

The Annotated Lincoln

Edited by Harold Holzer and Thomas A. Horrocks

The Belknap Press of Harvard University Press, Cambridge, MA, 2016. 640 pages, \$39.95.

Reviewed by Henry S. Cohn

Harold Holzer and Thomas Horrocks, two leading authorities on Abraham Lincoln, have edited and annotated this fine collection of Lincoln speeches and other writings. Holzer has written numerous books on Lincoln, including the prize-winning *Lincoln and the Power of the Press*, and, my personal favorites, *Lincoln at Cooper Union* and *The Civil War in 50 Objects*. Horrocks wrote *Lincoln's Campaign Biographies*, which I reviewed in the March 2015 issue of *The Federal Lawyer*.

Holzer and Horrocks chose the Lincoln letters, speeches, and presidential messages that they included in *The Annotated Lincoln* primarily from the nine-volume *Collected Works of Abraham Lincoln*, edited by Roy P. Basler, published in 1953, and now searchable on the Web. *The Annotated Lincoln* also has more than 100 illustrations, many in color. The illustrations include the earliest known photographs of Lincoln, drawings of slave markets, numerous campaign broadsides, pictures of battle scenes, and photographs of people from Lincoln's private and public life, including Mary Owens, a failed love interest, and Stephen A.

Douglas. On page 321, in connection with a letter Lincoln wrote in 1859 praising Thomas Jefferson, the editors have placed a photograph of Lincoln from the same year and labeled it "Mary Lincoln's favorite pre-presidential portrait of her husband."

The book also reproduces both the famous 1864 oil painting by Francis Bicknell Carpenter of Lincoln reading the preliminary Emancipation Proclamation to his cabinet, and an 1866 lithograph of Lincoln reading the final Emancipation Proclamation to his cabinet on Jan. 1, 1863. The editors note that Lincoln delayed signing the final Emancipation Proclamation throughout most of the day, to the dismay of African-American people, while a printer's error was corrected, and Lincoln engaged in the traditional greeting of White House visitors on New Year's Day.

The book also contains one of the many depictions of the room in the Petersen House, across the street from Ford's Theatre, where Lincoln passed away. The room was small and had hardly any space for visitors. The drawing on page 575, dating from 1868, nevertheless shows a massive crowd at the death watch. Scholars refer to such drawings as showing a "rubber room," capable of enormous expansion and holding every known person who was in the room for any length of time and some who were not there at all.

The editors have taken great care in presenting accurate texts. For Lincoln's address at Cooper Union in New York City on Feb. 27, 1860, which boosted Lincoln's name-recognition, propelling him to the Republican presidential nomination later that year, Holzer and Horrocks have combined the text as prepared by Lincoln's hosts with the *New York Herald* version published the morning after the address. This allows the reader to share in Lincoln's pauses and the crowd's cheers. Similarly, the editors had to choose a version of the Gettysburg Address, delivered on Nov. 19, 1863. Lincoln wrote out several versions that differ slightly from the speech as delivered. For example, Lincoln added the words "under God" to the sentence "this nation, under God, shall have a new birth of freedom." For the book, the editors selected

the copy that Lincoln wrote for a Baltimore Charity Fair in 1864. The version was also contained in a contemporary anthology, *Autograph Leaves of our Country's Authors*.

The editors give a brief introduction to each item, indicating its importance, and provide extensive footnotes for each item. In preparing the book, they relied on leading Lincoln biographers, including David Donald, Michael Burlingame, Douglas L. Wilson, and Ronald C. White. The documents in the book include Lincoln's initial political speech in a failed effort for election to the state legislature, his parting words in ending his romance with Mary Owens, a speech in favor of temperance later used by the "drys" in their efforts to pass the 18th Amendment, and eulogies for Zachary Taylor and for Lincoln's hero, Henry Clay. The documents for Lincoln's two years in Congress include his "spot" resolutions and other statements against the Mexican-American War.

Lincoln's legal career is represented by a lecture that he gave to lawyers, probably in 1850. According to Mark Steiner in *An Honest Calling*, this lecture is a classic statement of Whig legal philosophy. *The Annotated Lincoln* also includes Lincoln's highly regarded jury summation on behalf of the bridge owner in the Rock Island Bridge case, as it was reported in the Chicago press. This was a suit brought by the owners of the steamboat *Effie Afton*, which had crashed into the bridge. It is the subject of a recent book, *Lincoln's Greatest Case*, by Brian McGinty.

