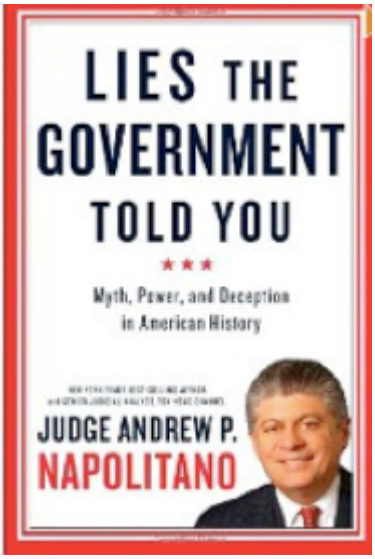
Written by **Thomas R. Eddlem** on March 31, 2010

Judge Napolitano Exposes Government Lies



Judge Andrew Napolitano's Lies the Government Told You should be read by every American. His book should especially be read by conservatives who love the U.S. Constitution (i.e., "constitutionalists"); conservative readers will learn that Napolitano unveils a number of troubling but unassailable facts about their country's history in his compelling book.

Napolitano begins his book with the unfortunate truism that "the government lies to us regularly, consistently, systematically, and daily on matters great and small, but it prosecutes and jails those who lie to it." He then chronicles the various "lies" where government officials promise freedoms to the people but throughout history have failed to live up to those promises.

Each chapter in the book is another topic where somewhere in history government has broken its promise to protect a freedom. "Everyone is innocent until proven guilty" explains the increasing presumption of guilt upon detainees in the "war on terror," as well as Americans whose business is to work with cash in the "war on drugs." "We don't torture" exposes the open attack on the Eighth Amendment to the U.S. Constitution banning "cruel and unusual punishments" by the Bush administration. And "All men are created equal" chronicles the historical American legacy of slavery and Jim Crow, one of the few areas where freedoms have been largely restored over time.

Napolitano's focus in the book, as in his previous books, is upon the "natural law" as described in Thomas Jefferson's *Declaration of Independence*. The natural law is nothing more than the right and wrong and individual rights and dignity given to every human being by God, and Napolitano

stresses these rights exist independent of government.

Napolitano also issues a clarion call for judicial remedies to attacks on the natural law, using the Bill of Rights to stop federal abuse of individual rights and the 14th Amendment to stop state trespasses upon individual liberties.

Napolitano begins the book with his assessment of post-slavery racism that the federal government accepted in the case of *Plessy v. Ferguson*. The Plessy case was about a "black" man (though Homer Plessy was only one-eighth black, which met Louisiana's threshold at the time) who bought a first-class ticket on a state train and wanted a seat in the first-class car, but was told there was no first-class car for blacks under Louisiana law. He was directed to the black coach car, and arrested when he protested. "Separate but equal" in this case was clearly separate and not equal. Supreme Court Justice Stone noted in his brilliant Plessy dissent:

> Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor a to assert the contrary.

Napolitano concluded: "Unfortunately, Justice Harlan's opinion did not represent the prevailing view in this country until well after the case of *Brown v. Board of Education of Topeka*, decided in 1954." In his argument against the more than 50-year *Plessy* case precedent, Napolitano deploys the unequivocal language in the 14th Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.... [and] the Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Napolitano argues that the intent of the 14th Amendment was to require the states to protect individual liberties guaranteed by the U.S. Bill of Rights (not just the equal protection of the laws) — a view that later became known as the "incorporation doctrine." The doctrine is controversial because it has been applied unevenly by the courts (courts have applied the First Amendment's "Congress shall make no law respecting an establishment of religion" to the states, but have not applied the Second Amendment's "the right of the people to keep and bear Arms, shall not be infringed" to the states); because it has been the excuse for federal courts to invent "rights" such as a "right" to an abortion; and because states already had protections for individual rights, though those protections were not always extended to everyone and needed to be applied equally.

What's clear is that the federal courts were designed to be empowered to stop state trespasses upon rights of citizens. New York Republican Congressman John Bingham, author of the 14th Amendment,

stressed his intent for introducing the constitutional amendment in congressional debate back in February 28, 1866:

> [I]f [the states] conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is hereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow man. Why should it not be so? That is the question.... Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.

The Warren court eventually ruled in the *Brown* case that:

> Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Napolitano freely admits that the Warren court's *Brown v. Board of Education* decision in 1954 overturned more than half a century of precedent and upset the court's principle of *stare decisis*. *Stare decisis* means "let the decision stand," and is an important principle of fairness in the Anglo-American common law system. It helps ensure two parties with the same facts at stake have the same result in court. Courts shouldn't overturn precedents, i.e., *stare decisis*, for light reasons. But Napolitano argues that when the clear language of the Constitution and the explicit original intent of the founder of that amendment conflict with *stare decisis*, as was the case in *Brown v. Board of Education*, it's better for courts to follow the Constitution.

