

# America Just Says No to the Rule of Law

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*A society is in serious trouble when its political pariahs have at the core of their demands a return to the rule of law. This inversion, with our political and cultural outcasts demanding a respect for law, highlights the awful fact that the most radical and retrograde forces within the body politic {the Right—D.K.} have seized control. – Chris Hedges*

In 2005, Michael Greco, the President of the American Bar Association, decided he had to come to the defense of the rule of law in the US. A variety of Bush administration practices, such as signing statements, struck Greco as dangerous transgressions against the constitution, and he commissioned three research reports on the subject from groups of ABA specialists who had deep experience working within the executive branch, including the FBI, the CIA, the NSA, and the Justice Department. Each report identified serious violations of the constitution, and expressed alarm at the gravity of the consequences should they go unchecked. Greco made the reports public, and delivered them to the White House, only to be met with silence from the media and the political establishment. The rule of law, it seems, was no longer a concern to the US establishment, even when the legal profession's umbrella association was weighing in with stern warnings.

However indifferent the establishment may have become to the rule of law by 2005, a large proportion of American citizens were not willing to tolerate brazen illegality at the top. Indignation at the Bush administration's disregard for the law played a significant role in delivering the Presidency and majorities in both chambers of Congress by 2008. President Obama's own background as a one-time teacher of constitutional law conditioned optimism that his administration would honor the rule of law, and would hold many Bush administration officials accountable for their transgressions. Such was the spirit of 2008.

Alas, Obama moved to temper expectations for justice as soon as he assumed office, famously declaring his preference for "moving forward" rather than dredging up the sins of the just concluded Bush administration. Obama's policy made quite an impression, given the scale of the crimes—which included launching a war of aggression in Iraq on false pretenses, the systematic use of torture on prisoners, and the widespread orchestration of federal prosecutions for partisan (Republican Party) political purposes. The implications of non-prosecution are momentous, of course. It serves to establish the practices of the Bush administration in precedent, and leaves such practices available to future administrations.

*"Traditionally, a bank would tell the Department of Justice when an employee engaged in crimes, but what do you do when the bank itself is run by a criminal enterprise? – Solomon L. Wisenberg, former chief of a Justice Department financial institutions fraud unit.*

As grievous as the lack of accountability in the executive branch may be, Americans have

still held out some hope for accountability in the economic realm, chiefly as regards the major Wall Street banks and the specialized mortgage lenders (Countrywide being the most famous) that did so much to foment the financial crisis. The contours of the criminality are sufficiently clear. To consider just one of many vectors, mortgage lenders systematically and surreptitiously falsified documentation from mortgage loan applicants, so as to ensure the approval of these loans, and payment for themselves when they sold ownership of the loans on to banks, for repackaging into MBS (mortgage-backed securities) the banks hawked worldwide.

It is worth a moment to contemplate the scale of just this one dimension of Wall Street crime in the lead-up to the crisis of 2008. According to former Citigroup VP Richard Bowen, who led the group evaluating mortgages bought from lenders like Countrywide, about 60% of 2006 vintage mortgages were defective. He reported this up channels to the top of consumer lending group, but the business was highly profitable, so the bank took no corrective action. It continued to declare that the mortgages underlying its MBS met internal Citigroup lending standards. The defective rate hit 80% in 2007. Bowen notified everyone at the very top of Citi, including the Board of Directors and CEO Charles Prince. But Prince took no action, and signed off on SEC filings that all within his company and its MBS offerings was in order, thus leading investors worldwide over a cliff.

While the Justice Department and the SEC claim to be investigating MBS fraud and other criminal machinations of the banks and lenders, they have pursued only trivial prosecutions to date. When asked point-blank on Friday (December 9th) how the Justice Department could possibly be so inert, the President dodged, deferring to the Justice Department. Facing the same question, the official in charge of the investigations there, Lanny Brewer, insists they are investigating everything, and that they have not experienced any interference from anywhere else in the government asking them to go easy on the big banks. At the very least, this tells us that Obama and his upper advisers are not keen on prosecutions. The President could certainly bolster and accelerate the investigations. To leave himself out of the process is to invite Justice Department officials to collude with the large banks, so as to secure lucrative “revolving door” jobs for themselves in the near future.

The public’s suspicions that Wall Street is above the law look all the more accurate in the light of recent revelations that the Justice Department consciously withdrew resources from financial crime investigations back in 2005. Under pressure from President Bush’s attorney general, the Justice Department outsourced investigations of wrongdoing to the banks themselves, allowed a gray zone between guilty and not guilty assessments, deferred prosecutions, etc. And the picture darkens further when we learn that 1) the SEC systematically and illegally shredded materials from 18,000 investigations over the last decade; 2) this was an SEC-wide policy, per a discovered internal memo; 3) that the SEC tried to cover up their cover-up; and 4) that the SEC has been very rough on whistleblowers within its own walls.