When Lincoln returned to politics in 1854, he attacked Douglas' "popular sovereignty" doctrine at Peoria, Ill. He spoke against the expansion of slavery at Kalamazoo, Mich., in 1856, and, at Springfield, Ill., in 1857, he gave a strong reply to Chief Justice Roger Taney's *Dred Scott* opinion. The book reprints edited transcripts of the first, second, and fourth of the 1858 senatorial debates between Lincoln and Douglas. Lincoln emphasized that the Declaration of Independence's statement that "all men are created equal" would lose its meaning if it were not applied to black people. At Cooper Union, he rejected a claim that the Republican Party was to blame for John Brown's 1859 raid

on the federal armory at Harpers Ferry. He ended his speech in a rousing fashion: The country's duty was to stop the spread of slavery and "[n]either let us be slandered from our duty by false accusations against us, nor frightened from it by menaces of destruction to the Government. . . ."

Among other famous speeches that Holzer and Horrocks include are Lincoln's two inaugural addresses, the second of which Frederick Douglass called "a sacred effort," and Lincoln's thrilling annual message to Congress of Dec. 1, 1862. Although much of the annual message sets out Lincoln's later-abandoned brief in favor of compensated emancipation, it concludes dramatically: "The dogmas of the quiet past, are inadequate to the stormy present. . . . As our case is new, so we must think anew, and act anew. . . . Fellow-citizens, *we* cannot escape history. . . . We shall nobly save, or meanly lose, the last best, hope of earth."

The book ends on three touching notes. The first is Lincoln's letter to General Ulysses S. Grant on Jan. 19, 1865, asking that, as a personal favor, he name Lincoln's son Robert to his staff with a nominal rank and with Lincoln's paying his expenses. This incident was portrayed in Steven Spielberg's Academy-Award-winning movie, *Lincoln*.

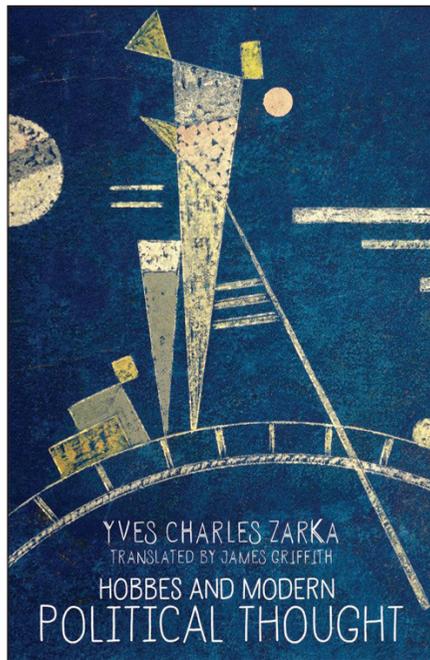
The second event was the series of several addresses, including Lincoln's speech on April 11, 1865, in which he called for limited black suffrage. On hearing his remarks, John Wilkes Booth declared, as it turned out correctly, that "that is the last speech he will ever make."

Finally, a letter to Kentucky newspaper editor Albert G. Hodges on April 14, 1864, shows Lincoln at his rhetorical finest, writing of the wrong of slavery and of his efforts to preserve the Union. He concludes, "I claim not to have controlled events, but confess plainly that events have controlled me." As in his subsequent second inaugural address, Lincoln calls the removal of slavery from this country a responsibility that has been imposed by God on both North and South.

If there is a second edition of this beautiful book, my one wish is that Holzer and Horrocks include Lincoln's address on March 5, 1860, at Hartford, Conn. He had just delivered the Cooper Union address, had visited Robert at Phillips-Exeter Academy in New Hampshire, and was heading home to Illinois. To justify opposing the extension of slavery into the federal territories, but not calling for its immediate

abolition in the states where it existed, he made a wonderful analogy between a man who finds a rattlesnake in the field, as opposed to finding one in a bed in which children are sleeping. The man would be applauded for killing the snake in the field, but would be wrong to risk striking it in the bed because that might "do more hurt than good." Lincoln had not yet become the Great Emancipator, but this speech illustrates his mastery of expression and why he was and is beloved by so many. ☺

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Hobbes and Modern Political Thought

By Yves Charles Zarka,
translated by James Griffith

Edinburgh University Press, Edinburgh, Scotland, 2016.
256 pages, \$110.

Reviewed by Christopher C. Faille

Yves Charles Zarka is an important figure in contemporary francophone political philosophy, a professor at the Sorbonne, and the author of books with weighty titles such as *Repenser la démocratie* (*Rethinking democracy*). He is not as yet well known in the Anglosphere. His study of the British philosopher Thomas Hobbes (1588-1679), originally published in French in 1995, has now been translated into Hobbes' language.

