

[*Crisis and Command: A History of Executive Power From George Washington to George W. Bush*, John Yoo, Kaplan Publishing, 544 pages]

A Brief For Bush

By Joseph Margulies

JOHN YOO, the embattled law professor and former attorney with the Justice Department's Office of Legal Counsel, has completed his third and final book on the power of the presidency. Yoo, of course, was the principal author of the most controversial legal memos of the Bush years. His work gave the administration cover for many of its most problematic programs, including indefinite detention at Guantanamo and torture by the CIA. Given this résumé, it has become an immensely popular parlor game to launch personal attacks on Professor Yoo. No reproach seems to satisfy his many detractors, who vilify him in print and protest him in public. Websites are devoted to his pillory. At a minimum, we are told, he should be indicted as a war criminal, fired from the academy, and disbarred from the practice of law.

Such insults are easy to level but harder to defend. I say this despite my long professional engagement with Yoo's handiwork. I have been involved in challenges to post-9/11 detentions since late 2001. I was counsel of record in *Rasul v. Bush*, the first case to hold that Guantanamo was not a prison beyond the law. I am also counsel for Abu Zubaydah, the man for whose interrogation the CIA sought, and Yoo wrote, the infamous torture memos in August 2002. At every step of the way over these last seven years, I have confronted legal arguments crafted by Yoo—arguments I consider legally deficient and morally bankrupt. But I have never doubted that he sincerely believed the president had the authority to act as he did. He is mistaken, not

malign. My criticism has always been with his ideas, not his character.

And the idea behind his latest book, *Crisis and Command: A History of Executive Power From George Washington to George W. Bush*, is simple: throughout American history, crisis has inspired constitutional daring, and the race to presidential greatness goes not to the leader who hews most faithfully to the constitutional text but to the one most willing to bend the document to meet the perceived demands of the day. It is a disappointing contribution to the literature on the Constitution and the American presidency, and beneath a scholar of Yoo's ability.

In his introduction, Yoo mocks the raft of writers who saw a return of the imperial presidency in the policies of his former employer. They just don't understand. The reader settles down for the coming donnybrook, in which the learned professor will marshal what he perceives as the lesson of American history to prove that presidential greatness requires inherent authority—the prerogative to ignore the will of Congress and the fetters of the Constitution when the national interest demands it, as when war clouds our visage. (That is what the historian Arthur Schlesinger meant by the imperial presidency when he coined the term and what he described at length in his 1973 Pulitzer Prize-winning book of the same name.) But the proof never comes. Professor Yoo is a creative, even inventive scholar. Yet even he cannot make an argument that the great sweep of American history sustains a case for inherent presidential power beyond the Constitution. It is simply not true.

The most thorough account of these issues during the founding and early Republic is Abe Sofaer's classic from a generation ago, *War, Foreign Affairs, and Constitutional Power: The Origins*. Professor Sofaer, then at Columbia Law School, later a Reagan administration appointee, and now a senior fellow at the Hoover Institution, carefully documents the many occasions when presidents have deliberately pursued consti-

tutionally questionable behavior that could, or did, lead to military engagements. He concludes, "At no time did the executive claim 'inherent' power to initiate military action."

Lincoln, for instance, accused President Polk of acting unconstitutionally when he unilaterally provoked the Mexican War in 1848. The founders, Lincoln said, had "resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us." Yet 13 years later, Lincoln assembled the militia, enlarged the Army and Navy beyond their authorized numbers, suspended *habeas*, spent unappropriated funds, and instituted a naval blockade of the southern ports, all without congressional approval. But Lincoln understood that his actions were beyond the Constitution, and that he would later be accountable to Congress and the American public. Never did he pretend these steps were justified by some inherent right to act as he saw fit.

As Yoo well knows, the claim to an inherent right has a much more modest historical pedigree, beginning only in 1950 with President Truman's defense of his decision to dispatch troops to Korea without congressional authorization. Dean Acheson, Truman's secretary of state, later took credit for this constitutional innovation: it was not for nothing that Acheson titled his autobiography *Present at the Creation*.

