP.

Reply
bobschacht September 25th, 2010 at 12:49 pm
18
In response to bmaz @ 11

I'd like to, but I dunno– I'm marooned in MPLS right now, but should be in the PHX airport from about 7:30-9:30 PM. Will that work?

Bob (going back to AZ)

Reply
bmaz September 25th, 2010 at 12:51 pm
19
In response to emptywheel @ 17

Well, yes, maybe worse though is the facade that a judge is evaluating it through the classified filings; but, as *Jeppesen* proved, that is a total sham.

Reply
MadDog September 25th, 2010 at 12:52 pm
20

I can't find my original comment a few weeks ago (not exactly but I'm just too lazy today to look very hard *g*), but the government's filing matched almost exactly what I had expected. Namely:

1. No standing.
2. AUMF from September 2001.
3. And if the above don't work, then States Secret Privilege.

What I really hope the ACLU and CCR argue is that the Executive branch violently intrudes on Article III Court territory with respect (or a total lack of respect *g*) to sentencing an American citizen to death, and without trial.

Sentences of such kind (indeed any kind) are the singular Constitutional province of the Judiciary, and most certainly not a Constitutionally assigned power of the ~~King~~ Executive.

This is an transparent Executive branch power grab, and if the Federal courts can't understand that simple fact, then woe is us!

Reply
bmaz September 25th, 2010 at 12:53 pm
21
In response to bobschacht @ 18

Starts at 9 here, so looks like you are going to miss it. And we will miss you.

Reply
earlofhuntingdon September 25th, 2010 at 12:54 pm
22

The nice thing about resorting to these "and the kitchen sink, too" arguments is that it gives the judge a basket of goodies in hopes that he or she will find one of them not so repugnant that s/he can incorporate them into a decision that says, "Too much for me; go ahead, Mr. President."

Given Obama's unwillingness to be so rude as to spend political capital to push for his own judicial nominees – he acts as if he were Shrub, hiding in Democratic clothing and loath to nominate his own judges – Obama has allowed a precarious number of judicial vacancies. The resulting judicial vacuum ups the odds that he'll find a Janice Rogers Brown or Brett Kavanaugh or Jay Bybee who will be happy to accept his argument. There may be method in his madness, but its madness just the same.

Reply
bobschacht September 25th, 2010 at 1:15 pm
23

I got a theory– OK, maybe just a wild-arsed crazy idea: Obama's first few years will be like Bush's first few years: Cowboys running loose all over the place, subverting the rule of law left & right. But even Bush eventually reigned in Dick Cheney, Don Rumsfeld, Steve Cambone, Paul Wolfowitz & the torture crew, finally figuring out that they were a liability. And he didn't pardon Scooter. Maybe Obama will finally figure out that his legacy could be tainted by the current crop of cowboys running loose.

Bob in AZ

Reply
emptywheel September 25th, 2010 at 1:17 pm
24
In response to bobschacht @ 23

Well, that happened because the 25% who first opposed the cowboy stuff grew to include another 45%. It doesn't happen w/o pressure.

Reply
MadDog September 25th, 2010 at 1:28 pm
25
In response to emptywheel @ 24

And I can't see any pressure, can you?

At least with the Bush/Cheney regime, we had Democratic Congresscritters who would at least stamp their feet. But with a Democratic president, those folks are going to stay mum.

And forget Repug Congresscritters. They're all in favor of the Unitary Executive.

No, the only possible pressure point is the Federal Judiciary. And with the packing of the Federal courts, including the Supreme Court, with conservative supporters of the Unitary Executive, betting on them is a longshot.

Reply
bobschacht September 25th, 2010 at 1:50 pm
26
In response to MadDog @ 25

> And forget Repug Congresscritters. They're all in favor of the Unitary Executive.

Yeah, but they all want to *Get Obama!*, don't they? And besides, maybe they'll get tired of him tapping their telephones.

Bob in AZ

Reply
Arbusto September 25th, 2010 at 1:55 pm
27

If only a judge would call bullshit on these vacuous legalize motions. Call the DoJ authors before the bench and ream them for wasting the courts time and put them on notice: submit responsible, well reasoned motions or suffer sanctions. I suspect the DoJ would start rebuilding it's professionalism if judges do this.

PS for what it's worth, I see the motions author is a mlederman. Anyone know who that may be other than a secretary?

Reply
scribe September 25th, 2010 at 2:07 pm
28

To me, this seems a lot simpler than people are making it out to be. The government loses on due process grounds. Viz.:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend V.

At a basic level, procedural due process is essentially based on the concept of "fundamental fairness." For example, in 1934, the United States Supreme Court held that due process is violated "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). As construed by the courts, it includes an individual's right to be adequately notified of charges or proceedings, the opportunity to be heard at these proceedings, and that the person or panel making the final decision over the proceedings be impartial in regards to the matter before them. This is stated thusly:

> Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 . This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.
>
> **An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.** Milliken v. Meyer, 311 U.S. 457 ; Grannis v. Ordean, 234 U.S. 385 ; Priest v. Las Vegas, 232 U.S. 604 ; Roller v. Holly, 176 U.S. 398 . **The notice must be of such nature as reasonably to convey the required information**, Grannis v. Ordean, supra, **and it must afford a reasonable time for those interested to make their appearance,** Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U.S. 71 . But if with due regard for the practicalities and peculiarities of the case these conditions [339 U.S. 306, 315] are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." American Land Co. v. Zeiss, 219 U.S. 47, 67 ; and see Blinn v. Nelson, 222 U.S. 1, 7 .
>
> **But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected,** compare Hess v. Pawloski, 274 U.S. 352 , with Wuchter v. Pizzutti, 276 U.S. 13 , **or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.**
> * * *
>
> In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with [339 U.S. 306, 320] less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." McDonald v. Mabee, 243 U.S. 90, 91 .

Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

Similarly, there is no distinction between the procedural due process owed by the state or federal governments to individuals. "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring).

So, there you have it (QED, for the fancier folks): before the government may kill a person – regardless of the statutory rubric or privileges involved – that person must have received notice, an opportunity to be heard to contest the allegations, and to have it heard before a neutral judge.

That's textual – well-grounded in the actual text of the Constitution and in deeply ingrained case law.

Moreover, it places the state secrets privilege in direct contradiction to and conflict with the constitutional guarantees of due process. The state secrets privilege, it needs be remembered, is a judicial confection woven out of the whole cloth. As such, it should not be able to stand against the guarantees of the due process clause.

Reply
emptywheel September 25th, 2010 at 2:10 pm
29
In response to scribe @ 28

That's probably a diary all by itself. Note Glenn's observation that the filing repeatedly says, "why doesn't

he just come here and avail himself of the courts himself."

Of course, he hasn't been CHARGED w/anything, and they say litigating his secret execution order is a state secret.

Reply
bobschacht September 25th, 2010 at 2:20 pm
30
In response to scribe @ 28

B-b-b-but we're at WAR, doncha know! Ya can't keep the people SAFE if ya hafta worry about LAWS and stuff. They just get in the way! And did I mention we're at WAR? Congress said so! And didn't we take an oath of office to keep the people SAFE and do whatever the Prezident sez??? Besides, we're at WAR!!!

/s

Bob in AZ

Reply
bmaz September 25th, 2010 at 2:20 pm
31
In response to emptywheel @ 29

Yeah, generally there is nothing compelling a civil litigant to appear for anything unless he has been subpoenaed, so that appearance claptrap is pure shit..

Scribe – I have many issues with the govt position, but I fail to see how they even think about making the argument without formally stripping him of his citizenship. And there is a process for that, they just don't want to to be bothered with such due process niceties.

Reply
scribe September 25th, 2010 at 2:22 pm
32
In response to emptywheel @ 29

"Why doesn't he just come here and avail himself of the courts himself."

Because a litigant does not have to physically present himself to the Court, even as a plaintiff, unless and until discovery begins.

Because, under "next friend" and "guardian ad litem" practice, another person can manage the litigation and present facts independent of the physical presence or participation of the real party in interest.

Because, conceivably, this particular plaintiff could prosecute the case as a class action, in which he is a representative of the class of people affected by the government's conduct.

Because, if he were to try to get on a plane, he would never make it to he United States alive. He would be stopped and killed and the government would then move to dismiss the case on the grounds of mootness. Or he would be shiped off to Bagram, where there is no judicial review and then the government would move to dismiss on the grounds of the plaintiff's failure to prosecute the case.

Or some other bullshit.

Reply
CTuttle September 25th, 2010 at 2:22 pm
33

EW, here's a great read…!

US peace activists' homes raided by FBI due to alleged support of PFLP"

Reply
scribe September 25th, 2010 at 2:25 pm
34
In response to bmaz @ 31

> I have many issues with the govt position, but I fail to see how they even think about making the argument without formally stripping him of his citizenship. And there is a process for that, they just don't want to to be bothered with such due process niceties.

Go back and re-read Amendment V. It says "no *person* may be deprived…", not "no *citizen* may be deprived…".

That whole person-hood thing is what enables corporations to have Fifth Amendment rights.

So, stripping him of citizenship or whatever is wholly irrelevant. The government cannot kill any person without putting him through due process of law. Period.