Zarka is an opponent of historicism in political philosophy—an approach taken

by, for example, Quentin Skinner, eminent British historian of ideas. Historicism, in the relevant sense, is the tendency to consider every utterance or argument as completely accounted for by, and bound up in, facts about its own time and place. Thus, Plato has nothing to say to us because the meaning of his views on politics must be bound up with the dying years of the Greek city state and the rise of the Macedonian empire.

The contrary to historicism might be termed "essentialism." It posits the existence of a long-lasting essence that one might call "human nature," and that the question of how humans ought to govern each other is in essence the same question today that it was in Plato's time, so we can enter with him into a conversation on the subject.

Zarka seems to have attempted to mark out a middle ground, trying to explain how it is possible to reject what is logically dubious in historicism without losing all sense of context and its genuine significance for meaning.

It is well, then, that he introduces himself to the English-speaking world through a book on Hobbes. Historicist-versus-essentialist debates have raged long and deeply among scholars of this particular sage.

Gracián

Part of Zarka's approach here, and the part on which I will focus for the remainder of this review, involves situating Hobbes in the context of his intellectual peers and contemporaries on the European scene. He was part of their conversation, after all, before he became part of ours. Zarka contrasts Hobbes especially with Baltasar Gracián (1601-1658), Blaise Pascal (1623-1662), and Robert Filmer (1588-1653). Zarka contends that these figures, and others of their time and stature, created modern political philosophy, and that, in the 21st century, it continues to have the shape they gave it.

Gracián, a Jesuit philosopher and theologian associated with the Spanish Baroque literary movement, wrote a political work, *The Hero*, in 1637. A Graciánesque *hero* can rule over others because he can rule over himself, and he can do so because he excels in qualities of mind, heart, and taste. As Zarka writes, Gracián conceives of the transition "from the hero's qualities to his effects upon others" as immediate.

What does any of this have to do with Hobbes? This: Hobbes systematically undermines any notion that politically eminent

people are eminent because of their personal qualities. Rather, Hobbes tends to see all men as equal, in the quotidian sense that anyone can pose a threat to anyone else in the hypothetical war of all against all that he posits to have existed in the state of nature, before people contracted with one another to institute a sovereign to rule and protect them. Further, the eminence of the eminent arises from this social contract and can be, so far as Hobbes is concerned, quite arbitrary. We can imagine the contracting parties bringing peace to their world by drawing straws to decide who gets to exercise supreme power, or by deciding that their descendants shall draw straws at intervals thereafter.

From the contrast between Gracián and Hobbes, Zarka concludes not that the latter was answering the former, but simply that, in the intellectual climate of the 17th century, Hobbes was on the winning and Gracián on the losing side of an important split, as the deposing of the hero figure allowed political theory to displace itself “from a consideration of the prince to a rationalization of the mechanisms of power....”

Pascal

Early on, Zarka quotes Blaise Pascal’s *Pensées (Thoughts)*, again to give a sense of the ideas about individuals and the state that were in the air in the 17th century:

If they [Plato and Aristotle] wrote on politics, it was as if laying down rules for a lunatic asylum; and if they presented the appearance of speaking of a great matter, it was because they knew that the madmen, to whom they spoke, thought they were kings and emperors. They entered into their principles in order to make their madness as little harmful as possible.

The presumption is that Pascal himself isn’t so much playing historian here as he is reworking the classical materials to his own tastes. What Zarka calls the “theological anthropology” here is that man is a fallen post-Edenic creature, that no one has a univocal legitimacy to rule anyone in this world, but that certain pretensions must be made, while the wise retain the knowledge that they are pretentions.

Pascal wrote a work more specifically addressing political philosophy, his *Three Discourses on the Station of Noblemen*, in

which he tries his own hand at making madness harmless. He writes admiringly here of a king who knows at some level that his monarchical status is humbug, but carries on regardless:

[The king] had two ways of looking at things; the one according to which he acted as king, the other by which he recognized his real state, and that it was mere chance that had put him in the place where he was. He hid this later thought and brought the other to light.

This view gives Pascal an ironic distance from politics and allows him to offer political leaders an ironic distance from their own role.

That is quite antithetical to Hobbes’ view. For Hobbes, as Zarka emphasizes, the nature of the authority of the law is at least potentially “the object of a recognition of all the subjects.” Everyone, insofar as he or she is capable, must understand the disaster that a recursion to the war of all against all would be, and must understand that the authority of the state is justified in order to avoid that disaster. There is no sense in Hobbes that anyone, either those exercising power or those subjected to it, ought to suppress any deeper truth in order to act upon a more superficial but practically demanded idea.