Since Truman, the fortunes of the imperial presidency have waxed and waned. Every postwar president has claimed some version of the power of inherent right, though some, like Eisenhower, made relatively less use of it than others, like Johnson. But this postwar experience proves there is no correlation between presidential greatness and constitutional license. The Nixon presidency, for instance, represented the high-water mark of that thinking—until George W. Bush at least. Nixon demonstrated, to the nation's considerable regret, that should the ineffable demands of national security be enough to unleash a president's inherent author-

ity, then it is just a matter of time before domestic political dissenters and “enemies” at home come to be regarded as threats to national security. “When the president does it,” Nixon later explained, “that means that it is not illegal.” Wisely, Professor Yoo does not number Nixon among the great presidents. Yet his theory cannot explain Nixon’s many shortcomings.

The lesson here is that many who have occupied the Oval Office at times have been, shall we say, constitutionally adventuresome. The Founders fully expected as much. And the wisdom of their insight was not the fatalistic resignation that it would happen but the utopian vision that it might be harnessed. They hoped to design a political system in which no part may long operate without the aid of the others, so that the natural and salutary impulse by one

branch to chaff at the limits of its power would be checked by the competing impulse of the other, interdependent branches to do the same. The result, they hoped, would be “a machine that would go of itself,” as once was said of the Constitution.

The presidential impulse to take liberties with the Constitution is thus not a sign that some presidents are great but that all are human. For that reason, it bears no relationship to excellence. In arguing otherwise, Professor Yoo makes an elementary logical error: because great presidents have bent the Constitution, he thinks greatness must require it. This confuses a characteristic with a cause; nearly all presidents have bent the Constitution, and Lord knows we cannot count them all as exceptional. The characteristic, in other words, cannot explain the condition. Instead, presidential greatness, to the extent we can define it, emerges as the unpredictable convergence of character and circumstance—extraordinary leaders who made the most of grave challenges and unique opportunities.

It was George W. Bush who demonstrated most clearly the difference between breaking the mold and breaking the law. Yoo maintains that the policies of the Bush administration “fell within the precedents set by earlier Presidents.” But that is not defensible. The most controversial policies of the Bush years—including indefinite detention without due process, legalized torture, and warrantless domestic surveillance of American citizens—shattered American legal and moral traditions. In each case, the Bush administration claimed an inherent right, ostensibly justified by the crisis at hand, to exceed the Constitution, ignore Congress, and evade the Judiciary. At the same time, the administration adopted an unprecedented commitment to secrecy, which to this day has prevented the complete scope of executive misfeasance from coming to light. It was, by design, unfettered executive power deliberately divorced from public or political accountability.

Professor Yoo remains an unapologetic booster for these policies and defends them by dropping all pretense to scholarship. He repeats the old canard about torture as the one indispensable means to get “timely information from captured al Qaeda terrorists.” Tellingly, he does not say that the information would be reliable and avoids the mounting evidence that the torture program has repeatedly produced false leads, including the catastrophic claim of a link between al-Qaeda and Saddam Hussein. He insists that warrantless domestic surveillance is necessary “to prevent a devastating attack on the American homeland,” but does not stoop to justify his hyperbole. And he mocks the decision by the Obama administration to protect prisoners from “humiliating and degrading treatment” and “outrages on personal dignity,” as required by the Geneva Conventions.

Professor Yoo is not a student of the American presidency and does not claim either to advance new constitutional arguments or to have unearthed new primary sources. It is impossible to avoid the suspicion that his real objective is not so much scholarship as redemption. If President Bush, against all odds, becomes the next great man, known to history as the president who reshaped the office to meet the challenges of his time, then Professor Yoo—the legal architect of the attempted transformation—rises like a phoenix from the burned wreckage of a ruined reputation, no longer a pariah but a sage.

History, of course, always has the last word, and no one should be fool enough to predict with confidence whether the passage of time will be kind to the memory of our 43rd president. But one lesson of American presidential history is already clear: greatness, like respect, requires considerably more than an accumulation of power. It is a lesson that John Yoo has not yet learned. ■

Joseph Margulies is Clinical Professor of Law at the Roderick MacArthur Justice Center at Northwestern University.

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[*Obamanomics: How Barack Obama Is Bankrupting You and Enriching His Wall Street Friends, Corporate Lobbyists, and Union Bosses*, Timothy P. Carney, Regnery, 256 pages]

Big Government, Big Business, Big Rip-off

By Michael Brendan Dougherty

THE RIGHT HAS GONE MAD, it's true. The conservative head, already suffering traumatic brain injury after insisting that pre-emptive war, waterboarding, and debt are enduring Western values, finally went blank when Barack Obama ascended the federal throne. Tea-party activists say that a Kenyan Nazi is readying a death panel for Sarah Palin. Fascism is liberal nowadays; communism, too. It's all connected. Glenn Beck is chalking lines between Keith Olberman, Levi Johnston, and Leon Trotsky. How can the Right fight an enemy that will not release its birth certificate?