Reply
emptywheel September 25th, 2010 at 2:33 pm
35

In response to bmaz @ 31

Yeah, one of the things I found most amusing about the entire filing is that the observation that he retains US citizenship are made w/word 6 and 7 of the body of the filing.

Strip his damn citizenship if his crimes are so clear.

Reply
emptywheel September 25th, 2010 at 2:35 pm
36
In response to scribe @ 32

Golly. If only I could find a lawyer to make this "why doesn't he present himself" argument!

Don't you know that Glenn Greenwald is recovering from food poisoning? That only leaves about 10 more people in this entire country who give a goddamn about civil liberties!

Reply
scribe September 25th, 2010 at 2:37 pm
37
In response to emptywheel @ 35

Citizenship has no bearing on the applicability of the criminal law.

Reply
Mary September 25th, 2010 at 2:40 pm
38

Remember the good ol Bush days, when a suspect's lawyer only had to worry about being illegally wiretapped, not being assassinated while meeting with his client?

Reply
bmaz September 25th, 2010 at 2:42 pm
39
In response to scribe @ 34

Well, right, and not that I would buy into it in the least, but I could at least see a half assed enemy combatant, or whatever ginned up nomenclature is trendy at the moment, designation being applied to a foreign person in a foreign land deemed to be at war with the US. And indeed "at war with the US" is pretty much a paraphrase of the standard for removal of citizenship. I am not saying it would make it all hunky dory (and I know you don't think I am saying that), but at least I could see some semblance of an attempt at a good faith logical path if the government were to at least try on this shit. But they don't make even those rudimentary efforts, and it is fucking obvious they imperially think they are far above such due process mechanics. You would think a court would look at this crap and say "Come on man, how the fuck do you expect me to give you one iota of deference with your past record of dishonesty and obfuscation, now coupled with the fact you are not even fucking trying??? Get the hell outta here!"

Reply
MikeD September 25th, 2010 at 2:48 pm
40

The court isn't even going to get to these quasi-substantive claims like state secrets and political question. It's just going to go with standing.

Reply
Mauimom September 25th, 2010 at 2:51 pm
41

Will everyone who's read & commented here please go contribute to the Marcy Fund?

That damn "thermometer" hasn't moved in a week — and it should.

"Dammit."

Reply
JohnLopresti September 25th, 2010 at 3:00 pm
42
In response to bmaz @ 31

I agree with the citizenship discussion as above, however, I sense, as I begin reading the motion to dismiss, citizenship as an issue may be perceived as an obstacle better left until later in litigation.

Further, I am seeing in the thesis development of the first 10+ pages of the 60-page MTD, wholesale avoidance, as well, of perhaps equally as problematic development of issues centered upon actors ostensibly shielded within stateless entities. Maybe for the purposes of the instant MTD such a collateral colloquy would seem to tempt the judge into distractions, and, consequently, footnote 2 is dropped at p11, citing defendant*s having appeared in a UN list of persons, however, I get a 404 error trying to access Fn.2*s link at the UN.

Reply
MadDog September 25th, 2010 at 3:03 pm

43
In response to Arbusto @ 27

> …PS for what it's worth, I see the motions author is a mlederman. Anyone know who that may be other than a secretary?

The only mlederman that I'm aware of at the DOJ was Marty Lederman as a Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel, but from what I can tell, he's left the DOJ recently and returned to Georgetown University Law.

Reply
MadDog September 25th, 2010 at 3:05 pm
44
In response to emptywheel @ 36

And it's probably a wee bit difficult to surrender to the US when the US has a "kill on sight" extrajudicial assasination order out on you.

Reply
Mary September 25th, 2010 at 3:10 pm
45

"Defendants state that if Anwar al-Aulaqi were to surrender or otherwise present himself to the proper authorities in a peaceful and appropriate manner, legal principles with which the United States has traditionally and uniformly complied would prohibit using lethal force or other violence against him in such circumstances."

ROFL. Coppolino is really just not a good person, is he? I seem to remember this Iraqi General who turned himself over to the US (which had taken his children hostage). Let's see, how did it go? Something like – tortured by night by CIA proxies and by day beaten and suffocated in a sleeping bag by military, till he was suffocated to death while he also was listening to what he thought was his son being executed. I don't recall anyone getting in trouble for any of that – charges dismissed on the military route and nothing ever pursued on the CIA front. Would THOSE be the "traditionally and uniformly complied" standards they are referencing?

Look at the list of techniques approved by OLC and by the army field manual as okeydokeysmokey for use against detainees and see how that jives with Coppolino's allegations. I'd sure like to see his OLC definition of "other violence" and he doesn't seem to even try to say that he wouldn't be subject to degrading and abusive treatment.

> Anwar al-Aulaqi would have the choice at that point, as he does now, to seek legal assistance and access to U.S. courts.

Oh really? Cuz I seem to remember some arguments that the US can take people in its custody to Bagram instead of the US for trial and avoid judicial scrutiny in that fashion.

The sales pitch on the "political" branches "authorizing" the Exec kind of glosses over the prohibition against attainder and acts of Congress that constitute bills of attainder as well.

Reply
bmaz September 25th, 2010 at 3:11 pm
46
In response to MadDog @ 44

No, you would have to find a way to surrender to the French or Swiss embassy – a country that does not extradite if the death penalty is involved (especially of the immediate variety).

Reply
bobschacht September 25th, 2010 at 3:18 pm
47
In response to MadDog @ 44

If he wanted to, couldn't he "surrender" through the offices of the embassy of a third country that would protect his rights?

Oops, I see bmaz has answered my question @ 46. Thanks.

Bob in AZ

Reply
bobschacht September 25th, 2010 at 3:25 pm
48
In response to bmaz @ 46

So, they might torture him and accidentally suffocate him to death, but as long as they say they won't "execute" him, they're OK with that?

Bob in AZ

Reply
MadDog September 25th, 2010 at 3:25 pm

49
In response to bmaz @ 46

I'm not sure if being in the French or Swiss embassy would suffice.

Reply
PJEvans September 25th, 2010 at 3:29 pm
50
In response to emptywheel @ 36

> Don't you know that Glenn Greenwald is recovering from food poisoning?

He has my heart (and gut)-felt sympathy.

Trust me, you don't want food poisoning.
(Arranging for some government officials to get it, however, would be, well, interesting, especially if it can be timed to hit in front of CSPAN or Faux-plus-CNN. I'm thinking JoeL for openers, plus, say, Boehner and Rahm….)

Reply
mymarkx September 25th, 2010 at 3:30 pm
51

Tyrants can do whatever they wish.

Tyrants with the consent of the governed can claim not to be tyrants.

Those who vote in elections where the predetermined and only possible outcome is more wars, more bailouts for the rich, continued corporate rule, and continued expansion of the empire, regardless of how they vote, who they vote for, or why they think they're voting, are granting their consent of the governed to tyranny.

And then, despite the fact that only 21% of the voters who granted their consent, believe that this government deserves that consent, they have the unmitigated gall to call those of us who are concerned and responsible enough not to grant our consent to tyranny, "apathetic."

When the masses cheer fascism, they always attack those who fail to cheer as being apathetic, unpatriotic, or traitors.

In a nation of laws, not of men, neither the assassination proclamation nor this litigation could occur.

Real apathy is voting in undemocratic elections for candidates who cannot be held accountable because the perceived benefits of temporary rights or privileges that may be granted by the government appear to outweigh the risks of the irreparable harm that is done when millions of people are tortured or killed, the economy is trashed, and our planet habitat is destroyed for private profit.

Your vote is your consent. If you claim that you were raped, the first thing you'll be asked is whether you freely and voluntarily gave your consent. If you've done it more than three times, you may even be penalized for making frivolous claims.

When you vote to delegate your power, grant your authority, and give your consent of the governed to people you cannot hold accountable, you forfeit your claim to self-government, self-determination, and even self-respect.

If you really want to take your country back, the first step is to stop giving it away. The approximately 50% of us who won't vote for a government that doesn't represent our interests, aren't apathetic–voters are.

By simply expanding the criteria, Obama and subsequent administrations can give themselves the right to kill any and all American citizens they think aren't loyal. Due to the undemocratic nature of our Supreme Court, decisions supporting tyrannical powers cannot be appealed. The United States met all 14 points of fascism long ago, yet some are still calling it a democracy because they have the right to vote in faith-based, unverifiable elections for people they can't hold accountable.

If you're willing to grant the government the right to shoot you, who am I to say that you don't deserve to be shot?

Reply
emptywheel September 25th, 2010 at 3:36 pm
52
In response to PJEvans @ 50

Jane and I went to this lovely Afghan restaurant in VA one night, instead of me going to eat wings with the boys at the Big Hunt. I thought I was being smart, bc when I go to wings w/the boys I always feel crappy the next day.

But then we both got food poisoning (and I had to fly home). It sucked. And she was just barely out of chemo at the time. It sucks.

Reply
donbacon September 25th, 2010 at 3:37 pm
53

> Last I checked, only one political branch has the authority to declare war, Congress. Not multiple political branches.

Obama used to teach Constitution law. He knows all this. It's time to take he gloves off and call for reinforcements.

