Grasping Reality with Both Hands

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Social Studies 50th Anniversary Symposium: Is There Hope for the Rule of Law in America?

That was the question asked by Denver University Professor Alan Gilbert during the morning panel.

Here is the answer I gave, as best as I can reconstruct it:

The question is: "Is there hope for the rule of law in America?" My answer is: No.

Begin with the assassination of George Villiers, Duke of Buckingham and Prime Minister to King Charles I Stuart, on 23 August 1628. Nobody at the time doubted the king's power to torture the confessed assassin, John Felton, on the rack--the king's father James I Stuart had tortured Guy Fawkes and the other Gunpowder Plot suspects. But the king's power to torture was part of his prerogative powers of state, and Charles I Stuart sought to reserve his prerogative powers for use in more important arenas--that is, to raise money with them.

Thus Charles I asked his judges to authorize the torture of John Felton not as an act of state under the royal prerogative but as part of the process of the criminal law. And let's let William Blackstone pick up the story at IV, 25, 326 of his *Commentaries on the Laws of England*:

> [T]rial by rack is utterly unknown to the law of England; though once... [the] ministers of Henry IV [Lancaster]... laid a design to introduce the civil law into the kingdom as a rule of government... erected a rack for torture, which was called in derision the Duke of Exeter's daughter, and still remains in the Tower of London; where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth.
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> But when, upon the assassination of Villiers, duke of Buckingham, by Felton, it was proposed in the privy council to put the assassin to the rack in order to discover his accomplices, the judges, being consulted, declared unanimously, to their own honour and the honour of English law, that no such proceeding was allowable by the laws of England...

With the Great Revolution of the 1640s the prerogative powers of the monarch of the United Kingdom shrank. And with the Glorious Revolution they shrank again. And with the accession of the German-speaking Hanover dynasty they shrank yet again. And by 1789, when James Madison and company moved the then-powers of the monarch of the United Kingdom to make them the powers of the President of the United States, there were no prerogative powers left: the President was 100% Chief Magistrate with the power and the duty to take care that the laws be faithfully executed, and 0% *princeps legibus solutus*.

So things stood for 200 years--save for Abraham Lincoln's arrogation of Congress's Art.I §9 power to suspend the "privilege of the writ of *habeas corpus* in "cases of rebellion or invasion" but only when such suspension was "required" for the public safety.

So things stood until John Yoo.

Now John Yoo is an interesting case. In 2000 he was arguing at the Cato Institute that the President's powers as commander-in-chief were extremely crabbed and narrow--and that President Clinton had, in fact, exceeded his c-in-c powers and undermined the rule of law by ordering American soldiers to *obey the orders of a British NATO general*. That the president--or, indeed, that any commander--does not have the power to place American soldiers under allied command would have been a great shock to Dwight D. Eisenhower, or Harry S Truman, or Franklin D. Roosevelt, or Woodrow Wilson, or William McKinley, or indeed George Washington himself. Yoo's claim in 2000 had absolutely no warrant in the constitution, in the law, in precedent, or in history.

But that is how it is with Yoo.

Sources who should know and whom I believe to be reliable tell me that when histenure case moved through the University of California at Berkeley, historians objected to his use of history in his published articles: "What the frackity-frack is this?" they asked. "This isn't history. This isn't how it happened. This isn't *wie es eigentlich gewesen*." The response of then then-Dean of Berkeley Law School, a response that was convincing to the then-Chancellor of the University of California is said to have been that history plays a special role in legal academia and argument. In legal academia, one's claims about history do not have to be true, the argument went. Indeed, a major mode of legal argumentation and academic debate is to make false claims about what the law has been in past in the hope that those claims will then shape what the law will be in the future.

By 2001 with a Republican as president John Yoo had reversed field 180 degrees. He was making a very different set of false claims about what the law of America had been. He was then claiming that the president's commander-in-chief powers contained within them prerogative powers to torture and kill outside of legal procedure that would have astonished George III Hanover, and even exceeded those of William I Conqueror. When William I Conqueror tortured or killed, he agreed owed his barons at least an after-the-fact accounting of why if not any before-the-fact procedural checks.

Backed by John Yoo and company, George W. Bush claimed that he did not owe even an after-the-fact accounting. And Barack Obama holds to the same line.

So I see no hope.

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