

2010

# 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](mailto:dforsythe1@unl.edu)

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Forsythe, David P., "When Governments Break The Law: The Rule of Law and the Prosecution of the Bush Administration." (2010).  
*Faculty Publications: Political Science*. 65.  
<http://digitalcommons.unl.edu/poliscifacpub/65>

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

**Administration.** Edited by Austin Sarat and Nasser Hussain. New York: New York University Press, 2010. 240p. \$75.00 cloth, \$25.00 paper.

doi:10.1017/S1537592711005202

— David P. Forsythe, *University of Nebraska-Lincoln*

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 editors themselves do not take a clear position on these matters but say rather that they wish to analyze various views. The contributing authors, all from leading academic institutions in the United States, have written chapters that are disparate and in some ways uneven. The book focuses for the most part on prisoner issues.

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, not to mention journalists, but also because of inside commentary by

those in the know. A US official, Susan Crawford, dismissed legal proceedings against a Guantanamo prisoner because he had been tortured; his interrogation was supervised by Secretary of Defense Donald Rumsfeld, among others. The cautious and credible International Committee of the Red Cross concluded, on the basis of its interviews with former CIA detainees, that they had been subjected to torture or cruel treatment in secret prisons. Space does not permit references to US *policy* toward prisoners in Afghanistan, Iraq, and elsewhere. So we are not focused here on “bad apples” who engaged in mistreatment in excess of policy guidelines, but rather authorization of policy at the highest levels.

The long introduction by the editors does indeed survey the options available for a response, and sometimes provides interesting background—for example, reminding us that at the Nuremberg trials, the Altstoeer case established that “legal advisors who prepare legal advice that is so erroneous as to give rise to an international crime are themselves subject to the rules of international criminality” (quoted at p. 11). This could be seen as having relevance to the lawyers in the US Department of Justice who provided the so-called torture memos that enabled the Bush policies of torture and cruelty that followed.

Some chapters, like the one by Claire Finkelstein on “Vindicating the Rule of Law,” are complex and dense and perhaps suitable for other law professors. In their introduction, the editors need no fewer than eight paragraphs to try to summarize her views. On the other hand, the chapter by Daniel Herwitz on abuse of prisons at the Guantanamo Naval Base, and the possible responses by various actors, is a much shorter think piece, with only seven reference notes (Finkelstein had 42).

To focus on another example, the chapter on universal jurisdiction by Lisa Hajjar is a clear summary of the concept and is perhaps useful for undergraduate readers wanting an introductory overview, but it presents little that is new or thought provoking for those already familiar with the concept.

For this reviewer, the most striking chapter is by Stephen Holmes on “The Spider’s Web: How Government Lawbreakers Routinely Elude the Law.” With penetrating insight that some might term critical realism, the author explains why successful prosecution of Bush officials in US courts is highly unlikely—which, no doubt, explains one reason why President Barack Obama and his attorney general 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

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 reluctant 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.