We've got to get the Tea Party people onto this matter. They particularly support the Constitution's constraints on federal power. According to the Tea Party's Constitution:
"Tea Party activists have declared that the central goal of their movement is to return the federal government to constitutional principles."

Reply
themomcat September 25th, 2010 at 3:39 pm
54

Since they are so interested in defending the Constitution, what does The Tea party, have to say about this? I'll bet not a word.

Reply
Mary September 25th, 2010 at 3:40 pm
55

It's the "uniformly" part that really gets to me. We had about a decade of Executive directed torture – that Coppolino and his pal Keisler know all about.

Reply
themomcat September 25th, 2010 at 3:41 pm
56
In response to donbacon @ 53

LOL you and I must be on the same wave length. See comment 54

Reply
donbacon September 25th, 2010 at 4:00 pm
57
In response to themomcat @ 56

I was only half kidding. If one looks through the recent topics discussed on FDL & Co. one sees a lot of topics which involve violations of the Constitution, usually by the more powerful Executive. I say make a pact with the devil himself if we can elevate the publicity on this important issue and try to roll it back.

Again we are 'blessed' with a Decider — one who is out-deciding the original one and the Constitution be damned. That's the problem, and it's getting worse.

Reply
Mary September 25th, 2010 at 4:07 pm
58

I guess the really interesting argument would/will be when people start arguing that the DOJ is so corrupt and has been so undisciplined for its corruption that prosecution by it, without courts appointing outside legal oversight, is as much a violation of due process guarantees as extrajudicial imposition of penalties.

Good series by USA today on the run amok prosecutors and the system that excuses them everything.
http://www.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm?loc=interstitialskip

> With help from legal experts and former prosecutors, USA TODAY spent six months examining federal prosecutors' work, reviewing legal databases, department records and tens of thousands of pages of court filings. Although the true extent of misconduct by prosecutors will likely never be known, the assessment is the most complete yet of the scope and impact of those violations.
>
> USA TODAY found a pattern of "serious, glaring misconduct," said Pace University law professor Bennett Gershman, an expert on misconduct by prosecutors. "It's systemic now, and … the system is not able to control this type of behavior. There is no accountability."

Reply
emptywheel September 25th, 2010 at 4:08 pm
59
In response to Mary @ 58

Oh, now you've done it!!

bmaz is sure to go off about how badly that undercounted prosecutorial misconduct.

Let's just hope Sharktopus starts before he hijacks both this and Trash Talk.

Reply
Mary September 25th, 2010 at 4:21 pm
60
In response to emptywheel @ 59

hehehe

He's already working on the Sharktopus sequel – Sharktoprosecutor!

BTW – do you remember (or anyone) which case it was where they had to go in and file a new declaration bc the old one was, well, um – not accurate let's say? That was a Coppolino case too, wasn't it? They all blur in my mind.

Reply
QuickSilver September 25th, 2010 at 4:22 pm
61

Since when did the U.S. Constitution apply to ordinary American citizens?

Reply
bmaz September 25th, 2010 at 4:33 pm
62
In response to Mary @ 58

Arrrgh. Marcy is right; now you done it sister (see, there are about twenty modalities I have for communicating with Marcy, so by the time you see my pissed off ranting here, she has been broadsided by it in several directions already. As Mr. T would say, "Pity teh fool!"). So here ya go, all I gots ta do is cut and paste:

> From that article, about ten cases gets you in the worst states for elite prosecutorial the Times name at the top of the list. Give me a few beers and I could come up with ten just right here in my district, off the top of my head and maybe a 60 second google; if I called a few friends, that list would quickly grow to about 50-60.
>
> However you view the current quality of the DOJ, even if you are some blind ignorant David Margolis type of DOJ fanboy dork, only finding 201 cases nationwide over the last twelve years is fucking absurd. There are a LOT more than that. A LOT. There is stuff done every day, in every district, not to mention the mooks at DOJ Main, by Federal prosecutors that would get private lawyers committing similar acts disbarred. In a heartbeat, and with extreme prejudice. Most complaints are summarily dismissed by OPR and the one or two percent that get through to investigation rarely result in diddly squat happening in the way of actual discipline. And that fuckstick David Margolis is knee deep in the fact it is such a joke. The folks that call DOJ OPR "The Roach Motel" hit it squarely on the head.

So, in short, the USA piece is nice and all that, but their math skills are seriously fucking lacking.

Reply
bmaz September 25th, 2010 at 4:35 pm
63
In response to Mary @ 60

al-Haramain

Reply
scribe September 25th, 2010 at 4:59 pm
64
In response to Mary @ 60

that would be al-Haramin

Reply
CTuttle September 25th, 2010 at 4:59 pm
65

Dayam… What a nightmare…

Anti-war activists targeted in FBI search speak out…

> Weiner and Iosbaker will go before a federal grand jury in Chicago on Oct.5, said their lawyer, Melinda Power. Power declined to speak about anything that might be covered at the grand jury hearing, including whether her clients had ever supported foreign groups.
>
> Leaders of activist groups Saturday spoke in support of Weiner, who teaches at Wilbur Wright College, and Iosbaker, a staff member at University of Illinois at Chicago and a steward for Service Employees International Union Local 73. They chanted anti-oppression slogans and decried U.S. policy toward Afghanistan, Iraq, Colombia and Israel.
>
> The activists said they showed up because they have done the same things as Iosbaker and Weiner.
>
> **"It really could have been any of us," said William Ostapiuk, a member of student groups at Columbia College.**

gah

Reply

Garrett September 25th, 2010 at 5:04 pm
66

> In OLC's words — written just one week after the AUMF was enacted — neither the WPR nor the AUMF, nor, presumably, any other statute, "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response." "These decisions," OLC wrote, "under our Constitution, are for the President alone to make."
>
> Think about that.
>
> Such a sweeping claim of presidential power to ignore all statutes regulating his behavior in warime is radical and profoundly troubling — and, as far as I know, virtually unprecedented. (I welcome other examples of such an extreme assertion.)
>
> Marty Lederman on inherent authority (2005)

Oh Marty. Think about that.

When you said you'd welcome other examples of such an extreme assertion, examples of claims that there are no limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response, you didn't mean and didn't want that you should just type the example up yourself.

Reply
bmaz September 25th, 2010 at 5:10 pm
67
In response to Garrett @ 66

I know I am pointing out the obvious, but such a sweeping construct has never been the case even in times under a formal declaration of war, much less without. And an authorization for restricted police action is NOY a declaration of war, nor equivalent of a declaration. This is all perfectly established. And, so long as the courts of the country are open and functioning, there is not even a freaking cognizable argument to be made for this shit. It is sheer craven fantasy, and why that has escaped the media and functioning cognoscenti, such as they may be, defies comprehension.

Reply
donbacon September 25th, 2010 at 5:15 pm
68

The war itself is a criminal act, so what's a few more. Should Anwar al-Awlaki be especially immune to death-by-Obama because he was born in the USA and isn't in an Afghan wedding party? I guess not.

Reply
PJEvans September 25th, 2010 at 5:18 pm
69
In response to mymarkx @ 51

You're assuming that a majority of people knowingly vote for this kind of crap.

I didn't vote for this.
I voted for 'yes-we-can', the hope and the change, the message that we wouldn't keep doing it the way Bush and Cheney had been doing it.
This isn't what I voted for.
And I won't vote for it again, if there's any way to avoid it.

Reply
themomcat September 25th, 2010 at 5:22 pm
70
In response to donbacon @ 57

I knew we were in trouble with Obama when he flipped on his FISA vote. Constitution be damned

Reply
PJEvans September 25th, 2010 at 5:24 pm
71
In response to donbacon @ 53

In a pig's eye.
They support anything that allows *them* to have power and everyone else not.
They're against everything from the last century and a half, maybe two centuries, as long as they get to tell women and minorities what to do, when and where to do it, and sit on a veranda watching them do it.
(Actually, I think they'd prefer to be in an air-conditioned media room with wall-to-wall Faux … but if they turn the clock back that far, they won't have that option, because the entire national infrastructure will collapse.)

Reply
earlofhuntingdon September 25th, 2010 at 5:28 pm
72
In response to bmaz @ 67

Absolutely. The distinction between a “declaration of war” and the more limited “police action”, eg, relating to Korea, is now firmly established.

Reply
b2020 September 25th, 2010 at 5:29 pm
73

Obama + Secret + Kill List == The Don’t Ask Don’t Tell Presidency.

President Palin would have neither the determination nor the ability to do this much damage. Bygones Habeas is sure Untertaking a serious reform of The Constitution.

Reply
b2020 September 25th, 2010 at 5:33 pm
74
In response to bmaz @ 67

The cognos know, but contrary to popular belief they are not all committed to defend and uphold the constitution. I think a corollary of the concept of democracy is that you cannot rely on the elites to defend the republic against its enemies. Happens that in the 2nd or 3rd generation, the elites inevitably are the enemy.

Reply
donbacon September 25th, 2010 at 5:38 pm
75
In response to earlofhuntingdon @ 72

Calling Korea a police action just because the Congress never declared war only gets to the point that the fact that Congress has abdicated its responsibility, and that doesn’t change the character of the conflict. Korea was a war. So was Vietnam, Iraq I & II and Afghanistan. Coming soon to a theater near you: Yemen and Somalia.

