
In the Matter of George W. Bush *v.* the Constitution

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THE INDICTMENT of the Bush administration for its conduct of the war on terrorism is both familiar and increasingly insistent. In the aftermath of 9/11, it is charged, the White House responded in ways that not only traduced the U.S. legal system but radically transformed it, stripping American citizens of time-honored rights, trampling on the fundamental premises of our Constitution, and bringing shame on our country for extreme and illegal practices in the treatment of suspected adversaries.

Across seven years, a vast journalistic and legal literature has catalogued the depredations allegedly visited on the American constitutional order. Numerous lawsuits challenging the administration's counterterrorism policies, brought by groups ranging from the American Civil Liberties Union to the Electronic Frontier Foundation, are moving up and down the rungs of the federal court system. The issues have been caught up in the presidential election contest, with both Hillary Clinton and Barack Obama slamming George W. Bush for having breached the proper channels of executive-branch power, and castigating John McCain for carrying the President's banner.

At stake are legal and policy questions that are exceptionally complex, involving a clash between the exigencies of national security and the most cherished provisions of our civil and political order. Has

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there indeed been a fundamental shift to our common detriment? If so, how did it happen, and why?

IN ATTEMPTING to answer these questions, one convenient starting place is a new book, *Bush's Law*, which carries the premonitory subtitle, "The Remaking of American Justice."¹ Its author, Eric Lichtblau, is a reporter for the *New York Times* who, assigned to cover the Justice Department after joining the paper in 2002 (before that, he had the same beat at the *Los Angeles Times*), has enjoyed a front-row view of judicial developments ever since America entered a war unlike any other in its past. In 2005, together with his *Times* colleague James Risen, Lichtblau broke the "warrantless-wiretapping" story of the National Security Agency's Terrorist Surveillance Program, for which the duo won a Pulitzer prize.

Lichtblau's premise, in a nutshell, is that the al-Qaeda attack of September 11 sparked a dangerous panic within the Bush administration. Officials, some of whom (like Attorney General John Ashcroft) had been complacent about terrorism up until September 10, were now, on September 12, bending every effort to carry out the President's urgent imperative: "Don't let this happen again." In pursuit of security at any price, they proved willing to ride roughshod over legal and constitutional norms.

Bush's Law recounts how this played out. Thus,

¹ Pantheon, 349 pp., \$26.95.

Lichtblau offers a lengthy series of instances in which individuals were made the victims of egregious violations of due process and basic rights. He tells, for example, of the arrest and prosecution of a group of Muslims in Detroit who were swept up amid the 9/11 fears; although the principal evidence against them was a sketch of a U.S. airbase in Turkey that turned out to be a harmless doodle, two of the men were nevertheless convicted of conspiring to provide material support to terrorists. Similarly, Lichtblau describes the arrest in a rural Virginia town of a Pakistani doctor named Taj Bhatti who, although he had no links whatsoever to terrorism, was one of some 70 or more men and women rounded up in the weeks and months after 9/11 and held as “material witnesses.”

To human-rights groups, writes Lichtblau, this deployment of the material-witness law was “bald-faced abuse” and “a dangerous end-run around the system meant to protect the rights of the accused.” But the White House did not care; as far as it was concerned, the country was “on a wartime footing, a permanent state of emergency.” Traditional restraints were off, “[g]uilt and innocence became almost antiquated notions,” and the government “had to strike first.”

If innocent individuals were paying the price for this recklessness—“collateral damage” is Lichtblau’s acid word for their fate—so too, in broader terms, were our constitutionally enshrined freedoms. High on Lichtblau’s list of offenses here is the 342-page Patriot Act, “a smorgasbord of a bill pushed so urgently by Ashcroft and the administration that few lawmakers who voted for it had time to read its fundamental reworking of the law, much less understand it.”

With “the shackles now off,” American intelligence was out on the trail “for the faintest whiff of terrorism.” The Immigration and Naturalization Service was set loose: some 1,200 people were detained and sent to jails around the country, many of them on minor visa and entry violations. In criminal investigations of national-security cases, the ban on racial profiling was rescinded. “Middle Easterners” could now be singled out merely by virtue of their country of national origin.

