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Burning Witches and Torching American Democracy



On December 1, President Joe Biden announced that he was pardoning his son Hunter for all the crimes he committed from January 1, 2014 through December 1, 2024. Biden's sweeping pardon of all of his son's abuses epitomizes how presidents and their families are now above the law. It also illustrates how the "King James Test for American Democracy" could become the death of the Constitution.

The American Revolution was heavily influenced by a political backlash that began across the ocean in the early 1600s. King James I claimed a "divine right" to unlimited power in England, sparking fierce clashes with Parliament. Since the 9/11 attacks, some of the same moral and legal principles have been advanced in this nation, but few people recognize the historical roots.

Before he became king of England in 1604, James was king of Scotland. He cemented his claims to absolute power there by launching witch panics and burning hundreds of Scottish women alive to sanctify his power. Harsh methods were not a problem because James

insisted that God would never allow an innocent person to be accused of witchcraft. “While James’s assertion of his [Scottish] royal authority is evident in his highly unorthodox act of taking control of the pre-trial examinations, it is his absolutism which is most apparent in his advocating the use of torture to force confessions during the investigations,” according to the University of Texas’s Allegra Geller, author of “Daemonologie and Divine Right: The Politics of Witchcraft in Late Sixteenth-Century Scotland.” Torture produced “confessions” that spurred further panic and the destruction of far more victims. England did not have similar witch panics because officials were almost entirely prevented from using torture to generate false confessions. James justified the illicit torture, “asserting his belief that as an anointed king, he was above the law,” and similar rationales emitted from the Bush administration from 2002 onward in the name of the 9/11 attacks.

After Queen Elizabeth died and James became king, he vowed that he had no obligation to respect the rights of the English people: “A good king will frame his actions according to the law, yet he is not bound thereto but of his own goodwill.” And “law” was whatever James decreed. Nor did he flatter the men elected to the House of Commons: “In the Parliament (which is nothing else but the head court of the king and his vassals) the laws are but craved by his subjects and only made by him at their roagation.” James proclaimed that God intended for the English to live at his mercy: “It is certain that patience, earnest prayers to God, and amendment of their lives are the only lawful means to move God to relieve them of their heavy curse” of oppression. And there was no way for Parliament to subpoena God to confirm his blanket endorsement of King James.

James reminded his subjects that “even by God himself [kings] are called Gods.” Seventeenth-century Englishmen recognized the grave peril in the king’s words. A 1621 Parliament report eloquently warned: “If [the king] founds his authority on arbitrary and dangerous principles, it is requisite to watch him with the same care, and to oppose him with the same vigor, as if he indulged himself in all the excesses of cruelty and tyranny.” Historian Thomas Macaulay observed in 1831, “The policy of wise tyrants has always been to cover their violent acts with popular forms. James was always obtruding his despotic theories on his subjects without the slightest necessity. His foolish talk exasperated them infinitely more than forced loans would have done.” Macaulay scoffed that James was “in his own opinion, the greatest master of king-craft that ever lived, but who was, in truth, one of those kings whom God seems to send for the express purpose of hastening revolutions.” After James’s son, Charles I, relied on the same dogmas and ravaged much of the nation, he was beheaded.

Charles I's son ascended to the English throne in 1660, but his abuses spurred the Glorious Revolution of 1688 and sweeping reforms that sought to forever curb the power of monarchs. A century and a half after King James denigrated Parliament, a similar declaration of absolute power spurred the American Revolution. The Stamp Act of 1765 compelled Americans to purchase British stamps for all legal papers, newspapers, cards, advertisements, and even dice. After violent protests erupted, Parliament rescinded the Stamp Act but passed the Declaratory Act, which decreed that Parliament "had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever." The Declaratory Act canonized Parliament's right to use and abuse Americans as it pleased.

The Declaratory Act ignited an intellectual powder keg among colonists determined not to live under the heel of either monarchs or parliaments. Thomas Paine wrote in 1776 that "in America, the law is king. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other." The Founding Fathers, having endured oppression, sought to build a "government of laws, not of men." That meant that "government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers," as Nobel Laureate Friedrich Hayek noted in 1944.

For generations, American politicians spoke reverently of the Constitution as America's highest law. But in recent years, the Constitution has fallen into disrepute. The rule of law now means little more than the enforcement of the secret memos of the commander-in-chief. We now have the "King James Test for American Democracy." As long as the president does not formally proclaim himself a tyrant, we are obliged to pretend he is obeying the Constitution. Government is not lawless regardless of how many laws it violates — unless and until the president formally announces he is above the law.

While King James bluntly declared his right to absolute power 400 years ago, recent presidents only make such claims via their lawyers, often in secret documents that citizens are supposed to never see.

The most important recent change in American political thinking is nonchalance regarding government criminality. The notion that "it is not a crime if government does it" is the new conventional wisdom in Washington. It doesn't matter which agency or official broke the law. Instead, the only prudent response is to pretend nothing is amiss.

Nowadays, every act of government is judged in a vacuum, as if every constitutional violation is a fluke. This is the mirror image of how the Founding Fathers viewed government power. In 1768, John Dickinson wrote that colonists fixated on “not what evil has actually attended particular measures but, what evil, in the nature of things, is likely to attend them.” Dickinson pointed out that because “nations in general, are not apt to think until they feel ... nations have lost their liberty.” The Founding Fathers looked at the liberties they were losing, while modern Americans focus myopically on the rights they supposedly still retain. Law professor John Phillip Reid, in his seminal work *The Concept of Liberty in the Age of the American Revolution*, observed that liberty in the 18th century was “largely thought of as freedom from arbitrary government.... The less a law restrained the citizen, and the more it restrained government, the better the law.”

