Book Reviews

Constitutional Chaos: What Happens When the Government Breaks Its Own Laws

by Judge Andrew Napolitano

*Reviewed by Michael C. Cernovich**

You can't always judge a book by its cover, but you can often judge a book by its dedication. Judge Andrew Napolitano, who is a Senior Judicial Analyst for the Fox Television Network, dedicates *Constitutional Chaos* to Sir Thomas More, who was "murdered by the government because he would not speak the words the King commanded."[1] Fans of *A Man for All Seasons* can see where this book is heading. Judge Napolitano then quotes former President Ronald Reagan's famous wit: "The nine most terrifying words in the English language are: 'I'm from the government and I'm here to help.'"[2]

Constitutional Chaos is full of examples where government officials, like Roper, would "cut down every law in [America]"[3] to catch the Devil. The Reagan quote is also particularly apt, and shows a real incongruity in conservative thinking. Conservatives generally distrust the government, except when it's "here to help" by enacting and enforcing criminal laws. Why should skepticism of government power end at the text of criminal laws?

Napolitano's dedication serves as a unifying theme for his book. As St. Thomas More recognized, the government cannot punish every "bad man" without also destroying the rule of law that protects the innocent.[4] And when the government offers to help, by criminalizing and regulating all human conduct, we should be terrified. Indeed, the book is filled with alarming examples of the government "helping."

Napolitano devotes several pages to former Attorney General Janet Reno's prosecution and conviction of several innocent men and women. While serving as Dade County State's Attorney, Janet Reno pioneered what would later be called the "Miami Method." In theory, the method was brilliant: task experienced rape prosecutors to form a unit specifically designed to target child molesters. Hire experts to speak with children in friendly settings, and videotape those sessions for trial. The execution of that method, however, was horrifying. Under Reno's execution of the Miami Method, psychologists and social workers would convince unharmed children that they had actually been molested, as Grant Snowden can attest.

Grant Snowden was too short to become a police officer. But after years of effort he was finally able to begin his dream career. He did well under pressure, and was soon highly decorated: in 1984 he was South Miami's Police Officer of the Year. Since public service rarely pays well, his wife ran a part-time day-care center from their home. The Snowdens were living well. Then, in 1985, one of Mrs. Snowden's day care attendees said that Grant Snowden touched her inappropriately. That seemed improbable since at the time the abuse allegedly occurred, the girl wasn't at the Snowdens' home. Grant Snowden denied the charge and went to trial. Given the lack of any real evidence, he was acquitted.

Napolitano reports that Reno responded by turning the Miami Method into the Shotgun Approach. Reno retained Laurie Braga, someone lacking formal education in child psychology, to interview children who had stayed at the Snowdens. During the interviews, Braga would undress dolls, and convince children they had been molested. One child, after an interview, claimed that Snowden had urinated in her mouth. Still, there was no physical evidence that Snowden abused anyone.

This was because the children were never molested. After meeting with Braga, many children came out believing they had been sodomized with snakes, sticks, and swords. Their stories were unbelievable. But Reno, and prosecutors acting under her, put on expert testimony claiming that children never lie about molestation.[5] Thus, even though the stories were incredible, the expert testimony buttressed the story. Because several children related stories, "something" horrible must have happened. Snowden was convicted after a second trial on related abuse charges.

After spending almost a dozen years in prison, a federal court granted Snowden's petition for a writ of *habeas corpus* and took the unusual step of allowing Snowden to remain free pending the government's appeal. The Eleventh Circuit Court of Appeals affirmed.[6] Writing for the panel, Chief Judge James Larry Edmonson noted that, excluding the expert testimony, there was "very little evidence" of guilt.[7] Indeed, the panel noted how unjust the case was, writing that: "Very rarely will a state evidentiary error rise to a federal constitutional error; but given the circumstances of the trial underlying this case, we conclude that allowing expert testimony to boost the credibility of the main witness against Snowden—considering the lack of other evidence of guilt—violated his right to due process by making his criminal trial fundamentally unfair."[8] The Snowden travesty is not an "isolated incident." Sadly, the abuse of prosecutorial power is much more common than people generally believe.