Most egregiously, as Lichtblau and Risen would discover, the National Security Agency, “long banned from spying on Americans after the abuses of the Vietnam era,” was ordered to intercept the international phone calls and emails of Americans suspected of ties to al Qaeda. In a blatant violation of the Fourth Amendment, the NSA acted without getting judicial warrants based upon “probable

cause”; instead, it engaged in “drift-net” data-mining, potentially invading the privacy of millions of unsuspecting Americans.

And so it went. Abroad, provisions of the Geneva Conventions regarding the treatment of prisoners of war were “deemed ‘quaint’ and ‘obsolete’” by White House counsel Alberto Gonzales, and military tribunals were announced in a plan that “promised secret trials and the denial of basic rights of appeal.” Some captives were subjected to interrogation techniques that amounted to torture. The ancient right of habeas corpus was tossed out, not only for captured enemies but even for American citizens caught fighting in enemy ranks.

Through it all, Lichtblau writes, Congress was not permitted to perform its allotted role of checking and balancing. Not only was its approval not sought, but blanket secrecy was the order of the day, and as often as not our elected representatives were kept in the dark about what was being done in the nation’s name.

Thus, the primary and still-enduring issue raised by the Bush administration’s conduct was the fate of the Constitution itself. Did the President have the authority to use his commander-in-chief powers to prosecute the war against al Qaeda come what may, or would we instead continue to “cling to the notions of individual liberties, due process, and prohibition of unreasonable search and seizure spelled out in the Bill of Rights?” To this last question, concludes Lichtblau, President Bush and his men made their answer perfectly clear. They shredded the Constitution.

LICHTBLAU HAS marshaled a large array of facts about happenings in various arenas as the United States entered the age of counterterrorism. An energetic reporter, he has found numerous sources within the government willing to tell him things that were either secret for genuine national-security reasons or, on some occasions, simply inconvenient or embarrassing for the public to know about.² With the facts he has gathered, Lichtblau has constructed an ostensibly plausible narrative of events. As an analyst, however, his performance is something else again. Though important questions emerge from his narrative, the answers he supplies are often superficial or worse: muddled, irrelevant, misleading, and/or merely rhetorical.

One problem is the wholesale use of what might

² Whether his reporting has irresponsibly compromised ongoing counterterrorism programs is a question I have looked at previously in “Has the *New York Times* Violated the Espionage Act?” COMMENTARY, March 2006.

be called the dump-truck method of documentation. In covering the Justice Department over the years, Lichtblau evidently accumulated notebook upon notebook full of stories, some of them eventually published by his employers, some of them not. Rather than letting any of this go to waste, he evidently decided to dump into the manuscript a truckload or two, relevant or not. That may explain why, for example, we find page upon page here devoted to cases like that of Brandon Mayfield.

Mayfield was a convert to Islam and a lawyer in the state of Washington who was arrested in 2004 and accused of participation in the bombing of the Madrid railway system that killed 191, the worst terrorist incident in Europe in memory. His fingerprints were found on a plastic bag containing detonators at the scene of the crime. But the fingerprint evidence, usually a foolproof means of identification, proved to be anything but. FBI technicians had botched their analysis and the Bureau then stubbornly ignored the warnings of its Spanish counterparts that the wrong man had been seized.

Without doubt this was a highly unfortunate occurrence. But what bearing does it have on Bush's alleged perversion of U.S. law? The only significant lesson of the Mayfield story—like others padding Lichtblau's book—is that the September 11 disaster by itself did nothing to fix an investigative agency whose single major accomplishment in recent years has been to resist all efforts at reform. If the FBI was cloddish before the attacks,³ it remained just as cloddish in the days and weeks afterward, even while operating at a higher tempo. But responsibility for the blunders of FBI fingerprint analysts can hardly be laid at the doorstep of the White House, even if, for Lichtblau, it is clearly expedient to suggest otherwise.