Filmer

I conclude by taking up the contrast between Hobbes and a countryman of his, Robert Filmer, the author of *Patriarcha*.

Filmer, like Hobbes, was reacting to the horrors of England’s civil war, was an admirer of the Stuart dynasty, and thought that submitting to the claims of that dynasty by the whole population of the British Isles would be a salutary development, preventing any recurrence of those horrors. Yet, though that sounds like a good patch of common ground with Hobbes, the two men’s minds worked in very different ways.

Filmer believed in the divine right of kings to rule. Rule over a kingdom is but rule over a family writ large, and the rule of a family by the patriarch is the divinely ordained system, one illustrated throughout the Old Testament in particular. It was right for Charles II to take the throne because he was the eldest son of Charles I, who had reigned before him, and, thus, with his father’s beheading in 1649, Charles II became the patriarch of the nation (although he

had to wait for the end of Oliver Cromwell’s Interregnum in 1660 to occupy his rightful place).

Just as Hobbes has no use for Gracián’s notion that some are especially fit to rule by virtue of their character, or with Pascal’s notion that rulers ought to know that there is some level of truth on which they ought to question their own legitimacy, likewise he has no use for Filmer’s notion that the natural fact of procreation creates a title of domination, or that the civil sovereign is simply that title of domination writ large.

In *The Elements of Law*, Hobbes wrote that the “title to dominion over a child, proceedeth not from the generation, but from the preservation of it.” From this distinction, it follows that an adoptive father, devoted to preserving the life of a child, is in the same position of “title to dominion” as if he had sired the child. And that in turn makes it clear that the “title to dominion” is a social or conventional sort of fact, not like the Old Testament “begats.”

The Conclusion

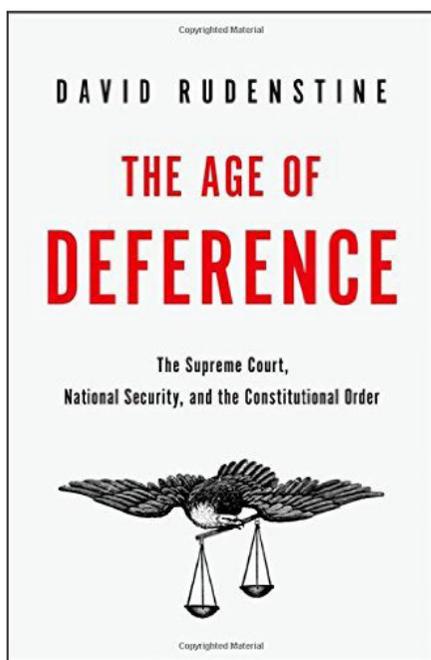
Zarka leads us through many expository twists and turns. I’ve given a sense of only some of them. In the end, though, he provides us with a list of four contributions that Hobbes made that have been foundational to political and legal philosophy ever since. I’ll simply paraphrase them here without further ado:

- Hobbes introduced a conception of the individual as universal (as opposed to heroism, which is a very particular trait). The universal individual “dissolves every natural social hierarchy and every organic conception of the people.”
- Hobbes understood the reliance of political power upon a theory of signs, of language and signification.
- Hobbes “liberates the concept of political power [*pouvoir*] and that of sovereignty from the terms of a theory of property within which they were thought.”
- Hobbes initiates the “juridical theory of the state,” that is, the discussion not merely of its function within the society but of its internal functioning and principles of succession.

This is a fine book and will surely receive careful study by all serious scholars of 17th-century political thought, whether they are historicist or essentialist or somewhere in between. Further, theorists with contemporary concerns will likely take note of Zarka’s

chapter on Hobbes' view of private property. He emphasizes Hobbes' claim that, in Zarka's paraphrase, property "is not primarily the work of labour upon nature, but the work of the power that founds it through law." ☉

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The Age of Deference: The Supreme Court, National Security, and the Constitutional Order

By David Rudenstine

Oxford University Press, New York, NY, 2016.

326 pages, \$29.95.

Reviewed by Louis Fisher

David Rudenstine, a professor of law at the Benjamin N. Cardozo School of Law, develops a strong case that presidential power in external affairs has expanded in large part because of judicial deference and abdication. The result is to diminish the quality of the constitutional order "by denying a remedy to injured individuals, insulating unlawful conduct, needlessly reinforcing a secrecy system that

is already grossly exaggerated, undermining the possibility of transparency, and eroding democratic value." Throughout this process, extensive damage is done to the rule of law and the system of checks and balances.

