

Never Again: Securing America and Restoring Justice

BY JOHN ASHCROFT

Reviewed by Christopher Wray & Robert Hur*

One senior administration official described my role in President George W. Bush's administration as one of 'spear-catcher.' Every spear caught is injury avoided; the ones you don't catch—the ones that catch you—are the ones that really hurt. John Ashcroft

This quote from John Ashcroft's new book, Never Again, conveys much about the task of serving as Attorney General during a period (2001 to 2005) marked by the largest and most devastating terrorist attacks in American history. The metaphor of catching spears is an aptly martial one, for Ashcroft served as a member of a war Cabinet. Early in his tenure, the country was wrenched into a state of war by the attacks of September 11. Haunted, like all Americans, by images of hijacked airplanes and burning buildings, he immediately set about his duty of re-orienting the Justice Department toward the terrorist threat and ensuring that the Department did everything in its power to prevent further attacks. As September 11 made all too clear, the front lines of this war are not only those manned by our soldiers in faraway lands; our enemies have brought the conflict to us, and law enforcement agents and prosecutors confront them on our own soil.

This task, already a Herculean one, was further complicated by the heated criticism of the Bush Administration's response to September 11. By virtue of his position as the nation's top law enforcement officer, charged by the President himself with preventing further terrorist attacks, Ashcroft became the face that Americans associated with many of the Administration's most high-profile and controversial methods for grappling with the terrorist threat. To be the President's spear-catcher, Ashcroft needed—and had in full measure—a steady willingness to weather the heavy blows of those who disagreed with him.

Those of us who served with him in the Justice Department during this time saw him face this situation with remarkable calm and resolve, borne of the conviction that he and the Administration were fulfilling their obligation to do everything within their lawful authority to protect the American people from further attacks. In the best tradition of leaders in times of crisis, once he determined what he believed was the right thing to do, he went forward without flinching from the political or personal harm he might suffer as a result. Hence, as he says, he "may have been the most controversial attorney

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general in modern American history. . . . People love me or hate me. Few are indifferent."

Readers of Ashcroft's book will detect neither hand-wringing over the size of his "hate" camp nor fire-breathing rhetoric intended to galvanize those in his "love" camp. Rather, they will find a straightforward, clear-eyed account of the staggering challenges that confronted the nation during Ashcroft's service as Attorney General and his efforts to confront those challenges and prevent further loss of American life. While his role was an intensely public one, Ashcroft's book provides revealing background details that bring to light his character and the deliberations and decisions made in the wake of the September 11 attacks. Ashcroft's writing often humanizes him—for example, in the weeks after September 11, he exhibits the all-too-human reactions of anger, frustration and fatigue—and tempers his public caricatures with a welcome measure of truth and sanity. Even those who have thrown spears of their own may find admiration for his dedication to public service, great determination and clarity of purpose.

Never Again begins at a point in Ashcroft's career that has since been eclipsed by his record as Attorney General: his unsuccessful effort in 2000 to win re-election to the U.S. Senate from Missouri. Before he was elected to the Senate, Ashcroft served for two years as Missouri's state auditor, two years as state assistant attorney general, two terms as state attorney general and two more terms as the governor of Missouri—a twenty-year record in state government that showcases his deep commitment to public service. With immense dignity, he declined to contest defeat at the hands of former Missouri Governor Mel Carnahan—who had perished in a plane crash two weeks earlier: "There were already loud, contentious voices shouting and arguing with one another over the Bush-Gore results. We didn't need any more divisiveness."

The book's title is adapted from the instructions Ashcroft received from President Bush on the morning of September 12: "Don't ever let this happen again." Ashcroft adopted the words "Never again" as a personal motto for the remainder of his time as Attorney General. Never again, he resolved, would Americans suffer as they had on September 11.

Like Ashcroft, many Americans remember vivid and personal details of the September 11 attacks: where they were when they heard the news; when they first viewed the horrifying images that became seared into the nation's collective consciousness; whom they telephoned immediately after learning of the tragedy. Ashcroft's own memories are as vivid and pungent as anyone's. He can "still see the doomed leaping from the World Trade Center, and smell the stench of the rubble." His powerful recollections of that day bring back one particularly terrifying aspect of the attacks:

We did not know whether more attacks were imminent. Four aircraft had crashed—two in New York, one in Washington and one in Pennsylvania—but still others were sending out distress signals. These airplanes' pilots responded that the mayday signals were unintentional, but how were we to know whether or not a terrorist was holding a knife or a gun to the captain's throat as we answered a mayday call? . . . How many other planes were still out there with madmen at or near the controls?

organizations require a firm and determined hand at the helm to commit to a new course. Given the radical re-tooling required, the institutional hurdles present and the time pressure involved, Ashcroft's efforts yielded remarkable results.