A MORE FUNDAMENTAL difficulty with *Bush's Law* is Lichtblau's framing of the broader issues. His palette holds only two colors: black and white. On one side of his ledger is the Constitution and the Bill of Rights. On the other side is the Bush administration, and never the twain shall meet. Although he is fully aware of the unprecedented challenge posed to national security by the 9/11 attacks, and of the belief within the government that a follow-on attack was a near-certainty, Lichtblau declines to suggest what measures might have been appropriate in place of the ones he labors at every step to condemn as "over-the-top."

After a surprise attack that killed thousands of American civilians and in which nineteen out of nineteen perpetrators were from "Middle Eastern"

countries, was it truly unreasonable for the Justice Department to single out individuals from those lands for special attention? In Lichtblau's judgment, it was not only unreasonable, it was nefarious. Explaining how such profiling came to be employed, he writes that "[a]mong Ashcroft's base of conservative political supporters the scourge of illegal immigration was red meat, and he and his senior aides knew it." In Lichtblau's view, it was only "xenophobia" and the desire to curry favor with right-wing yahoos that explain how it came to pass that "Middle Easterners boarding a plane in California . . . could be subjected to increased scrutiny." Whatever one thinks of John Ashcroft or such profiling, this caricature is preposterous on its face.

Another case in point is Lichtblau's treatment of what he calls the administration's overriding "punchant for secrecy." This led Vice President Dick Cheney, along with "other hardliners," to set in motion a strategy that included the wholesale withdrawal of information long in the public domain:

Librarians at public universities that stored government material were ordered to destroy CD-ROMs in their collections on national reservoirs and dams because government officials told them that the information could aid the enemy. . . . Government websites on hazardous waste sites and nuclear materials were taken down. The administration's classification of government documents ballooned, and American spy agencies began reclassifying tens of thousands of pages of documents that had been already publicly available for many years, like the number of American spies in business in 1946.

In a tone of sympathetic outrage, Lichtblau tells of a librarian at Syracuse University who was so "repulsed" by the directive that she cut the proscribed CDs "into tiny shards and threw them away." Singling out the fact that some of the information being classified—like the OSS roster in 1946—was of no possible value to terrorists or anyone else, he writes that secrecy "was both the Bush administration's rhapsody and its ruin."

But did it not make sense, and does it not still make sense, to protect our nation's physical infrastructure, including reservoirs and dams, by removing blueprints and other sensitive information from ready access to those who would do us harm? And did the government have the time, resources, and personnel, in the hours and days after 9/11, to review every single document that might put us at

³ See my "How Inept is the FBI?" in the May 2002 COMMENTARY.

risk? Or was it simply more efficient to classify entire categories of documents at once, sweeping up some innocuous data along with the dangerous kind, all of them to be reviewed at a later date? Once again, Lichtblau declines to enter into a discussion of the intricacies involved in meeting the threat, preferring instead to castigate the administration for waging “a war of information” aimed not only at terrorists but at “keeping information from the American public.”

CHERRY-PICKING facts, tossing in irrelevancies, and engaging in other underhanded methods of argumentation—one could adduce many more examples than those cited here—Lichtblau fails, all told, to sustain his indictment of the Bush presidency. But just because Lichtblau is a disreputable prosecutor, playing to the gallery and not to the jury, can the indictment itself be so readily withdrawn? In fact, it would be almost miraculous if, over the course of seven years of struggle following the unprecedented cataclysm of September 11, any administration had acted with flawless wisdom or stayed consistently within the confines of the law and the Constitution. When, where, and why did this one go astray?

Answers far more cogent and complex than anything on offer in *Bush’s Law* come from a source within the administration itself, in the person of Jack Goldsmith. In 2002, Goldsmith, a law professor of conservative bent, joined the office of the Pentagon’s top lawyer, where he worked on legal issues ranging from Guantanamo to missile defense to military commissions. In fall 2003, he was tapped to join the Department of Justice, there to head the Office of Legal Counsel (OLC), the critical sub-unit within the federal government that determines whether the government’s own actions are legal. As Goldsmith has explained in *The Terror Presidency*,⁴ a memoir of his stormy nine months’ tenure, the OLC, by virtue of its obligation to rule on the legality of particular actions *before* they are taken, possesses “one of the most momentous and dangerous powers in the government: the power to dispense get-out-of-jail-free cards.”