Korea dead in combat:
South Korea 137,899
USA: 36,516
UK: 1,109
Turkey: 721
North Korea 215,000
China: 114,000

So much for limited “police action.”

Reply
bluewombat September 25th, 2010 at 5:40 pm
76

Just think how much better off we would have been if we now had a president who had been a professor of Constitutional law.

What’s that, you say?

No way!

Never mind…

Reply
eCAHNomics September 25th, 2010 at 5:41 pm
77

74 comments on a nonstory. Simply amazing.

Reply
donbacon September 25th, 2010 at 5:44 pm
78

Congress also abdicated war powers in the War Powers Act of 1973 which kicks off with “It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, . . .” which is of course horsepucky.

And then it gets to the real damages: “The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities . .”

Reply
RevBev September 25th, 2010 at 6:02 pm
79
In response to bobschacht @ 30

But, I do believe I heard, that now the Repub new Contract is going to provide that any law from Congress must cite that it rests in a provision of the Constitution….we won’t be needing so many judges then, I guess.

Reply
GeorgeJohnston September 25th, 2010 at 6:02 pm
80

I know Obama during his campaign kept telling us how he was a Constitutional scholar. Did he ever tell us grades on it?

Reply
neaguy2010 September 25th, 2010 at 6:06 pm
81

Well, then that makes Obama a terrorist.

Reply
TheLurkingMod September 25th, 2010 at 6:08 pm
82

David Dayen is upstairs!
BP Spilled 4.4 Million Barrels Into Gulf, According to New Estimate

Reply
donbacon September 25th, 2010 at 6:09 pm
83

Sen. Obama, who has taught courses in constitutional law at the University of Chicago, has regularly referred to himself as “a constitutional law professor,” most famously at a March 30, 2007, fundraiser when he said, “I was a constitutional law professor, which means unlike the current president **I actually respect the Constitution**.” A spokesman for the Republican National Committee immediately took exception to Obama’s remarks, pointing out that Obama’s title at the University of Chicago was “senior lecturer” and not “professor.”

UC Law School statement: The Law School has received many media requests about Barack Obama, especially about his status as “Senior Lecturer.” From 1992 until his election to the U.S. Senate in 2004, Barack Obama served as a professor in the Law School. He was a Lecturer from 1992 to 1996. He was a Senior Lecturer from 1996 to 2004, during which time he taught three courses per year. Senior Lecturers are considered to be members of the Law School faculty and are regarded as professors, although not full-time or tenure-track.
http://www.factcheck.org/askfactcheck/was_barack_obama_really_a_constitutional_law.html

Reply
DWBartoo September 25th, 2010 at 6:20 pm
84
In response to bmaz @ 67

The courts may be “open”, however, were they “functioning”, as you postulate, wouldn’t those courts notice … something?

Unless judges are NOT among those with supposedly superior knowledge or understanding, one wonders why some legitimate curiosity has, for so long, not moved some judges to wonder, aloud, at the executive power grab, and a few, at least, to feel their pride piqued by the mere indignity of simply being ignored?

At some point, the depth, breadth, or height of understanding consistently evidenced here in the “discussion”, must, according to even the most feeble of all chance possibilities, sneak up on a few federal judges, at least once in a while.

You have spoken of prosecutorial misconduct, bmaz, and it is, indeed, very widespread, and very destructive. What is judicial conduct “missing” if judges choose to bury their heads in the sands of time, closing their eyes to what is nothing less than the highest of crimes?

The rule of law, to succeed, to actually be in force, to really exist, requires the honest devotion and sincere courage of all who practice it, most especially, judges.

I know, I harp on this, bmaz, but no one who makes their living at the law may excuse themselves from the obligation of protecting it and of caring for it. Those who make their living at the law cannot ignore assaults upon it, no matter how exalted their position, or how humble.

DW

Reply
donbacon September 25th, 2010 at 6:23 pm
85

Gerry Spence, the famous trial lawyer: “We are told that our judges, charged with constitutional obligations, insure equal justice for all. That, too, is a myth. The function of the law is not to provide justice or to preserve freedom. The function of the law is to keep those who hold power, in power.”–From Freedom to Slavery, p 109

Reply
Teddy Partridge September 25th, 2010 at 6:29 pm
86
In response to bmaz @ 15

Considering that this week's FBI raids on activists who organized the 2008 GOP Convention protests were all 'terror-related' for purposes of the warrants, what's to stop the feds from gunning down Americans, on American soil, who are exercising their constitutional rights to free speech and assembly in a way the executive deems terror-related or -supportive?

Why limit this executive power to overseas, in other words?

Reply
econobuzz September 25th, 2010 at 6:41 pm
87

Great fucking post and thread. I'm speechless. What a community!

Reply
spanishinquisition September 25th, 2010 at 6:48 pm
88
In response to Teddy Partridge @ 86

Yeah, seeing how that Obama is claiming that he gets decide what is "appropriate and necessary" and who he target, I see no limit to how this can be used. It is particularly absurd for Obama to say that Al-Awlaki should turn himself in when Al-Awlaki isn't even charged with anything.

Reply
CTuttle September 25th, 2010 at 6:49 pm
89
In response to econobuzz @ 87

heh Aloha, Noobie…! ;-)

Reply
econobuzz September 25th, 2010 at 6:57 pm
90
In response to CTuttle @ 89

Aloha

Reply
donbacon September 25th, 2010 at 7:02 pm
91

. . .the documentary unit "Fox News Reporting" which uncovered new details about American cleric Anwar al-Awlaki and efforts by the FBI to track and recruit him for intelligence purposes after 9/11.
http://www.foxnews.com/politics/2010/09/25/pentagon-destroys-copies-controversial-memoir-written-army-officer/

Now we know why Obama wants him dead. They did recruit him.

Reply
Bluetoe2 September 25th, 2010 at 7:05 pm
92

Would Obama approve of lynching as an acceptable means of targeted killing?

Reply
sporkovat September 25th, 2010 at 7:09 pm
93

thanks Firepups! how do you like the guy you supported *now*, after scoffing at critics whose assessments were *way* more accurate than yours?

Reply
econobuzz September 25th, 2010 at 7:10 pm
94
In response to Bluetoe2 @ 92

Too messy and ethnic.

Reply
bmaz September 25th, 2010 at 7:12 pm
95
In response to sporkovat @ 93

Fucking brilliant. You wander in and try to pimp the one major progressive blog that was neutral in the primary and honest in the general. And your link you so proudly threw out doesn't work. Go back and rethink your battle plan bubba.

Reply
Bluetoe2 September 25th, 2010 at 7:14 pm
96

In response to econobuzz @ 94

Are you kidding? A crowd of Obamabots, torches in hand, smiling and laughing in the moonlight as the target twists on the end of a rope. He might think it's just what's needed for that 2nd term. And it plays to history. Give them blood sport.

Reply
econobuzz September 25th, 2010 at 7:21 pm
97
In response to Bluetoe2 @ 96

Too "but-for-the-grace-of-god-go-I" — don't you think?

Reply
PJEvans September 25th, 2010 at 7:42 pm
98
In response to Bluetoe2 @ 92

He might actually have a clue that some people might possibly think he was an appropriate guest of honor for one.

Reply
bobschacht September 25th, 2010 at 8:04 pm
99
In response to Mary @ 58

Mary,
Thanks for your report on this. USA Today? Who knew?

I'll have to get a copy.

Thanks again,
Bob in AZ
Waiting for a plane

Reply
Quasit September 25th, 2010 at 8:11 pm
100

And if the judge rules against Obama, no problem. Obama can just secretly order that he be killed. Secretly.

Reply
bmaz September 25th, 2010 at 8:21 pm
101
In response to bobschacht @ 99

It's on the web, I saw it a day or two ago.

Reply
wundermaus September 25th, 2010 at 8:39 pm
102

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." – Presidential Oaths of Office
http://memory.loc.gov/ammem/pihtml/pioaths.html

Reply
MikeD September 25th, 2010 at 8:47 pm
103

ACLU & CCR won the right to represent Anwar vis-a-vis the Treasury regulation, is that not right? If that is wrong, disregard this, but what is it that kept them from simply filing this under his name directly rather than in his father's on his son's (Anwar's) behalf (as well as his (Nasser's) own)? It seems to gift the government with a standing argument (though they'd still make one if I'm not mistaken, but this enhances it)?

Reply
Mauimom September 25th, 2010 at 9:13 pm
104
In response to bobschacht @ 99

Bob, I hope you manage to find a sports bar. There are a LOT of great games on today — still. Watching the Oregon-ASU shoot-out right now.

Reply
Mauimom September 25th, 2010 at 9:21 pm
105

I think when the next fund-raising plea from the DNC, DCCC, DSCC or OFA hits my mailbox, I'll tell 'em

I'm contributing to the ACLU or CCR instead.

Or, of course, the Marcy Fund.

Reply
mymarkx September 25th, 2010 at 9:25 pm
106
In response to PJEvans @ 69

PJ writes,

> "You're assuming that a majority of people knowingly vote for this kind of crap."

Are you trying to tell me that people don't know that they voted?

> "I didn't vote for this."

When you vote, you're granting your consent of the governed to whoever wins, and to whatever they choose to do, not to whoever you voted for or what they promised to do.