The results of all of these efforts after September 11, 2001? During the remainder of Ashcroft's tenure as Attorney General and the service of his successor in that post, the United States has not suffered another terrorist attack on its soil. To be sure, no one can attribute the length of this respite to any single factor, and Ashcroft makes no attempt to take credit for it. Indeed, he provides a sobering reality check by intoning solemnly that we "will suffer more terrorist attacks during this war with al Qaeda. They are fanatical, relentless, and patient. . . . This network will hit us again when they can." Nonetheless, Ashcroft's efforts have surely enabled the nation's antiterrorism network to gain significant ground in the "game of inches."

Ashcroft's memoir accurately conveys to readers the enormous amount of time, energy and resources that the Justice Department devoted to the prevention of further terrorist attacks. What the book does not provide, however—and likely could not provide, given editorial constraints—is a comprehensive depiction of the many other law enforcement priorities that the men and women of the Department continued to tackle after September 11. The Department remains responsible for enforcing the entire gamut of federal criminal law, including corporate fraud, drug trafficking, child exploitation, tax crimes, antitrust violations, intellectual property theft, extraditions and other forms of coordination with foreign law enforcement authorities—the list goes on and on. These efforts had to, and did, continue, and readers would be well served by a fuller portrayal of Ashcroft's tenure as Attorney General.

Ashcroft has given readers much food for thought. His call for "unyielding mental toughness" in the fight against terrorism, his prescriptions for continued advances in our ability to prevent terrorist attacks, and the descriptions of his own efforts to protect our country make for sobering yet inspiring reading.

The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11

BY JOHN YOO

*Reviewed by Will Consovoy**

The idea that the President holds the primary power to manage the foreign affairs of the United States, and retains a substantial degree of autonomy in exercising this constitutional authority, should be uncontroversial. However, recent judicial decisions and the tide of opinion over Bush Administration policies have drawn this principle into question. In *The Powers of War and Peace*, former Justice

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Department official and current professor of law, John Yoo offers an intriguing view of the Constitution's foreign affairs powers and, in so doing, makes an important contribution to the debate over the proper role of the respective three branches of government in matters of war and peace.

Powers of War starts from the assumption that the Constitution vested the vast majority of foreign affairs powers in the Executive—not in Congress or in the courts. The Framers, Yoo argues, adopted a regime in which the office best suited to respond to the dynamic nature of foreign affairs, the Executive, would have a relatively free hand to confront international crises. At the same time, however, Congress was relied-upon to control appropriations and domestic legislation, to insure against presidential overreach. Thus, the separate and coordinate powers of the President and Congress allow them either "to cooperate" or "to pursue independent and conflicting foreign policies." But, whatever accommodation is eventually struck between the political branches, matters of war and peace are to be free from judicial interference.

Professor Yoo's analysis of text and history constitutes a sharp departure from that of several notable scholars, such as Louis Henkin, Harold Koh, and Michael Glennon. These authors posit a Constitution that demands "equal participation of Congress and the federal judiciary in national security decisionmaking." The notion that Congress and the courts have an equal role in foreign policy matters is belied, Yoo claims, however, by the plain text. Article II of the Constitution vests "the Executive power" in the President and declares that the "President shall be Commander in Chief of the Army and Navy of the United States." This broad grant of authority differs sharply from the enumerated legislative grant—i.e., the powers "herein granted"—to Congress in Article I of the Constitution. Thus, Professor Yoo holds, the foreign affairs powers allocated to the legislative branch, such as the Senate's role in treaty-making, are exceptions from the general grant of executive authority.

This means, again, that the Constitution does not provide a "fixed process for foreign relations decisionmaking." Rather, in "allocate[ing] different powers to the president, Senate, and Congress, [it] allows them to shape different processes depending on the international system at the time and the relative political positions of the different branches." The Constitution, according to Professor Yoo, thus sets forth a "flexible system for making foreign policy in which the political branches could opt to cooperate or compete. The Constitution did not intend to institute a fixed, legalistic process for the making of war or treaties." Viewed through this lens, the historical practice of the federal government with respect to foreign affairs, according to Yoo, "generally falls within the range of permissible outcomes allowed by the Constitution." *Powers of War* thus espouses a view of separation of powers in the area of foreign affairs that is political in nature—conflict and compromise between the political branches occurs in a power struggle largely without a judicial referee.

With this interpretation of text established, *Powers of War* takes up the spirit of the letter, delving into several contemporary foreign policy disputes; chief among them "whether the Constitution requires congressional approval of war or whether the president has the discretion to initiate