Goldsmith went into the administration agreeing with and supporting those of its policies and attitudes he knew about. As he recounts in his book, these included its decision to try captured terrorists before military commissions, its ruling that the Geneva Conventions did not apply to al-Qaeda and Taliban fighters taken prisoner, and its skepticism toward the International Criminal Court and the influence of international institutions on U.S.

policy in general. But there were decisions taken by the administration that Goldsmith did not know about because they were secret. These concerned such matters as the NSA surveillance program and the CIA’s interrogation techniques. Some of them, he discovered fairly rapidly, “rested on severely damaged legal foundations.”

How this happened, and whether the lapse constituted an ineradicable stain on the Bush administration, are the issues at the heart of Goldsmith’s book. To address them, one has to put oneself in the shoes of President Bush on September 12, 2001. How best to respond to the previous day’s disaster?

Bush responded as, presumably, any President would—by mobilizing his administration in an all-out effort not to let this happen again. But a great many things were standing in the way.

One was a seemingly ineradicable torpor engulfing the lower echelons of the Department of Defense, the CIA, and the National Security Agency, the very instruments that make up the sharp end of the American spear. A culture of risk-aversion had taken deep root in these institutions: one manifestation of a profound shift in the years since World War II that had been further exacerbated by legislation enacted in the aftermath of the abuses of Watergate and associated intelligence scandals.

“[F]or the first time ever,” writes Goldsmith, “the President’s ultimate obligation to do what it takes to protect the nation from devastating attack was checked by a hornet’s nest of complex criminal restrictions on his traditional wartime discretionary powers.” These played heavily on the lower registers of the security bureaucracies, especially the CIA, instilling apprehension that today’s orders to engage in aggressive action might bring tomorrow’s inspector-general investigation, a grand-jury subpoena, the end of one’s career, possible criminal conviction and imprisonment, and ruinous legal bills.

Reinforcing such trepidations among officials up and down the line was a “swarm of lawyers that rose up in the military and intelligence establishment to interpret multiplying laws and provide cover for those asked to act close to the legal line.” In the CIA, the number of lawyers, reports Goldsmith, had risen to over 100. In the Pentagon, it grew to 10,000 strong, enough to fill ten or more pin-striped battalions—and the figure did not include lawyers in the reserves. Officers and intelligence operatives not wishing to be prosecuted later for actions taken now—“retroactive discipline” is the term for this—insulated themselves from risk by having attorneys approve every order in advance

⁴ Norton, 256 pp., \$25.95.

of its execution. “If the lawyer said ‘no,’” Goldsmith writes, “the official had a perfect excuse for not acting. If the lawyer said ‘yes,’ the official was effectively immunized from legal liability, including jail.”

Goldsmith offers a typical example of the ensuing dysfunctionality. In February 2002, just months after September 11, Pentagon attorneys produced a 30-page legal opinion examining whether terrorists captured on the battlefield in Afghanistan would have to be read a *Miranda* warning (“you have the right to remain silent . . .”). In the national emergency created by September 11, this extreme legalism and the caution it induced would clearly not do. Tackling the problem was a group of high-ranking officials including Alberto Gonzales, David Addington (Vice President Cheney’s counsel), and, most controversially, John Yoo, the number-two official in the OLC.

THE OLC was the crucial pivot point. It alone “could provide the legal cover needed to overcome law-induced bureaucratic risk-aversion,” and this is what Yoo set out to accomplish in a series of memoranda that put a stamp of legality on the administration’s every counterterrorism initiative. And here is where the real difficulties began.

Some of Yoo’s memos, writes Goldsmith, “were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President.” Seemingly, they freed Bush to take a whole range of actions without consulting Congress or gaining its assent. Indeed, Yoo had argued that Congress could not

place any limits on the President’s determination 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, under our Constitution, are for the President alone to make.

This line of reasoning, comments Goldsmith, was “without any citation of authority,” and was not tenable.

Yoo’s memos were written in reaction to the pressure of events, but they also reflected something else: a conviction, shared by Vice President Cheney and Addington, that executive power had been unduly sapped over the preceding decades and needed to be restored to its rightful place. The view was hardly without merit, as just one vivid example adduced by Goldsmith illustrates.