> "I voted for 'yes-we-can', the hope and the change, the message that we wouldn't keep doing it the way Bush and Cheney had been doing it."

You didn't bother to check Obama's Senate voting record? You didn't bother to check to see which corporations donated to his campaign? You didn't notice when he and McCain stopped campaigning and pretending to appeal to voters long enough to issue a joint statement in support of bailouts, something that the vast majority of voters opposed? You've never before seen a candidate promise one thing during a campaign and do another once elected? Was '08 the first election in which you were old enough to vote?

> "This isn't what I voted for."

Maybe you can call the waiter and send it back?

> "And I won't vote for it again, if there's any way to avoid it."

Don't be such a spoilsport. Millions of people voted for Gore in 2000, and despite the fact that the Supreme Court ruled that they had no Constitutional right to have their votes counted, stopped the vote count, and installed Bush without allowing the votes to be counted, they went right back and voted again in 2004, with the exact same result. Remember, it's not whether you win or lose, it's that you keep playing in the rigged game.

Take heart! Just because you voted for Obama doesn't mean that your vote was tallied for Obama, if it was counted at all. About six million votes, according to the best estimate I've heard, simply disappeared. Yours may have been one of them, so you have nothing to feel guilty about.

donbacon's Gerry Spence quote @ #85 pretty much nails it. The function of our elections is the same as the function of our laws, to keep the oligarchy in power.

The only way that you can avoid granting your consent of the governed to candidates you cannot hold accountable if they betray you, is by not voting. Your vote is your consent. Not to who or what you voted for, but to whoever wins the election. In an election like '08 where both major party candidates were pro-war, any vote at all, even a vote for a third party candidate or a blank ballot, was a vote for war. There appeared to be a choice between a Democratic war and a Republican war, but a choice between war and war is not a real choice. Where there's no real choice, it isn't a real election.

If you have no way to know if a candidate is lying or not, and no way to hold them accountable once they're in office if it should turn out that they lied, your vote is your consent to be governed by somebody who may have lied to you and who can't be held accountable if they did.

Anyway, you didn't vote for Obama. The names of Presidential and Vice-Presidential candidates are on the ballot fraudulently, as our Constitution prohibits everyone except the Electoral College from voting for President and Vice-President. You actually voted for the slate of Electors of Obama's political party, and you probably don't know their names because those names weren't on the ballot. And since our national election tallies can't be verified and Presidents are routinely sworn into office before the popular vote, which doesn't determine the results of the election, can even be fully counted, if anyone cared to, you can't know for sure if your vote was counted at all, no less counted toward the slate of Electors of the party you wanted to vote for.

In '08 I did an informal poll and asked every voter I knew if they would still vote if the only federally approved voting mechanism was a flush toilet. About half said that they certainly would not. The other half said that they would, most citing their precious right to vote that people had fought and died for. As if somebody had shed blood so that they could have their vote flushed down a toilet.

There's a difference between a vote and a voice in government. What people fought and died for was the right to a voice in government, not the right to a purely symbolic, often uncounted, and sometimes miscounted vote for tyrants who can't be held accountable during their terms in office, which is the ONLY time they're supposed to represent us. In Stalin's Soviet Union, people voted, but they did not have a voice in government. Voters don't have a voice in government here either, but most believe that they do. There's no arguing with beliefs.

I just had an extremely unpleasant vision of an Obama voter, having been shot by a government sniper after being suspected of having sent socks and flashlights to terrorists, saying, as the last of their life's blood drains out of them, "But that's not what I voted for!"

Unfortunately, it was.

Reply
lmka September 25th, 2010 at 9:46 pm
107

Antiwar activists in Obamian gunsights as well, no doubt.

Reply
onemore September 25th, 2010 at 11:31 pm
108

MyMarkx at Sep 25 @ 3:30pm

Everyone should read that until they get it.!!!!!!!!!!!!!

MyMarkx……I don't believe everyone is quite woke up yet and still
believe there is some form of political process left in this country.
This is still no excuse for voting any of duopoly. The least thing that
"progressives" should do, turn off the BOOB TUBES. Watching the MSMs spill
their garbage be it General Electric or Mudock, you loose your ability to
think logically and for yourself. You let them pick the issues, pick how
they will be debated and let them limit the debate. Most on here let
Maddow/Olberman/Beck/O'Reilly, et.a. mosquedebate,Korandebate for three
straight months.
While issues like this post go untouched or garnish a 15sec soundbite.
It takes almost six months to recuperate from being brainwashed by the MSMs
WAPO, NYT, JOURNAL ect. You need to divorce yourself from this, realize
that it isn't going to matter if the whole Congress is filled with democrats, nothing is going to change.

Reply
onemore September 25th, 2010 at 11:56 pm
109

As an old lefty, and like many on here, a Viet vet, it was maddening
enough going through the seventies, eighties and ninties begging and
pleading for "liberals and progressives" to quit voting for Democrats so
we could rebuild the party in the manner that the Democrats still have the
nerve to say they represent. In those decades the Democrats acted no
different than they are right now.

But everyone is aware of what the Democrats are now and what they have
allowed to happen over the last ten years. It does not matter that they
were not in the majority while Bush was in office, the Democrat lawmakers
went along with every little desire that the Repubs asked them to. It is now a matter of criminal culpablabily
supporting these monsters.
Lets take everyones populist favorite Sharrod Brown for an instance. If I
knew what the Supreme Court docket was and when Citizens United was going
to be debated , then HE knew too. He also knew the balance of the Court
and exactly what the decision would be, so it was very disingenuous to
wait until after the decision to start a petition. Lets take the good
Liberal Judiciary Chairman Patrick Leahy……..but before I go into that
remember this vote count IRAN SANCTIONS PRELUDE TO WAR ACT 99-0.
Leahy has a website that he put up right after Obama took office.
The name of the Website is…..bushtruthcommision.com……
It is another petition, how many know about? How many have signed it?
Leahy does NOT want this petition signed, it was put out as a carrot to
make the public believe they wanted to bring the Bush Admin to justice.
However, Leahy knows that the Democrats and Obama are as guilty as Bush
ever was and in the last two months, has only showed 100 new signatures,
I know myself am responsible for that many signing this petition over that
period of time……..you got what i am insinuating.
Remember the 99 – 0……It's OK to bomb Iran to hell if you want
Mr. President.vote

Reply
NoOneYouKnow September 26th, 2010 at 12:08 am
110

Just out of morbid curiosity, couldn't Obama and him minions, particularly after that recent pernicious
SCOTUS decision declaring some First Amendment acts to be material support of terrorism, declare that
our opposition of his right to kill terrorists make us terrorist sympathizers, and therefore subject to sanction?

Reply
mymarkx September 26th, 2010 at 1:25 am
111
In response to NoOneYouKnow @ 110

I think you are correct, NoOneYouKnow (but from your comment, someone I'd like to know).

The question isn't who is appointed to the Supreme Court or how they decide things.

The question is how it is possible for an unelected body like the Supreme Court to make decisions that cannot be appealed in a society that wishes to have any pretense of being a democracy or a republic.

The Divine Right of Kings, prior to the Magna Carta, gave them the same power that Obama claims, to do away with their enemies without due process.

In a democracy or a republic, supreme power is vested in the hands of the people, not in the hands of a supreme deity, supreme monarch, supreme dictator, or supreme court. Our Supreme Court is incompatible with the definition of a democracy or a republic, as it has supreme power, power over which there is no appeal.

While Congress can attempt to legislate around Supreme Court decisions, the Supreme Court can strike down that legislation or even interpret it to mean the exact opposite of what it clearly says, and there is no appeal from their decisions, however unjust, unprecedented, unreasonable, or downright absurd such decisions may be.

Our government, all three branches of it, has put us back in the 13th Century by doing away with the rights that have existed since the Magna Carta.

Although Obama is claiming the right to kill those he doesn't like without according them due process, the Supreme Court is exercising its right to decide whether or not he can do that.

Nowhere in this is there any power of the people over government. In no way can We the People of the United States of America appeal a decision by the Supreme Court or remove a President who claims the powers of a tyrant or dictator from office.

We can petition Congress to remove a President from office or to remove a Supreme Court Justice for bad behavior, but all subjects can petition tyrants for redress of grievances. That doesn't mean that tyrants have to bother to consider such petitions, no less grant them. In a democracy or a republic, supreme power over government is vested in the hands of the people, so the people are not subjects petitioning tyrants, but citizens who can hold their elected officials directly accountable.

The myth that the United States is a democracy or a republic is deeply inculcated in our brains from an early age, but it is no more than a myth.

Reply
jpe12 September 26th, 2010 at 5:29 am
112

Courts seem to disagree with you re: associated forces:

> The authority [to detain] also reaches those who were members of "associated forces," which the Court interprets to mean "co-belligerents" as that term is understood under the law of war. Lastly, the government's detention authority covers "any person who has committed a belligerent act," which the Court interprets to mean any person who has directly participated in hostilities….Accordingly, the government has the authority to detain members of "associated forces" as long as those forces would be considered co-belligerents under the law of war.

(Hamlily v Obama, DC CA, 5/19/09)

re: the sep of powers argument: it's axiomatic that the executive branch controls foreign policy and the conduct of a given war.