Another practice the book focuses on is the violation of the federal witness bribery statute, which Napolitano claims occurs in courtrooms across the country. Under the federal witness bribery statute, 18 U.S.C. §201(C)(2), "[whoever] directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a

witness" has committed a felony. A thing of value has been broadly defined, and includes everything from money to conjugal visits.[9] Yet prosecutors regularly pay witnesses money, and give them promises of leniency, in exchange for testimony.[10]

In one such case, *United States v. Singleton*,[11] the prosecutor promised a drug dealer-turned-witness leniency for his testimony. The defense sought to exclude the drug dealer's testimony, arguing that it was obtained in violation of the federal witness bribery statute. The district court admitted the evidence, but was reversed by a three-judge panel of the Tenth Circuit Court of Appeals.[12] The panel's analysis was straightforward. The statute did not make any exception for prosecutors. Thus, it would be for Congress, and not the courts, to exempt prosecutors from its protection.

Ten days later, the Tenth Circuit vacated the opinion and agreed to rehear it *en banc*. Later, in a conclusory opinion, a split *en banc* court ignored the distinction between principal and agent, writing that federal prosecutors are "the alter ego of the United States." And as the alter ego of the United States, a prosecutor cannot be a "whoever." Why did an activist court ignore the plain language of a statute to side with prosecutors? The court's rationale can only be that of the tyrant—not law, but necessity.[13]

Of course, it may be that prosecutors should be allowed to grant promises of leniency in exchange for testimony. But it is a weak claim to say that the plain text of the statute does not apply to current prosecutorial practice. That is Napolitano's point, and he reiterates it time and again in his book. Prosecutors are charged with enforcing the laws—all laws, even the ones that make their jobs harder. Instead, they are breaking the law to enforce it, and judges are too often complicit in this. Where a law is generally applicable, no one should get a free pass.

The book is short on citations to legal and scholarly sources. It's a far cry from *The Founder's Constitution*. Then again, the book is not intended as a treatise but as a wake-up call. It's not a book of philosophy: it's a book of anecdotes. But the anecdotes are calculated to turn the reader on to Judge Napolitano's philosophy of individual freedom. Although the book emphasizes criminal law, other legal topics are addressed.

Prepare to be shocked. Prepare to be outraged. Prepare to disagree, for there is much to disagree with. But be prepared for Judge Napolitano's courage and non-partisanship. Few people are brave enough to criticize both former Attorneys General Reno and John Ashcroft. But this judge does. In doing so, he shows that, to borrow from Robert Bolt: Judge Napolitano is a man for all administrations.

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Footnotes

[1] Judge Andrew P. Napolitano, *Dedication* to Constitutional Chaos: What Happens When the Government Breaks Its Own Laws (Nelson Current 2004).

[2] *Id.*

[3] Robert Bolt, A Man for All Seasons at 66 (Vintage International 1990).

[4] *Id.* at 66 ("Yes, I'd give the Devil benefit of law, for my own safety's sake.").

[5] *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir. 1998) ("The evidence at issue in this petition is testimony by an expert witness (Dr. Miranda) that 99.5% of children tell the truth and that the expert, in his own experience with children, had not personally encountered an instance where a child had invented a lie about abuse.").

[6] *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998).

[7] *Id.* at 738.

[8] *Id.* at 739.

[9] *Salinas v. United States*, 522 U.S. 52 (1997) (interpreting the federal program bribery statute, 18 U.S.C. 666).

[10] *See* U.S. Dept. of Justice, United States Attorneys' Manual at §2044 ("An aphorism sometimes used to sum up the distinction between a bribe and a gratuity is that a bribe says 'please' and a gratuity says 'thank you.'").

[11] *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999).

[12] *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *vacated and reversed*, 165 F.3d 1297 (10th Cir. 1999).

[13] The court's conclusion comes down to this: bribing witnesses, even if unlawful, is necessary.