In June 1942, eight Nazi saboteurs were cap-

tured in the United States; one of them was an American citizen. The group had plans to blow up defense plants and other national infrastructure, along with Jewish-owned department stores. President Roosevelt demanded of Francis Biddle, his attorney general, that the men be tried by a military commission. Although Biddle had reservations about whether the law would permit this, FDR swept such scruples aside. In short order, a commission was established that had “no written procedures,” operated in total secrecy, and was not based upon law. The Supreme Court took up a habeas-corpus plea from the saboteurs but then beat a hasty retreat in the face of threats from the White House. In the end, the military commission pronounced a death sentence on six of the eight. A week later, to the approbation of the public as well as the *New York Times* and the *Washington Post*, they went to the electric chair.⁵ All this happened in the course of a mere six weeks after their capture.

Compare such proceedings with the ongoing effort since 9/11 to establish military commissions for prisoners in Guantanamo. With the executive branch curtailed, that effort is now dragging into its seventh year with no end in sight. It involves men charged with crimes outstripping anything done by the hapless German saboteurs who had managed only to wander around Manhattan and Chicago, spending \$612 of the \$174,588 they had brought with them. The fact that captured al-Qaeda terrorists are today being represented by blue-chip law firms and are using the federal courts to challenge every aspect of the government’s case offers a glimpse of how radically the cultural landscape has changed.

In Goldsmith’s judgment, the Bush administration’s effort to push back against the legal restrictions standing in the way of national security was entirely reasonable. But pursuing it in extreme fashion, on the basis of rickety legal arguments and without regard to the political costs, was not. Yoo’s assertion of executive power did unquestionably enable the President to move forward with a number of effective initiatives, at least for a time. But

⁵ At the time, the *New York Times* editorial page, in remarkable contrast to its stance toward the same issue today, noted that the military commission “was lawfully constituted; and that no cause was shown for the discharge of the prisoners by writ of habeas corpus. . . . The statements made by prosecution and defense counsel made it clear that the accused were members of the German army; that whether or not they landed in a war zone, they came through one to get ashore; and that they went behind our lines wearing civilian clothing. The fact that there were eight of them instead of 800,000 made them no less invaders, subject if captured to military law. The fact that they were not in uniform exposed them to the military penalty of death. In light of what we now know all this is common sense.”

the fact that these were undertaken on a dubious legal footing and without congressional assent, when the same or roughly similar programs could have been undertaken on a sound legal footing and with congressional approval—the Congress was, after all, under Republican control until the end of 2006—led to short-term victories, long-term defeats, and the steady erosion of public support.

One of the most prominent defeats came in 2006 when, in the *Hamdan* decision, the Supreme Court invalidated the administration's laboriously crafted system of military commissions precisely because it had been set up without congressional approval. In this particular instance, it is true, Congress, under appeal from the White House, acted expeditiously to erect a similar system and even handed the President greater powers with respect to captured terrorists. But this was hardly an unalloyed victory. Not only was seeking congressional assent under the duress of an adverse Supreme Court decision a setback to the cause of expanding presidential prerogatives, but the Court had reached its judgment in *Hamdan* less in response to the strictures of the law—Goldsmith is not alone in finding its ruling “legally erroneous”—than in reaction to the “atmosphere of executive extravagance” created by the Bush team. In other words, the administration's dismissive attitude toward Congress had caused a backlash.

“It was said hundreds of times in the White House,” writes Goldsmith,

that the President and Vice President wanted to leave the presidency stronger than they found it. In fact they seemed to have achieved the opposite. They borrowed against the power of future presidencies—presidencies that, at least until the next attack, and probably even following one, will be viewed by Congress and the courts, whose assistance they need, with a harmful suspicion and mistrust because of the unnecessary unilateralism of the Bush years.