Reply
jpe12 September 26th, 2010 at 5:32 am
113
In response to NoOneYouKnow @ 110

No.

You have a first amendment right to vocally support terrorists. You can also oppose Obama on this. What you can't do is be retained by a terrorist org. ie, it's your freedom to contract, not your freedom of speech, that's really at stake.

Reply
Garrett September 26th, 2010 at 7:29 am
114

> plaintiff cannot demonstrate that he faces the sort of real and immediate threat of future injury that is required in order to seek the relief he is requesting.

Objection, your honor. Defendant is making arguments of unspeakable absurdity and horror.

Reply
bobschacht September 26th, 2010 at 8:02 am
115

On my recent trip, I've been reading Obama's The Audacity of Hope. There are a great many cynics here who think I've been wasting my time, and make all manner of jokes about the audacity of dope, and cynical remarks about Obama's perfidy. I've got problems with Obama, but I do recommend the book, especially now.

Many of you assume, without bothering to find out, that the "Audacity of Hope" means hope **in Obama**. That's the wrong way to read it. Obama is a master at seeing things **in context**. In 2006, he wrote as if expecting the Crash of 2008. He studied Roosevelt's response to the Great Depression. He writes as a pragmatist, rather than as an ideologue.

I'd say the cynics are missing a lot about who Obama is, and what he can do. Like I wrote above, I've got my problems with Obama, and they are major, but I think many of you are underestimating him and assuming worse than is merited.

Bob in AZ

Reply
bmaz September 26th, 2010 at 8:13 am
116
In response to mymarkx @ 111

That is a pile of hooey. A "Democracy" or "Republic" is whatever its founding and enabling documents make it. Ours provide for exactly what we generally have including, of course, Congress, the President and the Supreme Court.

Reply
Rayne September 26th, 2010 at 8:13 am
117
In response to scribe @ 28

Agreed with what Marcy says at (29), your comment is a post.

Thank you.

Reply
bmaz September 26th, 2010 at 8:19 am
118
In response to jpe12 @ 113

You must not have read or listened to closely the SG argument made by Kagan as the official position of the US government in HLP v. Holder, which is the case at issue. The implications of the government's position which, in light of the nature of the Court's decision, the government undoubtedly feels merge with the decision, are far broader than you indicate.

Reply
Rayne September 26th, 2010 at 8:58 am
119

IMO, the al-Awlaki case is not just about the handling of al-Awlaki; for the government it is a defense of what has already happened, the thinking, decisions and actions already used and taken by the current and previous administrations.

It can be inferred from Ret. Gen. Michael Hayden's comments about his beliefs and his choices under the last administration:

> Michael Hayden:
> If you're going to debate about what constitutes appropriate interrogation methods, invite me back. I'd be happy to come. But that's not what this is about. This is are these or are these not enemy combatants. And if they are enemy combatants, do I have the right to hold them, consistent with the laws of armed conflict because they are a danger to you. The Geneva Convention doesn't require me to prove that they're a criminal. I simply have to have reasonable belief that they're enemy combatants.
>
> John Donvan:
> But General, the implications of — the implications of that decision actually in practice have to do with the most important and critical information, the rationale for even heeling to your position is to be able to interrogate them using certain methods.
>
> Michael Hayden:
> No, no. The rationale, the primary purpose is to take the enemy combatant off the battlefield. **And if you overcomplicate my taking them off the battlefield by capturing him, you will leave me with one other choice to take him off the battlefield, and that's to kill him.** Now, do you want to create that box? If the American political process wants to create that box, the people who are left behind in the intelligence service will work in that box. But that is a far less noble box than continuing the war as we have traditionally fought wars. I was stunned –
>
> David Frakt:
> Could I respond to that, John?
>
> Michael Hayden:
> Wait. One comment.
>
> John Donvan:
> Okay, one comment, and then David.
>
> Michael Hayden:
> I was stunned that Stephen made the comment to follow American history.When in American

> history have we had habeas hearings for enemy combatants?

[emphasis mine]

The box was created already, in that Hayden claims war began on Sept. 11 and that anyone perceived as something other than an enemy combatant might claim *habeas corpus* rights. If there is no war in actuality, only alleged criminal conduct, Hayden et al have acted outside the box.

In a recent debate (pdf) from which the previous quotes have been excerpted, hammers and pounds on the existence of a war, pointing to both the former and current executives as subscribers to the belief in a war against terror:

> Michael Hayden:
> Well, I think Marc and David have kind of teed up the question pretty nicely for us here. Are we a nation at war or are we not? Should we perceive ourselves to be at war or should we not? David said that our adversary in this thing out there, war or not, are criminals and nothing more. But if that's the case, let me take you back almost a year to the day to the Horn of Africa, to Somalia, to American Navy SEAL, in a helicopter, a Seahawk, coming off a Navy carrier in the Indian Ocean, going after an individual named Sullah Nabhan [spelled phonetically], at the time was the leader of al-Qaeda in Somalia, al-Qaeda in the Horn of Africa.
>
> We killed him. We landed long enough to swab up portions of his remain to get DNA evidence that we had killed him. I wasn't in the mission, I was out of government at this time, I wasn't privy to the pre-brief. But I know what was asked by the field commander before he got on the helicopter. Sir, is this a kill or a capture? And it's very clear from what happened, he was told this is a kill. No probable cause, no warrant, no court. Because we are a nation at war and Saleh Ali Nabhan was part of an opposing armed enemy force. I became an advocate; my epiphany that we are a nation at war took place about 10 minutes after 10:00, September 11th, 2001. It became clear to me at that point and I believe in few things more firmly than I believe in the fact that we are a nation at war. President Obama has said we are a nation at war. President Bush has said we are a nation at war.

Eight times in two paragraphs he uses the word "war" like a mantra. He is hiding behind the word to defend not only future actions, but those which have been done — the outright killing instead of capturing those suspected of terror, and suspected on sight alone (as also indicated in the text of the same debate).

Reply
Mason September 26th, 2010 at 9:16 am
120

> The United States has further determined that AQAP is an organized armed group that is either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda *that has directed armed attacks against the United States* in the noninternational armed conflict between the United States and al-Qaeda that the Supreme Court recognized in Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006).

When did AQAP direct armed attacks against the United States? I don't believe they ever did, unless the Government is referring to the incident involving the underwear bomber who literally tripped over his dick, severely burning it.

If that is the case, I'm not satisfied that that incident was directed by AQAP. Two reasons:

1. Did the underwear bomber have a real bomb? Was it even possible for him to cause an explosion and, if so, would the explosion have been big enough to cause injury to anyone except him?

2. I suspect the underwear bomber was a dupe taken advantage of by a CIA black flag operation designed to keep fear alive in the United States, and that a member of that group accompanied the underwear bomber on the plane without his knowledge and interceded in the proverbial nick of time to "save" the lives of the passengers and crew knowing as he did so that he was not risking injury or death to himself because the bomb wasn't going to explode.

The chemistry involved in creating liquid bombs requires chilled temperatures and slowly adding one liquid to another a drop at a time. I believe it's extremely unlikely that anyone could pull that off on a plane, especially given the amounts of liquid necessary to create a big enough blast to blow-up and crash the plane. I believe that incident was staged without Abdulmuttalab's knowledge.

Reply
JohnLopresti September 26th, 2010 at 9:49 am
121

I have cleared up part of the problem with the MTD which I noted @42; although the Fn.2 link to the UN list continues in 404 error, the next footnote, Fn.3 is to a central page for the committee within the UN Security Council devising the list.

Further, anecdotal reports at BLT and MainJustice ~July 20, 2010 coroborrate the discussion between Arbusto and MadDog re MSLederman*s having returned to the faculty post effective at the end of August 2010. The way to find MSL*s name in the Adobe document is thru the search feature, which reveals what is likely evidence of his having been the MTD*s first creator, under the metadata fieldname Author. Interestingly, the complaint file date was August 30, 2010, but the MTD date is September 25, 2010, three weeks after MSL left OLC.

Reply

jpe12 September 26th, 2010 at 10:03 am
122
In response to Rayne @ 117

I listened very closely, which is how I've correctly summed up Kagan's position and that of the court.

Reply
indianagreen September 26th, 2010 at 10:25 am
123
In response to MadDog @ 20

It is also an impeachable offence! Obama can not set himself as an absolute monarch, which is precisely what he has done.

To the Obama apologists, consider this: do you want a President Angle or Palin to order your assassination because you are a "socialist?"

Reply
indianagreen September 26th, 2010 at 10:29 am
124
In response to GeorgeJohnston @ 80

I believe Obama's legal expertise was on Soviet law under Stalin. He certainly is applying that now.

Reply
indianagreen September 26th, 2010 at 10:34 am
125
In response to bobschacht @ 115

I don't care about a book Obama wrote about a father he hardly knew. I do care about Obama acting as a President-for-Life, rather than a President of a constitutional republic.

Obama = Bush + Nixon!

Reply
bmaz September 26th, 2010 at 10:44 am
126
In response to jpe12 @ 122

I have listened and read closely as well, and disagree.