Fortunately, Timothy P. Carney has a cure for such dementia: muckraking journalism, of the sort he ably exhibits in *Obamanomics: How Barack Obama Is Bankrupting You and Enriching His Wall Street Friends, Corporate Lobbyists, and Union Bosses*. Don't let the Fox-appearance-fetching title throw you: George W. Bush comes in for nearly as much abuse as Obama. A reporter for the *Washington Examiner* and a protégé of the late Robert Novak, Carney has carved out a career of picking apart Washington's latest regulations on industry and exposing the lobbyists and corporations getting rich in the name of public interest.

In *Obamanomics*, he demonstrates time and again how Big Business and Big Government are natural allies: an incumbent business loves nothing better than a regulator that raises overhead

costs for its smaller competitors or introduces legislation that ensures all Americans are compelled to buy its products.

Carney doesn't bother drawing ideological lines between Rahm Emanuel and Karl Marx. He is too busy documenting how Emanuel deals with his former partners at Goldman Sachs or reporting the activities of former Senate Majority Leader Tom Daschle, who now splits his time between advising the president on healthcare reform and cashing checks from health-industry clients.

Carney points out how the media treat nefarious partnerships between large corporations and government regulators as a surprise or as "proof that the case for reform is overwhelming," when in fact cooperation is routine and often involves easily discernible financial interests. As he puts it, "The economic law underlying *Obamanomics*—opaque to most journalists and contrary to conventional wisdom—is this: increased government control centralizes industries and favors the biggest businesses." So while liberal bloggers like Matt Yglesias and Ezra Klein welcome the support of red-state behemoth retailer Wal-Mart on their side of the healthcare debate, Carney points out that Wal-Mart is using government regulation to raise overhead costs for Target, which offers fewer health benefits than Wal-Mart.

Obamanomics also puts the lie to Obama's campaign rhetoric, in which he excoriated corrupt Republicans for promoting deregulation because they were subservient to large corporate interests and told lobbyists that their days were numbered. Obama claimed, for instance, that McCain had voted 23 times against "alternative energy like solar, and wind, and biodiesel." Carney notes, however, that most of these votes were against ethanol subsidies—a government program that acts as a simple wealth-transfer scheme from taxpayers to agribusiness giant Archer Daniels Midland, with no broader economic or environmental benefits.

Chapter 9, "GE: The For-Profit Arm of the Obama Administration," is worth the price of the book and provides a perfect case study. Just days after Obama's inauguration, General Electric CEO Jeff Immelt wrote to shareholders, "The global economy, and capitalism, will be 'reset' in several important ways. The interaction between government and business will change forever. In a reset economy, the government will be a regulator; and also an industry policy champion, a financier, and a key partner." Translation: Washington will subsidize our industry, provide grants for our research, and mandate our products for environmental reasons. *Kaching!* "The company makes light bulbs and refrigerators, sure," writes Carney, "but it also has a finance arm, a transportation arm, a healthcare arm, a communications arm, and more. The above letter from Immelt reveals what these arms all have in common: they all reach out for government favors."

Let us count the ways. GE launched its own PAC to solicit donations from its employees for candidates "who share GE's values and goals." Unsurprisingly, Obama received more money from GE employees than any other politician. Immelt now sits on Obama's economic recovery board and enjoys a weekly phone call with White House economic adviser Austan Goolsbee. In the past decade, GE has spent more on lobbying than BlueCross, Exxon, or Altria, the owners of Philip Morris. Former Sens. Trent Lott (R) and John Breaux (D) lobby for GE. And former Rep. Dick Gephardt, tribune of the working man, lobbies for NBC Universal, which as we go to press is a subsidiary of the GE conglomerate. If by any chance Obama forgets to ask himself "What would Jeff Immelt do?" before signing legislation, GE has recruited Linda Daschle, wife of that authentic North Dakotan voice of reform, Tom, as another of its lobbyists.

Where's the profit in all this influence? For one, GE has been investing in "carbon offset" assets that have almost no value unless the Obama administra-