THIS LAST line of argument has led to widespread acclamation of Goldsmith by critics of the Bush administration across the Left. A review in the *New York Times* hailed his book as a “devastating” portrait of a “highly insular White House obsessively focused on expanding presidential power and loath to consult with Congress.” At the same time, John Yoo has been pilloried as a “war criminal” for his role in drafting the “torture memos” repudiated by Goldsmith during his tenure in the OLC. But both the acclamation (at

least that coming to Goldsmith from the Left) and the pillorying, the latter extending to a campaign to have Yoo removed from his current tenured position at the Boalt School of Law, are misplaced.

Concerning the torture memos, Goldsmith did indeed maintain that Yoo had reached conclusions about the scope of executive power that “had no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law.” This seemed to him indefensible. Goldsmith's action in repudiating the memos caused great consternation in the White House and in the affected agencies, including the CIA, which had engaged in practices that were now, suddenly, in legal limbo. But even in the face of brutal criticism, the OLC prevailed. Bush and his team did not seek to have Goldsmith fired for challenging the legal basis of their policies. Instead, and contrary to the absurd charge by critics like Lichtblau that they transgressed the law at will, they took difficult steps, however reluctantly, to remain within the law as it was now being interpreted by a duly appointed official.

Even more significantly, it emerges from Goldsmith's book that the legal arguments brought to bear by Yoo “were wildly broader than was necessary to support what was actually being done” by interrogators out in the field. Thus, rejecting Yoo's memoranda was by no means tantamount to concluding that those interrogation techniques were themselves illegal. Even in the gray-area case of CIA practices reserved for “high-value terrorists” like Abu Zubaydah and Khalid Sheik Mohammed—and presumably including methods like waterboarding—it was not obvious “whether and which of the CIA's special interrogation techniques” were in violation of the law. In the subsequent six-month-long reexamination by the OLC of the legal issues, “no approved interrogation technique [was] affected.” In other words, whatever the dispute about the law, the policy as carried out had been within legal bounds all along.

Why, then, did Yoo, a seasoned scholar steeped in the relevant branches of law, write his memos, and why did the administration follow along? Goldsmith's answer is not unidimensional, but it begins with one word: fear.

In the days and months and even years after September 11, the air inside the upper echelons of government was heavily affected by the “threat matrix,” a report produced each day by the sixteen agencies that comprise the U.S. intelligence community and presented to the President and ranking policymakers. Often dozens of pages long, the threat matrix included

warnings extracted from the tens of billions of foreign phone calls and email messages that fly around the world each day, from scores of human informants, from satellite photographs, and from other sources. It summarize[d] every known new threat, ranging from obviously false accusations to credible warnings about catastrophic weapons of mass destruction and conventional attacks in the United States and allied countries around the globe. For each threat the matrix list[ed] possible targets, information on the group planning the attack, an analysis of the threat's credibility, and notes about actions taken in response.

Cumulatively, the threat matrix was a terrifying document. "It is hard," writes Goldsmith, "to overstate the impact that the incessant waves of threat reports ha[d] on the judgment of people inside the executive branch who [were] responsible for protecting American lives." To policymakers, September 11 had made it clear that a highly imaginative grand-scale attack on our homeland could be planned and successfully executed. No less clear was that "despite hundreds of billions of dollars in expenditures, 'round-the-clock efforts by thousands of people, and years of learning, the government [had] little 'actionable intelligence' about who [was] going to hit us, or where, or when."

IN 2002, during the period in which Yoo wrote the interrogation memos, such threat reports were "pulsing as they hadn't since 9/11." So loud had the volume of intelligence chatter grown that the conviction grew that a major second attack was imminent, perhaps timed to the anniversary of September 11. Stopping such an attack was an overriding imperative. With reports surfacing of a possible nuclear detonation in New York City, and with al-Qaeda chieftain Abu Zubaydah having been recently taken into custody, there was tremendous pressure on the OLC to give the President a free hand so as to obtain the information needed to avert disaster. Here was the "ticking time-bomb" that critics of the administration had dismissed as spy-thriller fantasy.