But government officials now claim unlimited discretion to define the law and their own prerogatives. Jack Goldsmith, who headed the Justice Department’s Office of Legal Counsel in 2003–04, later explained how top Bush officials dealt with “laws they didn’t like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.” It is no longer a question of having good laws, including laws that permit officials limited flexibility for contingencies. The rule of law has come to mean nothing more than finding a single lawyer who will say “Yes, Master!” to his political overlords. But it is folly to make the survival of liberty hinge on lawyer’s sense of shame.

If the Iraq war had not turned into a debacle, most of the media and the political ruling class would have continued deferring to President George W. Bush almost across-the-board. As long as his popularity ratings were high, he could do little or no wrong. America’s “best and brightest” were as naive or craven as the courtiers who defended the mass burning of Scottish women 400+ years earlier.

The Constitution’s checks and balances failed to deter recent administrations from erecting the legal scaffolding of dictatorship. Instead, implausible denials of seizing excessive power have been followed by “dictatorial apathy.” Lawless power grabs have become another background noise in Washington. Presidents and their legal teams can claim absolute power — and almost no one inside the government or the Justice Department blows the whistle. President Bush could boast that he was obeying the law because his appointees assured him that he was the law. Legions of government employees safeguarded their careers by going along and enforcing Bush-era absolutist legal doctrines. That settled any doubts about

whether Justice Department officials would be willing tools for future presidents who trample the Constitution.

Inside the Beltway, a mystical adoration of power is taken as proof of wisdom. In 2007, Bush nominated former federal judge Michael Mukasey as attorney general. Three years earlier, Mukasey had proclaimed that “the hidden message in the structure of the Constitution” is that the government is entitled to “the benefit of the doubt.” Mukasey did not reveal where the message was hidden. Mukasey’s “benefit of the doubt” assertion may have helped him snare the top law-enforcement job in the nation, where he provided all the benefits Bush needed.

The more power politicians capture, the more flattery they hear, and the more deluded they usually become. A phalanx of academics is always ready to cheer power-hungry presidents. In 2007, Harvard University government professor Harvey Mansfield exalted “one-man rule” in a *Wall Street Journal* oped, scoffed at the rule of law, and declared that “free government should show its respect for freedom even when it has to take it away.” And since the president is entitled to vast power, how would we know it is still a “free government?” Presumably because it would be a crime to assert otherwise. Mansfield scorned contemporaries who “forget to consider emergencies when liberties are dangerous and law does not apply.” The previous year, Mansfield wrote in a *Weekly Standard* article that the “Office of President” is “larger than the law” and that “ordinary power needs to be supplemented or corrected by the extraordinary power of a prince, using wise discretion.” Mansfield also asserted that in emergencies, “liberties are dangerous and law does not apply.” Such assertions may have swayed the National Endowment for the Humanities to select Mansfield in 2007 to deliver its Jefferson lecture — “the highest honor the federal government bestows for distinguished intellectual and public achievement in the humanities.” Mansfield’s cheerleading fits a pattern that goes back millennia. Throughout history, intellectuals downplayed the perils of political power. As long as court intellectuals were treated royally, rulers were indemnified for any and all abuses of the peasantry.

As French philosopher Bertrand Jouvenal noted in 1945, “Authority can never be too despotic for the speculative man, so long as he deludes himself that its arbitrary force will further his plans.” John Maynard Keynes, the most influential economist of the 20th century, exemplified this attitude. Keynes declared in 1944 that “dangerous acts can be done safely in a community which thinks and feels rightly, which would be the way to hell if they were executed by those who think and feel wrongly.” And who is to judge whether the community “thinks and feels rightly?” The same politicians seizing boundless power.

The same passion for absolving high-level wrongdoers is often expressed in muffled terms by the editorial pages of the *Washington Post* and other leading papers. From 2008 onwards, the *Post* inveighed against permitting lawsuits that sought to hold former Attorney General John Ashcroft, former Defense Secretary Donald Rumsfeld, and other top officials liable for the torture and other abuses that occurred on their watch. One *Post* editorial fretted: “Officials should not have to fear personal lawsuits for performing their duties in good faith and in violation of no established legal precedent.” This practically assumed the existence of “good faith torture” — as if maiming and beating people to death was the moral equivalent of a clerical error.

Unfortunately, the same “absolve everything” mindset often prevails in the federal judiciary. Government officials have become practically untouchable at the same time that they have become far more dangerous. The Supreme Court has expanded sovereign immunity like a toxic legal cloud. As Senator John Taylor warned in 1821, “There are no rights where there are no remedies, or where the remedies depend upon the will of the aggressor.”

Nowadays, lawless government is simply benevolence on amphetamines. Rather than the rule of law, we now have the “friend of humanity rhetorical test.” As long as politicians profess to be doing good, it is bad taste to quibble about legal technicalities or archaic constitutional clauses. The question is not what the president actually did but whether he “meant well.” The word “dictator” applies only to government officials who publicly announce plans to do bad things to good people.

How many dictates must a politician issue before we can label him a dictator? Sen. Daniel Webster warned in 1837 that “the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.” Americans must decide whether they want good leashes or a good master. We can either stop politicians from continuing to abuse their power, or we can spend our time looking for a wise and merciful despot. Either way, democracy cannot survive power worship.

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