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When Governments Break The Law: The Rule of Law and the Prosecution of the Bush Administration.

David P. Forsythe

University of Nebraska-Lincoln, dforsythe1@unl.edu

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This edited collection by Austin Sarat and Nasser Hussain starts by noting that during the George W. Bush administration, there were charges of violation of law regarding domestic surveillance, the invasion of Iraq, and the policy toward enemy prisoners. It then examines the question of why prosecutions and/or a truth commission have not occurred on any of these subjects, given that the United States is supposedly committed to the rule of law in which protection of human rights is supposed to loom large. The book-length treatment of Macedonian politics that has been released since the cessation of hostilities. The rich discussion journalists, but also because of inside commentary by rights organizations, activists, and scholars, not to mention journalists, but also because of inside commentary by

Those who follow the subject closely know that the Bush administration adopted a policy of torture and cruelty toward certain enemy prisoners after 9/11. We know this not only because of the outside commentary of human rights organizations, activists, and scholars, but also because of inside commentary by governmental officials in the Executive Branch have not been much interested in pursuing that option. Holmes, noting that the law is made by elites with an eye to protecting those elites, points out not only that governmental officials in the Executive Branch have the defense of sovereign immunity against prosecution. They also have the defense of acting in good faith consistent with legal memos once issued by the Office of Legal Counsel in the Department of Justice, however erroneous.


— David P. Forsythe, University of Nebraska-Lincoln

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those opinions may be. Even further, he notes that high officials can avail themselves of the argument of state secrets; the higher the official, the more that official can say that proper defense against charges of illegality requires the release of documents that the court should not pursue lest vital national security interests be compromised. US courts have often proven sympathetic to such claims.

To summarize his lengthy and wide-ranging analysis, Holmes is highly skeptical that national legal proceedings could effectively punish high officials who authorized torture (or aggression or illegal domestic surveillance). He argues that at the end of the day, law in the United States effectively does not control—and cannot punish—political elites who claim that they are acting in the interest of national security. He argues that persons like Vice President Dick Cheney and his key aide David Addington knew exactly how law and politics work in this country, took the necessary steps to protect themselves from legal accountability, and are—and will remain—beyond the reach of US law. His is a persuasive analysis.

That leaves open the possibility of US officials being prosecuted in foreign courts under universal jurisdiction, but few are the foreign officials who want to pursue such proceedings given the importance and power of the United States. As demonstrated by recent events in both Belgium and Spain, when foreign states start down this road, the United States is not hesitant to apply pressure to divert the process, with many foreign officials hesitant to elevate this kind of criminal justice over good relations with Washington.

As for the option of some sort of truth commission, perhaps along the lines of the bipartisan 9/11 Commission in the United States or the South African Truth and Reconciliation Commission, many things might be said but only one will be noted here. It took the United States more than 40 years to apologize and pay reparations for the wrongful internment of Japanese and Japanese Americans, and their arbitrary loss of property, during World War II. That was long after the end of the war and the demise of the Japanese threat—which, incidentally, was never very great on the mainland’s West Coast, as correctly perceived by any number of security officials at that time. It is likely to be some time, if ever, before the United States adopts a similar mea culpa with regard to such matters as torture after 9/11. Most likely any candid review of such US policies would occur after the demise of further attacks by extremist Islamic elements. As long as there are prospects for further attacks, something like 40% of Americans tend to elevate harsh security policies over prohibitions on torture (depending, of course, on how various questions are worded). As numerous observers have noted, any candid inquiry now would add to the already polarized and poisonous political culture extant in Washington.

In the final analysis, the Holmes chapter alone is worth the price of the book.