Fear—rational fear, not the "panic" derisively conjured up by Lichtblau—was a proper response to such a threat. In acting to avert it, officials may have wanted, in Goldsmith's words, to "push the law as far as it would allow." But none of them, he believes, including Yoo, "thought he was violating the law." In fact Goldsmith pens a qualified tribute to Yoo, noting that he

has defended every element of the [interroga-

tion] opinion to this day, and I believe he has done so in good faith. Yoo was indispensable after 9/11; few people had the knowledge, intelligence, and energy to craft the dozens of terrorism-related opinions he wrote. The poor quality of a handful of very important opinions is probably attributable to some combination of the fear that pervaded the executive branch, pressure from the White House, and Yoo's unusually expansive and self-confident conception of presidential power.

This seems fair. Moreover, even in criticizing Alberto Gonzales and John Ashcroft more harshly—in effect for being out of their depth—Goldsmith goes some way toward offering a defense of the administration's handling of the crisis, including in possibly extra-legal forays. Here his defense is based upon "honorable precedents" in the American tradition that allow for breaking the law in order to defend it.

Long before Congress restricted the President's wartime authority with laws like the Foreign Intelligence Surveillance Act and the War Powers Act, Presidents faced with extreme threats to the republic had chosen to act outside of the framework of the Constitution. In 1810, Thomas Jefferson put the pertinent principle on paper, in words that speak directly to the situation confronting George W. Bush:

A strict observance of the written laws is doubtless *one* of the highest virtues of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

With the opening of the Civil War in 1860, Lincoln was compelled to pursue Jefferson's "highest" virtue. Writes Goldsmith:

In response to the secession crisis that began when Confederate forces fired on Fort Sumter, Lincoln raised armies and borrowed money on the credit of the United States, both powers that the Constitution gave to Congress; he suspended the writ of habeas corpus in many places even though most constitutional scholars, then and now, believed that only Congress could do this; he imposed a blockade on the South without specific congressional approval; he imprisoned thousands of Southern sympathizers and war agitators without any charge or

due process; and he ignored a judicial order from the Chief Justice of the Supreme Court to release a prisoner detained illegally.

Yet even as Lincoln plainly violated basic constitutional precepts, he rooted his actions in a doctrine implicit in the Constitution itself. Goldsmith's summary quotes both from that document and from Lincoln's own words:

The Constitution requires all federal officers to swear to "support the Constitution," but it requires the President alone to swear to the best of his ability to "*preserve, protect, and defend* the Constitution of the United States." Lincoln thought this special oath conferred upon him a special constitutional "duty of preserving, by every indispensable means, that government—the nation—of which that constitution was the organic law." He believed that "measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation."

Eight decades later, in the run-up to and then in the middle of World War II, this same doctrine of national self-preservation was employed by Franklin D. Roosevelt in taking measures that would similarly thrust the Constitution aside. Some, like the detention of thousands of American citizens of Japanese descent, have been roundly condemned by history. Others, like those involved in setting up the Destroyers for Bases program, were bitterly opposed at the time (often in language strikingly similar to the animadversions of today's *New York Times* against Bush) but have been applauded in hindsight as crucial to the survival of Great Britain and the West.

In sum, Bush's men, writes Goldsmith, were "not entirely on thin ice in thinking that President Bush, like Franklin Roosevelt and Abraham Lincoln, had the power under the Constitution to do what was necessary to save the country in an emergency."

IF, MOREOVER, the history of the republic's great crises is instructive, just as instructive are the actions taken by Presidents who have *not* been faced with supreme national emergencies like the Civil War or World War II yet have asserted presidential authority in much the same way. One such President, although one would never have known it at the time from the thunderous quiescence of the liberal press, was Bill Clinton. In the Clinton era, observes Goldsmith, the OLC "wrote several opinions arguing that the President could disregard

congressional statutes that impinged on the commander-in-chief or related presidential powers." These included, among other things, OLC approval of "the CIA's original rendition program of snatching people from one country and taking them to another for questioning, trial, and punishment," a program for which the Bush administration has been repeatedly lashed by its critics.

They also included, even more strikingly, OLC approval of the bombing raids on Kosovo, "especially controversial because of their scale, because they began without congressional approval, and because they continued in the face of the House of Representatives' affirmative refusal, by a tie 213-213 vote, to authorize them." The political scientist David Gray Adler, cited by Goldsmith, records that Kosovo marked the "first and only time" in our history that a President has disregarded the restrictions of the 1973 War Powers Act, and characterizes Clinton's approach to executive power as one of "absolutist pretensions."