## **Obama Piles On?**

Beyond the shielding Bush administration officials and Wall Street banks from liability, the Obama administration has proceeded to inflict a wide a wide variety of new wounds on the rule of law in the US. Consider, for a moment, three of the seven pillars of democratic rights in America, as defined by Bill Goodman, former legal director of the Center for Constitutional Rights: “People can’t be detained without good cause and without being charged with a

crime in front of an independent magistrate. They can't be tortured or punished in ways that are extreme. They're allowed to protest publicly." Taking these three in reverse order:

1) Very strong indications point to the Department of Homeland Security having orchestrated or at least coordinated crackdowns on Occupy Wall Street encampments (and on journalists) in a number of cities in November. This is a serious violation of Constitutional prohibitions against federalized policing, (and responsibility would appear to rest with Obama, as Homeland Security chief Peter King reports directly to him).

2) Obama has famously embraced the right of the President to order assassinations, including of US citizens. As Glenn Greenwald put it: "...the U.S. Government has seized and exercised exactly the power the Fifth Amendment was designed to bar ('No person shall be deprived of life without due process of law'), and did so in a way that almost certainly violates core First Amendment protections (questions that will now never be decided in a court of law)."

3) The Senate recently approved a National Defense Authorization Act (NDAA) which awards the military the right to detain anyone, including US citizens, anywhere, including within the US, and detain them, indefinitely, without charges.

### **Where is the Outrage?**

Public reactions to revelations of selective justice and extra-legal oppression were tepid at best until this year, thanks to so-called "scandal fatigue" and to optimism regarding President Obama's promises to respect the laws of the land. Now that Americans have come out in the streets, however—first in the midwest this winter, and then in the context of OWS this fall—awareness of lawlessness at the top has galloped ahead, and the public is less likely to tolerate abuses. Thus, a high-profile exposure two weeks ago of the fact that members of Congress are not subject to restrictions on insider trading of stocks generated a torrent of disgust, and looks to be getting rapid reaction on Capitol Hill.

The public does not have the wherewithal to mobilize against all abuses, however. Many recent revelations of abuses have gone more or less unnoticed. Take, for example, recent news of then-Secretary of the Treasury Hank Paulson having leaked enormously valuable inside information to a handful of hedge fund friends as the financial crisis began to blow up in 2008 (as one analyst remarked: "What is this but crony capitalism?"; or the Federal Reserve surreptitiously bypassing the Federal Deposit Insurance Corporation to allow Bank of America to shift large quantities of very risky derivatives into vehicles the FDIC (taxpayers) will have to guarantee, a gesture Yves Smith and William Black imply was either criminal incompetence or abject corruption.

In these circumstances, hopes for a recovery of the rule of law rest largely in the hands of highly placed and independently minded judges and State-level Attorneys General. Fortunately, some of these ranks are taking up the challenge.

**"...worse than mindless,... inherently dangerous"** - Federal Judge Jed Rakoff, characterizing the SEC's habit of settling serious fraud cases with major banks out of court, concealing the details of the crime, and excusing the perpetrators from any further liability.

The judicial branch of government is not entirely under the thumb of the political and economic establishment, and may now play an aggressive role in reversing some of the

establishment's transgressions. A landmark ruling came down on November 28th, when a federal judge named Jed Rakoff rejected a \$285 million settlement the SEC (Wall Street's main regulator) had arranged to accept from Citigroup, pursuant to an investigation into deception and fraud in the composition and marketing of a mortgage-backed security in 2007. The settlement reflects Wall Street's immunity in more than one way. The \$285 million is only \$95 million more than Citigroup's profits plus interest on this particular deal, and pales before investors' losses of over \$700 million. It is not punishment at all. Further, it is the fifth time the SEC has proposed an out-of-court settlement with Citigroup regarding accusations of securities fraud since 2003, testifying to the ineffectiveness of such settlements, and the crying need for criminal prosecutions. Rakoff is effectively instructing the SEC to do its job, and enforce securities laws.

In a similar vein, several State-level Attorneys General have resisted pressure from the Obama administration to accept a blanket settlement of up to \$25 billion against the largest Wall Street banks and mortgage lenders for charges of deceptive and fraudulent practices with respect to home loan modifications and foreclosures. Massachusetts Attorney General Martha Coakley has now fired the first official shot against this particular Washington-Wall Street collusion, by filing a suit against five of the banks as regards loan modification and foreclosure practices. California, New York, and Delaware look likely to follow Coakley's lead, and the movement could easily snowball. Should the Occupy Wall Street movement maintain its momentum and continue to arouse public opinion against establishment abuses, the rule of law may recover to some extent. But there is certainly no guarantee of that.

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