

Napolitano, Andrew P. *Constitutional Chaos: What Happens When the Government Breaks its Own Laws*. Nashville: Nelson Current, 2004. 234 pp. \$26.99 hardcover.

Judge Napolitano is the senior judicial analyst for Fox News and a regular on Fox News public affairs discussion programs. A graduate of Notre Dame Law School—he makes a point of singling out Dr. Charles E. Rice for influencing his thinking while a student there—he is also a former law professor and New Jersey state judge. His book is the latest in an emerging genre of books, mostly geared toward a popular audience, which attempt to bring to light the systemic abuses that have developed in recent years in the criminal justice system and among prosecutorial and regulatory authorities in the U.S. The book is much like Paul Craig Roberts and Lawrence M. Stratton's *The Tyranny of Good Intentions*, which this writer reviewed in last year's *CSSR*. Unlike the latter book, however, Napolitano does not explore the philosophical roots of the present corruption, though its introduction suggests that legal positivism may be a culprit and that any true restraint on government requires a belief in natural law. The Roberts-Stratton book also has a *touch* more of a scholarly character to it.

Napolitano's book is divided into four parts: "Rights and Liberties," which is by far the longest; "Wake-Up Call"; "The Hard Test: The War on Terror"; and "Prospects for Liberty." The second and fourth parts are extremely short; the second essentially explains that it was Napolitano's experience as a judge that awakened him to the abuses he discusses.

"Rights and Liberties" discusses the major areas where the criminal justice system has routinely come to trample on constitutional rights (which is the reason for the book's title). These include such topics as entrapment; violating the Second Amendment; the misuse of the eminent domain power to seize real property for private interests; free speech violations; plea bargaining and the functional bribing of witnesses by prosecutors; violating the law to enforce the law (even by such means as kidnapping suspects to avoid the "bother" of extradition proceedings); the use of manipulation, gross deception, psychological abuse, and even torture to force confessions; and the Ruby Ridge, Waco/Branch Davidian, and Elian Gonzalez cases. Napolitano discusses the role of Clinton Attorney General Janet Reno in the last two episodes. He also recounts her use of psychological abuse and physical torture as Miami district attorney to secure spurious convictions in her great crusade of fighting child abuse.

It was good to see in this section that Napolitano does not hesitate to discuss little as well as big abuses. The key theme is always that government must follow the law in its enforcement activities, whether those victimized are innocent or guilty (and more often than one might think, they are innocent). So, on the one hand, he discusses the FBI's decision to allow a gangland murder plot they learn about to proceed and to refuse to prosecute the informant-perpetrator and things like an illegal FBI search of a mobster's computer, and, on the other, the NYPD's detaining of numerous innocent people in a public park to catch a few drug peddlers and the use of cameras of doubtful reliability to catch red-light runners. He rightfully understands that constitutional rights and our legal tradition's bedrock principle of "innocent until proven guilty" apply in *all* cases.

Some of the most outrageous subjects that Napolitano discusses are: the risk that citizens run of prosecution if they defend themselves with firearms against intruders in the act of committing a crime against them (even Thomas Hobbes, to whom we can trace much of our wayward political thought, believed that men always had the right to act to preserve their lives); how the eminent domain power now routinely involves government takings with grossly inadequate compensation—often from homeowners of modest means—so as to transfer property to private business interests to create better taxing possibilities; the sweeping, restrictive "gag orders" imposed by judges on attorneys, jurors, and reporters—sometimes even *in perpetuity*—about the particulars of high profile court cases, even when concerning matters of clear public interest; and the routine lying, even under oath in court (something that Napolitano witnessed repeatedly as a judge), of law-enforcement authorities to secure convictions. Still, the most distressing and sickening accounts were of the U.S. Government's setup of the Branch Davidians and subsequent actions in overrunning their compound and the psychological pressure tactics, mind manipulation, and actual torture Janet Reno ordered, as Miami district attorney, to force an ostensibly false confession in the Fuster day-care-child-abuse case.

One could go on and on recounting the cases Napolitano discusses. The terrible reality is that this is now "routine stuff" in American law enforcement. It is good to see that a figure of the stature of Napolitano is bringing it to light, but it is all too typical that in spite of that a major publisher did not pick up this book. It was brought out by a division of the evangelical Protestant publishing house Thomas Nelson. One hopes that people will pay attention, but one should not be too expectant. As the author says, unless an innocent person is caught

up in this system, he is hesitant to believe the problems are as serious as they are, and in fact, tends to laud the efforts of law-enforcement and prosecutorial authorities so long as they seem to be getting criminals off the streets. As one who has written and lectured for twenty years about the assault on innocent parents of the so-called child protective system (most of which does not involve law-enforcement agencies), I can testify to the lack of knowledge about, and even unwillingness to believe, the extent to which organs of the American government have turned on the citizenry. I wish that Napolitano had discussed these child protective agencies (called by various names in different states, such as Children's Services or Division of Social Services) in the book.