To be sure, there remains the qualification of Goldsmith's that I have already discussed—namely, the Bush administration's insensitivity to "Congress's prerogatives and constitutional propriety." By failing to put its counterterrorism policies on a sound legal footing, and therefore on a sound political footing, the administration, Goldsmith maintains, not only committed serious errors in interpreting the law but sacrificed key objectives (fighting al Qaeda) to a subsidiary one (asserting executive power). Yet whether one accepts or rejects this line of criticism—I found Goldsmith's articulation of it both disturbing and persuasive—it is based upon a thoroughly considered view, one that has taken into account not only historical precedent but the actual circumstances in which the Bush administration was making its decisions.

Agree or disagree with Goldsmith at every point, one does not come away from his book believing that Bush's men acted recklessly. To the contrary: compared with what some of their predecessors did, most notably Roosevelt in his handling of Japanese Americans, they have acted with astonishing restraint in the face of a danger that, by its hidden nature, has exerted a far darker pressure on the responsibilities of statesmen than did the one facing Roosevelt after Pearl Harbor.

Not only that, but their approach has succeeded. Although we still do not know what might yet come at us tomorrow out of the blue sky, the United States, against all expectations, has not been attacked again since September 11. For that reason alone, Goldsmith is surely right in speculating that

future historians may yet “come to view President Bush as we now view Lincoln and Roosevelt,” his constitutional lapses, like theirs, “regrettable but relatively unimportant episodes in the larger arc of liberty.” At the same time, Bush’s accomplishments “will likely always be dimmed by our knowledge of the administration’s strange and unattractive views of presidential power.”

THAT SEEMS a subtle and judicious appraisal. How refreshing it is to read such words next to the countless tracts painting Bush and his associates as torturers and aspiring tyrants. Particularly despicable has been the attempt to turn John Yoo into a pariah. In an additional irony, some of those leading the charge—notably, journalists like Eric Lichtblau, James Risen, and their editors at the *Times*—have declared themselves willing to take the law into their own hands whenever it suits them. Brushing aside statutes that apply to all Americans, they have pledged not to honor grand-jury demands for their testimony in investigations of national-security leaks, even gravely serious ones involving the disclosure of operational counterterrorism programs. In an even more egregious assault on our law and on our security, they have elicited classified counterterrorism information from disaffected government officials and published it for everyone, including our mortal adversaries, to devour.

The exact degree of damage wrought by these efforts to undermine government policy is difficult to specify given the secrecy in which intelligence

programs, including the NSA program, remain wrapped. But Goldsmith is only the latest in a long line of officials privy to the workings of the NSA program who have testified to the severity of the injury. “I was not opposed to . . . vigorous surveillance of terrorists,” he writes of the NSA program. “I agreed with President Bush that the revelations by Risen and Lichtblau had alerted our enemies, put our citizens at risk, and done ‘great harm’ to the nation.”

The degree of hypocrisy in Lichtblau’s book and similar journalistic efforts is staggering. It is exceeded only by the intellectual slovenliness with which he and his colleagues have advanced their case, the quantity of self-inflating gush in which they tend to wrap themselves,⁶ and the mendacity with which they strive to subvert those who have entered public service to protect the Constitution and the rights and freedoms it guarantees from tenacious enemies. As for those enemies, their own respect for those rights and freedoms, and for prize-winning reporters, is illustrated by the fate of Daniel Pearl of the *Wall Street Journal*; it amounts to taking journalists prisoner and cutting off their heads.

⁶ Here is Lichtblau, in *Bush’s Law*, describing the epiphany he experienced at the “instant” in which he decided to enter “noble public service” and become a journalist: “There’s a moment in time when a fuse is lit, a passion born. The moment is powerful and pungent, and it carries with it the sight and sound and feel of possibilities both real and imagined; the ‘swish’ of ball hitting net for the first time as a clapping, bounding five-year-old dreams of becoming the next Michael Jordan; the red haze of a sunset bleeding into the greens of a forest on an aspiring artist’s debut canvas. . . .”