Napolitano calls this principle of overturning unconstitutional precedents "constitutional activism," and contrasts it with the traditional idea of an "activist court." The traditional view of an activist court he defines (using *Black's Law Dictionary*) as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, guide their decisions." Such a contrast in judicial opinions came to the fore in a public debate between Supreme Court justices Steven Breyer and Antonin Scalia March 23, 2010, nationally televised on C-SPAN. Scalia argued against the the "social policy" aspect of judicial decision-making, arguing that the primary factor in decisions on constitutional questions must be the clear language of the Constitution and Bill of Rights itself. "The only way you can preserve the Bill of Rights is to give it a constant unchanging meaning," Scalia told Breyer, noting that if decisions are based upon ever-changing social phenomena that there really is no such thing as a Bill of Rights. Breyer agreed that considering the original intent is a waste of time: "If you want to do all this history, let us have nine historians on the Supreme Court. And let us not have nine judges." But Breyer also says that he can use contemporary social phenomena to bring the Constitution up-to-date.

Napolitano proposes to use "constitutional activism" to restore liberties through the Bill of Rights and the incorporation doctrine of the 14th Amendment across the political spectrum. It is a cudgel he would have courts wield to strike down excesses of the other two branches of government. For example, he argues that state laws against gun control must fall because of the incorporation of the Second Amendment upon the states. After all, who can argue that the right to keep and bear arms is not among the "privileges or immunities of citizens of the United States"?

Where Napolitano's arguments appear to fall flat are in his coverage of how judges have inconsistently

upheld the freedoms of Americans. Many judges have followed Breyer's social policy construct of judicial activism, while others — including Scalia — have fallen prey to executive branch fear-mongering during times of national emergencies. Napolitano has plenty of examples of judges at the U.S. Supreme Court level excusing abuse of the people's liberties explicitly protected by the Bill of Rights, from the internment of Japanese during the Second World War in *Korematsu v. U.S.* to more modern cases involving detainees in the "war on terror." In the latter case, Napolitano is happy to note that President Bush "made these extraconstitutional claims based, he said, on the inherent powers of the commander-in-chief in wartime. But in the Supreme Court, he lost all five substantive challenges to his authority brought by detainees."

Napolitano devotes much of the latter half of the book toward attacks on American liberties by the so-called "war on terror." Yet the Justice Department under the Bush administration (and Obama as well) have engaged in a deliberate and open attack on the rights of both foreign detainees and Americans' rights to a fair trial, be safe from torture and free from unconstitutional surveillance.

Napolitano admits that "the recent decision to try some of the Guantanamo detainees in federal District Court and some in military courts in Cuba is without a legal or constitutional bright line." Napolitano concludes that "All those detained since 9/11 should be tried in federal [civilian criminal] courts because without a declaration of war, the Constitution demands no less." Napolitano notes that "the rules of war apply only to those involved in a lawfully declared war, and not to something that the government merely calls a war." He also claims that "Among those powers is the ability to use military tribunals to try those who have caused us harm by violating the rules of war." But what precisely is a "military tribunal"? Napolitano doesn't define it. The Constitution and its amendments make no mention of such a body, though they do mention a separate military justice system currently used for U.S. servicemen — which neither the Bush nor Obama want to use for detainees. Moreover, the Bill of Rights explicitly prohibits the application of military commissions as they have been recently constructed by Congress and the presidency. The Sixth Amendment bans courts which don't have "an impartial jury of the State and district wherein the crime shall have been committed," and require that the "district shall have been previously ascertained by law." But in the case of military commissions, the district of the military commissions has been "ascertained" *after* the crime. It's now a *bipartisan* policy to create courts out of thin air to convict terrorist suspects, which leads to the obvious and justifiable charge that these would be kangaroo courts. Moreover, the Bush-Cheney administration had not limited military commissions to foreigners. Napolitano reveals that Bush and Cheney tried to hold American citizens Yaser Hamdi and Jose Padilla without charges (and in fact did so for years) and then to charge them under military commissions after losing *habeas corpus* appeals at the U.S. Supreme Court.

Fear-based abandonment of the U.S. Constitution has been the key to destroying the Fourth Amendment's prohibition against searches that don't have warrants supported by an oath, probable cause and specifics about what is being searched and what will be found in the search. Napolitano writes that:

> The Supreme Court held in the case of *Texas v. Stanford* (1965) that the government may not constitutionally issue general search warrants that do not describe with particularity the place to be searched or the things to be seized. This requirement of specificity is an inherent part of the Fourth Amendment and protects against fishing expeditions by the local or state police or federal agents. Or at least it did, until a section of the Patriot Act amended FISA [the Foreign Intelligence

> Surveillance Act] to authorize roving wiretaps.

Even judges who have engaged in what Napolitano calls constitutional activism have resorted to euphemisms such as “fundamental rights” as a substitute for talking about the religiously-tinged term “natural rights.” In short, Napolitano’s “constitutional activism” is not a complete strategy for the restoration of freedom in America, even if it could be one prong in the attack against centralized government.

Napolitano places the full remedy in the people themselves, calling on vigilance before, during and after elections and cautioning against political partisanship. He concludes "we have one party, the Big Government Party. There is a Republican version that assaults our civil liberties and loves deficits and war, and a Democratic version that assaults our commercial liberties and loves wealth transfers and taxes." Only an informed and steadfast citizenry can reverse bipartisan assaults on liberty. Reading Napolitano’s book is a good start toward a journey of becoming an informed and vigilant citizen.

Lies the Government Told You: Myth, Power and Deception in American History by Judge Andrew P. Napolitano, Nashville, Tenn.: Thomas Nelson Publishing, 2010, hardcover 349 pages, $24.99.