Reply
Mary September 26th, 2010 at 10:52 am
127

Way epu'd, but jpe12 you haven't correctly summed up "the court's" position, because there is no "the court's" position yet on the topic. Different habeas courts have spoken and circuit courts in other, non-speech, contexts have hinted at, what standards they are going to use for material support, but other than Kagan's self-stimulation on the topic b4 the Sup Ct, the issue hasn't been there and Congress has deliberately done a piss poor job.

A lawyer who can't represent a client, btw, does have a free speech issue – not just a freedom of contract issue. Commericial speech is speech and political speech – speech addressed to a political branch – is very definitely speech.

@119 – Elmer Fudd's evil twin must make Frakt nuts. "When in American history have we had habeas hearings for enemy combatants?" Uh – how about in that little case the SUp Ct has been hammering at you over and over and over and over and over? Ex parte Milligan? The one you lost Scalia on? The one that was, imo, pretty much a direct response to the *military commission* response to the Lincoln Assassination – with the court drawing a line.

As a matter of fact, when non-uniformed actors are involved and courts are open and operating, the question is when have we not allowed "combatants" – be they anarchists or black panthers or other – to not have access to habeas?

As a matter of fact, the Geneva Conventions REQUIRES a proceeding that is basically a habeas proceeding for non-uniformed detainees who claim they are not belligerents or combatants. So I guess the answers to Hayden would be you have to go back before the GCs and back before Milligan to get find that point in time when there was no habeas for alleged insurgent detainees. Except that, as you go back to our English common law tradition, you discover that in 1322 the Earls of Lancaster and Hereford led an insurgency against Edward II.

> They collected an army so large that Edward was compelled to raise forty thousand men to withstand them. The rebellious earls posted their forces on the Trent, and the armies of the king confronted them. They fought at Boroughbridge; the insurgent forces were overthrown; Hereford was slain and Lancaster taken in arms at the head of his army, and amid the noise of battle was tried by a court-martial, sentenced to death, and executed. When Edward III came into power, eight years later, on a formal petition presented to Parliament by Lancaster's son, setting forth the facts, the case was examined and a law was enacted reversing the attainder, and declaring: '1. That in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer. 2. That regularly when the king's

> courts are open it is a time of peace in judgment of law; and 3. That no man ought to be sentenced to death, by the record of the king, without his legal trial per pares.

From the petitioner's arguement in *Ex Parte Milligan*.

1322.

Not quite Time Immemorial - but close enough for horseshoes and habeas.
Almost
Hayden did this very same thing, if you remember, with the unconstitutional surveillance program. He ignored the warrant clause of the fourth amendment and said that all the fourth required was that he, Hayden, have a reasonable belief that he was wiretapping a bad guy. An unreviewable reasonable belief (bc nothing keeps beliefs reasonable like a lack of outside review).

Now he pops up and says that as long as he has a reasonable belief someone is an "enemy combatant" (although if he had been more careful and backed into a corner more he'd have modified that to say that he only needed a reasonable belief that someone was providing *material support* ie, something HE reasonably thought was material support) he can "take them off the battlefield" by detention. Except, hmmmm, he's also argued over and over that the whole world is a battlefield – so there's no "off" is there?

Anyway, both of those are pavers that take you to where he is really going with what he says above. We are "at war" not because there is any constitutionally declared war against an identifiable set of belligerents who qualify under the laws of war – - the United States is at war because Michael Hayden, usurping the roles of all branches of government, has decided it is *reasonable* from his personnel perspective to decide that we are at war. Every check and balance, everywhere, yields to his personal decision of what he believes is "reasonable."

He's such a disgrace to his uniform.

Reply
bmaz September 26th, 2010 at 11:03 am
128
In response to indianagreen @ 124

To the extent Obama had any special emphasis, it was, ironically, on equal protection as applied to minorities, the disadvantaged and voting rights issues. That is not to say that he seems to particularly understand equal protection law in the least, but that is the crux of what record he has.

Reply
mymarkx September 26th, 2010 at 11:13 am
129
In response to bmaz @ 116

bmaz wrote:

> "A 'Democracy' or 'Republic' is whatever its founding and enabling documents make it."

bmaz, are you saying that the dictionary definitions of democracy and republic are wrong or irrelevant, and that if the founding and enabling documents of a country say that a dictatorship is a democracy or a republic, then a dictatorship is therefore a democracy or a republic?

According to the dictionary definition, which you find irrelevant, a democracy is a form of government in which supreme power is vested in the hands of the people. A tyranny is a form of government in which supreme power is vested in the hands of a tyrant. A plutocracy is a form of government where supreme power is vested in the hands of a wealthy few.

A republic, again according to the dictionary, is also a democratic form of government where supreme power is vested in the hands of the people, but in a republic, rather than exercising their supreme power directly, the people exercise their will through their elected representatives.

These representatives are elected to represent the people for a fixed term of office. During that term of office, the people can exercise their will through their representatives by holding them accountable, that is, by removing them from office if they betray their constituents. If the people cannot hold their representatives accountable during their terms of office, which is the only time they are supposed to represent their constituents, and have to wait until their terms are up in order to try to elect different representatives they also won't be able to hold accountable during their terms of office, the people do not have supreme power over government because they cannot exercise their will through their elected representatives during the only time that those representatives are supposed to represent the will of the people, the time that they are in office.

An example of this was Senator John Olver who, when presented with a petition signed by more than 80% of his constituents, asking him to support the impeachment of Bush and Cheney, said, "Spare me! I'm fully aware that the overwhelming majority of my constituents support impeachment. I will not."

That is not a representative of the people. That is not an elected official through whom the people can exercise their will. And whether or not they openly state that they don't give a hoot about what their constituents want or don't want, that is the situation of all our elected representatives at the federal level because they cannot be held accountable by their constituents during their terms of office.

It is theoretically possible for some billionaires to buy an island, establish it as an independent and sovereign country, and write a Constitution saying that their country is a democracy or a republic because it has a lot of billionaires. Therefore, according to you, since their founding and enabling document says that it is a

democracy or a republic, it is not the plutocracy it actually is.

Although this country was more obtained by genocide than through purchase, the exact same thing happened here. Some landowners and slaveholders meeting in secret wrote a Constitution establishing a plutocracy, and called it a democracy or a republic.

Benjamin Franklin, who was sent to the Constitutional Convention to present an anti-slavery petition, upon realizing that the Constitution would not be ratified if it did not support slavery, withheld that petition and betrayed the people who had sent him to the Convention to represent them. After the Constitution was signed, he lied and said that it had given us a republic, when he knew that it had not. Read the book, *Slavery's Constitution: From Revolution to Ratification*, by David Waldstreicher.

Reply
Rayne September 26th, 2010 at 11:36 am
130
In response to Mary @ 127

I think in the debate Hayden went even further down the rathole than material support for justification — quite literally saying *visual appearance* was all that was required to make an assessment as to whether a human being was a terrorist or not.

> Male Speaker:
> The question is how do we make this distinction so that all of us can feel more comfortable with what our government may be doing?
>
> John Donvan:
> You mean the distinction who are the terrorists and who is not?
>
> Male Speaker:
> Yeah. You know, how to get the innocents off the bus.
>
> John Donvan:
> How and who? I mean, there is also the question of who makes the distinction as well.
>
> Male Speaker:
> Yeah.
>
> John Donvan:
> Let's take that to the side for the motion. Mike, go ahead.
>
> Michael Hayden:
> It's a process. It's a rigorous process. I governed it while I was the director of CIA with regard to that portion of the war that CIA had responsibility for. To be clear, just being a terrorist doesn't get much interest from us. The authorization we have from the Congress and the authorization for the use of military force is against al-Qaeda and its affiliates.
>
> So it's not a global terrorist issue. We are at war with a select group of terrorists. President Obama has made that clear. The Congress has made that clear. President Bush has made that clear. **We used same criteria to capture an individual as a terrorist that we use on the battlefield to kill. It is visual who is a terrorist.** I am responding to the political processes of the American state. All three branches of government have said we are at war. I'm using the full authority given to me. I use it in the clearest conscience I have. Are mistakes made on the battlefield? Killing, capturing? Of course, they are. What — you have very good men and women working very hard to apply absolute precision to their task. Now, I will admit that the processes of intelligence are a bit different than the processes of the judicial system. Again, as I mentioned in the one habeas case, we had to fold our tent and admit defeat because I could not, in conscience, tell the enemy combatant who the source of our information was. If I did that, I would quickly not have sources of information anywhere in the world. And so we had to make a serious tradeoff.
>
> That's what I mean by putting this into a law enforcement template, rather than using a vigorous and consistent with the rule of law, law of armed conflict.

Which begs the question: Is this the same criteria the FBI is now using in Minnesota and other U.S. locations? Do people including American citizens only need to appear (in the visual sense) to be terrorists to be targeted for interrogation, detention, so on? And who or what is the arbiter of the correct vision?

Reply
Mary September 26th, 2010 at 11:55 am
131
In response to Rayne @ 130

He is using a visual – that's been clear from the CSRTs that scheduled people for depravity based on wearing dark clothes or having a casio watch. He's also used an audio – a name that sounds like a name that might be a name of someone who could be a terrorists. He's also using an olfactoral – if it doesn't smell quite right to him. (He answers your who at the end pretty clearly though – it's him, or anyone in the Exec with a gun or a dribble of power and who thinks that it is "reasonable" in their own, unreviewed and unreviewable, political and personal belief system).