Two other major areas of governmental abuse that Napolitano should have included—Roberts and Stratton mention the one and extensively discuss the other—are the practices of the IRS and asset forfeiture laws.

The issues about the war on terror that Napolitano goes into in the third part of the book have received some attention in the media and among major public spokesmen; this is a topic that is not addressed in the Roberts-Stratton volume, which was published before 9/11. Although one can appreciate the need of the U.S. Government to aggressively battle elements who seem willing in their anti-American hatred to inflict all manner of destruction, I am not convinced that this war cannot be conducted with respect for traditional legal norms. Are American officials so lacking in confidence in our criminal justice system that they believe that public trials instead of indefinite detention of captives from Afghanistan (some of whom, Napolitano tells us, were rounded up by American-financed bounty hunters and may not even be terrorists) will undercut the fight against terror? It is possible that Napolitano downplays just how wickedly cunning terrorists can be in manipulating traditional legal procedures, but one does wonder if we really need provisions of the USA PATRIOT Act that allow the FBI to issue its own search warrants, without even the formality of going before a judge, and prohibit the many custodians of the personal records of Americans to even tell them that information was turned over to the government about them. Isn't it just possibly a recipe for abuse when the Act permits information to be turned over to authorities for other criminal prosecutions that have nothing to do with terrorism (even, theoretically, the local animal enforcement officer who thinks you are torturing your rabbits because he doesn't like the way you are raising them)?

Napolitano's solutions are sensible, even if they may not be adequate by themselves (as I suggest below): make sure that the law is

applied to everyone, even government operatives (e.g., they should be prosecuted for bribing witnesses and perjury just like everyone else is); make it easier to sue these operatives for wrongdoing, and make them *personally*, instead of the taxpayers, have to pay up; and more aggressive efforts by the courts—which he emphatically faults for too often giving government authorities a pass—to stop the erosion of constitutional guarantees. The last point is particularly noteworthy. I wrote in a previous issue of the *CSSR* that we cannot just outrightly condemn judicial activism: if there is judicial activism to uphold the natural law, I am for it; if it is used to foist all forms of ersatz rights on a people and restrict the rightful public choices of legislatures and the public, I am against it. Napolitano makes the same distinction, without going quite so deep. A judicial activism that usurps legitimate powers of the political branches, he says, is “judicial tyranny”; one that stops the political branches from acting outside the Constitution—that stops a “tyranny of the majority”—certainly is not.

He strikes an encouraging note—quite correctly, I think—by saying late in the book that the current corruption can be redressed by the American people, since they still have the power of the vote and can hold government ultimately accountable. Indeed, we must not underestimate the ability of a free political society with free elections to be a corrective; it has a great advantage in this regard over closed, despotic regimes of all forms.

Napolitano’s book is long on relating examples of the systemic abuses of law enforcement and other governmental arms—as such, it does a tremendous service—but it is short on analysis about the basic causes. As mentioned, he sees the rise of positivism as a factor, but does not explore this as the Roberts-Stratton book does (especially by their examination of the Benthamite influence on contemporary Anglo-American law). It would have been valuable to explore further the effect of positivism and the waning of natural law. Napolitano should also have considered two other factors: the utilitarian drift of American culture, and the resulting attitudes of all too many in government. If our culture holds that the ends justify the means generally, should we be surprised that law enforcement authorities will engage in even blatantly illegal and immoral action to get convictions? Should we not expect—especially with the overwhelming moral erosion—that torture will be used against terrorist and other suspects? After all, how many other social ends are as important as stopping crime, saving innocent lives, and maintaining order?

With the increasing reliance on government for so many things—reaching to the most fundamental aspects of our lives—our

public servants increasingly have come to see themselves as our masters. Many astute writers have said that as we want the government to give us more security, it requires us to give up more of our liberties. We think that it can solve more and more of our problems, so we allow it to regulate and control more.

On the solution side, Napolitano must understand that the problem discussed will be not addressed just by law enforcement “cleaning up its act,” legislation making it easier to sue the government, and more aggressive judicial oversight; it requires more substantial legislative change. Legislative bodies passed all the law that enforcement authorities are now abusively applying. We need a substantial review of our criminal law—which has expanded in recent decades to encompass more and more activities—and regulatory legislation, removing provisions that are not truly needed to promote the common good and changing needed parts that have given rise to abuses. Probably, though, for this to happen requires a general attitudinal change about what we want and expect from government, as stated above.

I hope that Napolitano’s prominent media role will enable his book to get wide circulation. When the public truly realizes what is happening, it will begin to demand legislative change and honest enforcement. Napolitano joins a growing group of what might be called “conservative civil libertarians,” who see that a sweeping protection of individual rights does not have to be the sole property of groups like the ACLU and that just because someone wears the label of “law enforcement” does not mean he should be given the overwhelming benefit of the doubt.

Stephen M. Krason
Franciscan University of Steubenville