It's the same basic failing – the whole of the world (in DIRECT contravention of previous supreme court authority) is a battlefield.

In any event, notice how he shifts here and abandons combatant. It's not, even on his real battlefields, a visual on whether or not someone is a combatant – it's a visual on whether or not they are a "terrorist."

On the "if they sound like" front –
http://news.yahoo.com/s/ap/20100924/ap_on_re_as/as_afghanistan

> Three journalists picked up by coalition forces or the Afghan intelligence service for their suspected links to Taliban propaganda networks have been freed after brief detentions that prompted angry reaction from journalism advocates and President Hamid Karzai's call for their quick release.
>
> NATO said Friday that it had released Mohammad Nadir, a television cameraman for al-Jazeera, and Rahmatullah Naikzad, who worked for both al-Jazeera and The Associated Press.
> …
> [One of the detainees] said one member of the coalition told him as he was released: "We heard a lot of bad things about you, but please forgive us."

Gossip and visuals. In essence, Hayden is claiming the "Mean Girls" doctrine as the basis for his illegal, depraved, detentions and killings. I guess when you model it on a fictional Lindsay Lohan character, that "war like no other" really becomes just that.

Reply
Garrett September 26th, 2010 at 11:58 am
132

Military and State Secrets.

The phrase is used a couple of times in the motion to dismiss as well:

> To the extent that the foregoing are not sufficient grounds to dismiss this lawsuit, plaintiff's action should be dismissed on the ground that information properly protected by the military and state secrets privilege would be necessary to litigate this action.

It is used once in *Reynolds*:

> Judicial experience with the privilege which protects military and state secrets has been limited in this country.
>
> U.S. v. Reynolds

In *Reynolds*, military secrets is used seven times. State secrets is used once, referring to *Totten*.

The government has used the phrase before:

> Pursuant to 28 U.S.C. § 517, the United States of America, through its undersigned counsel, hereby submits this Statement of Interest to advise the Court that the United States intends to assert the military and state secrets privilege in this action.
>
> Hepting v. AT&T, statement of interest (2006)

Wikipedia has what might be the best guide on the history of the term:

> * 1922: Main Administration for Literary and Publishing Affairs under the People's Commissariat of Education of the RSFSR (Главное управление по делам литературы и издательств при Наркомате просвещения РСФСР):
>
> * 1946: Administration for the Protection of Military and State Secrets in the Press under the USSR Council of Ministers. (управление по охране военных и государственных тайн в печати при СМ СССР)
>
> * 1953: Main Administration for the Protection of Military and State Secrets in the Press under the USSR Council of Ministers. (Главное управление по охране военных и государственных тайн в печати при СМ СССР)
>
> * 1966: Main Administration for the Protection of State Secrets in the Press under the USSR Council of Ministers. (Главное управление по охране государственных тайн в печати при СМ СССР:)

Reply
emptywheel September 26th, 2010 at 1:36 pm
133
In response to Garrett @ 132

Interesting. Thanks for that Garrett.

Reply
bobschacht September 26th, 2010 at 3:22 pm
134
In response to indianagreen @ 125

> I don't care about a book Obama wrote about a father he hardly knew.

That's not the book I was writing about. It is obvious that you have no idea what is in the book that I was

actually writing about, The Audacity of Hope. Such ignorance is a poor substitute for informed thought.

Bob in AZ

Reply
Garrett September 26th, 2010 at 3:34 pm
135

Are we (offically) at war in Yemen, and with who?

> Mr. Rivkin said he favored a different argument: a declaration that in war who can be targeted — and where — is a "political question" for the executive branch to decide, not judges.
>
> Inside the administration, that argument is also seen as attractive. But invoking it could give the court an opportunity to reject the idea that an armed conflict with Al Qaeda exists in Yemen, said Matthew Waxman, who was the Pentagon's top detainee affairs official under the second President Bush.
>
> "The more forcefully the administration urges a court to stay out because this is warfare, the more it puts itself in the uncomfortable position of arguing we're at war even in Yemen," he said. "The worst outcome would be if the court rules that the president is not authorized to wage war against Al Qaeda beyond combat zones like Afghanistan."
>
> Charlie Savage, NYT

On the "uncomfortable" question, they of course strenuously wish not to say:

> This would include, for example, (i) intelligence information that would reveal the Government's knowledge as to the imminence of any threat posed by AQAP or Anwar al-Aulaqi, and the sources and methods by which such intelligence was obtained, see Gates Public Decl. ¶ 6; Clapper Public Decl. ¶¶ 18- 19; (ii) information concerning possible operations in Yemen and any criteria or procedures that may be utilized in connection with such operations; see Public Gates Decl. ¶ 7; (iii) information concerning security, military, or intelligence relations between the United States and Yemen.
>
> Notably, plaintiff contends that the lawfulness of the alleged targeting of his son under international law would depend on whether the government could show either that Yemen has consented to the use of lethal force in its nation or that Yemen is unwilling or unable to stop any threat posed by plaintiff's son. Id. at 30. Any evidence that might exist as to either proposition, however, would plainly implicate sensitive diplomatic relations between the United States and Yemen and would thus also be covered by the state secrets privilege.

and strenuously wish not to have questioned, and moreover again wish not to say:

> But even assuming, as plaintiff does, that his claims would depend upon whether the actions in question would take place in an armed conflict, the very determination of whether and in what circumstances the United States' armed conflict with al-Qaeda might extend beyond the borders of Iraq and Afghanistan is itself a non-justiciable political question. Moreover, as plaintiff recognizes, see Compl. ¶ 25, any determination of this issue by this Court would necessarily implicate sensitive foreign policy issues affecting relations with Yemen.

Reply
irregulationary September 26th, 2010 at 5:02 pm
136

Notice what they're doing here…

> Enforcing an injunction requiring military and intelligence judgments to conform to such general criteria, as plaintiff would have this court command, would necessarily limit and inhibit the President and his advisors from acting to protect the American people *in a manner consistent with the Constitution and all other relevant laws, including the laws of war*.

They want to demote the Constitution to the same level as "all other relevant laws, including the laws of war."

If some "relevant law" permits extrajudicial killing, then we need not consult alternative jurisprudential commentaries such as the Constitution.

Henceforth, Presidents will honor and defend the Constitution only insofar as it bolsters Executive power against all comers: most importantly, the other two branches, and the people.

Reply
bobschacht September 26th, 2010 at 5:40 pm
137
In response to Garrett @ 135

> Are we (offically) at war in Yemen, and with who?

We're officially at war with a concept, and since a concept can never be exterminated, we're officially at war forever. Doesn't that make you happy?

We're not at war (explicitly) with Yemen, because Congress has never declared war on Yemen, although it could be argued that there is something in the AUMF that authorizes us to bomb and kill in Yemen.

Since most of the 9/11 bombers were from Saudi Arabia, why didn't Congress declare war on Saudi Arabia? Because we think they're our friends, and they have oodles of oil?

The whole thing is a fiasco, IMHO.

Bob in AZ

Reply
Rayne September 26th, 2010 at 6:32 pm
138
In response to irregulationary @ 136

There is this, though, which I sure as hell hope somebody uses to yank the leash on the White House and DOJ:

> 1. **When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.** [n2] In these circumstances, [p636] and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government, [p637] as an undivided whole, lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law. [n3]
>
> 3. **When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.** Courts can sustain exclusive presidential control in such a case only by disabling [p638] the Congress from acting upon the subject. [n4] Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

[*Youngstown Sheet & Tube Co. v. Sawyer*]

Reply
jawbone September 26th, 2010 at 7:31 pm
139
In response to themomcat @ 3

When True Believers are involved, no Regent U grads necessary.

The True Believer does not need facts: The One's words are are enough.

OMG!

Reply
jawbone September 26th, 2010 at 7:33 pm
140

And when will Eric Holder resign?

Time for a Holder Resignation Watch?

I used to note that few people left the BushCo administration with their reputations intact. Seems to me Holder is down for the count. Rep gone.

Reply
jawbone September 26th, 2010 at 7:34 pm
141
In response to bobschacht @ 137

Hey, can't Obama just claim that whether we're at war or not with a country comes under the state secrets shield? If not, why not? He's the King for the Term, right?

Reply
bmaz September 26th, 2010 at 7:59 pm
142
In response to jawbone @ 140

Actually considering the hyper-expensive corporate coddling inside fixer reputation Holder had in private practice, I think Holder has probably greatly enhanced and burnished his cred. His stock in trade was never the kind of people that read here, he was all about Chiquita, Merck, UBS etc.

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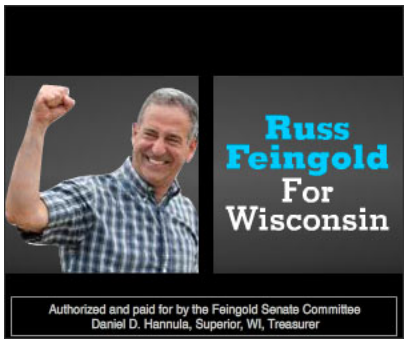

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41 minutes ago

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21 hours ago

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