To Rudenstine, the judicial decline began with World War II and has continued up to the present time, with some exceptions. For example, from 2004 to 2008, the Supreme Court rejected arguments that President George W. Bush possessed inherent authority to create military tribunals and turned aside the administration's argument that it could deny habeas corpus to individuals it detained for alleged ties to terrorism (*Hamdi*, *Rasul*, *Hamdan*, and *Boemediene*). On the whole, however, Rudenstine concludes that the Supreme Court "has generally betrayed for over seven decades its responsibilities to hold the executive meaningfully accountable in cases where the executive claims implicate national security." The Court "has effectively elevated the executive in national security cases above the law."

Judicial deference to executive claims of national security is evident in *Hirabayashi* (1943) and *Korematsu* (1944), which upheld the curfew and detention of Japanese-Americans, most of whom were U.S. citizens. Later it was disclosed that the executive branch had falsely informed the Supreme Court that Japanese-Americans had attempted to signal to Japanese submarines off the Pacific coast. Because of those executive falsehoods, the convictions of Hirabayashi and Korematsu were overturned in the mid-1980s on *coram nobis* lawsuits that successfully demonstrated that the executive branch had committed fraud on the courts. However, the Court itself was at error in the original cases for accepting plainly racist positions offered by Gen. J. L. DeWitt, who believed that all Japanese, by race, are disloyal. Judicial deference to military judgment might be justified. Deferring to racism is not.

As a key illustration of judicial deference, Rudenstine analyzes the state secrets case of *United States v. Reynolds* (1953). The 1948 crash of a B-29 killed five servicemen and four civilian engineers who helped with classified equipment on board. Three widows of the engineers filed a lawsuit under the Federal Tort Claims Act to recover damages, seeking to determine if the government had been negligent in allowing the plane to fly. In this litigation, as Rudenstine points out, the district judge and the Third Circuit acted

properly, demanding that the executive branch give to the district judge the official accident report to be read *in camera*. Because the government refused to do that, it lost at both stages. In short, the judiciary did not defer to executive claims. District Judge William H. Kirkpatrick and the Third Circuit, led by Judge Albert Branson Maris, did the right thing, fully understanding the essential value of an independent judiciary capable of protecting the American system of checks and balances.

The failure came at the level of the Supreme Court, which proceeded to uphold the executive branch without ever looking at the accident report. When the report was later declassified in 1995 and the three families gained access to it in 2000, it became clear that the report contained no state secrets, but did contain abundant evidence that the government had been negligent in allowing the plane to fly. The three families returned to court on a *coram nobis*, charging that the administration had committed fraud on the courts, but the families lost in district court and the Third Circuit, and the Supreme Court denied certiorari. The Supreme Court in 1953 and all three levels of the judiciary during the 2003-2006 litigation failed to exercise any judicial independence in protecting the rights of private parties.

Rudenstine states that the executive branch "engaged in the manipulation and misrepresentation of the evidence," resulting in the *Reynolds* Supreme Court opinion in 1953 being "riddled with deceit and pretense." He suggests that the efforts of the Air Force, Department of Justice lawyers, and the Supreme Court were "aimed at, among other things, shielding the Air Force from substantial public embarrassment." But the government had another option. It could have expressed its profound apologies to the widows who lost husbands dedicated to helping the nation in matters of national security. Generous financial assistance to the widows and their children could have settled the case and avoided years of litigation. But the record is quite clear that the government is not disposed to making apologies, even when clearly at fault.

That pattern is underscored when Rudenstine discusses state secrets cases after Sept. 11, 2001, including litigation brought by Mahar Arar and Khaled El-Masri, whom the executive branch tortured and abused. There were opportunities for apologies and financial settlement, but the U.S.

government chose to fight its way through the courts by invoking the state secrets privilege. To its credit, Canada publicly apologized for its role in Arar's being sent to Syria for torture. A unanimous European Court of Human Rights ruled that El-Masri was an innocent victim of torture and abuse. It held Macedonia responsible and ordered it to pay about \$78,000 in damages, even though the United States had played the lead role. The U.S. executive branch prefers to plead the state secrets privilege instead of taking responsibility for its crimes. Unfortunately, federal courts decide against playing an independent role in seeing that justice is served; instead, they generally uphold executive claims, however hollow.

Rudenstine also covers the resort to secrecy by the executive branch in using armed drones against suspected terrorists, including Anwar al-Awlaki, a U.S. citizen whom it killed. The Office of Legal Counsel prepared two legal memos analyzing whether it was lawful for the United States to kill al-Awlaki, but they were kept secret. Even when later released under the pressure of litigation, the memos were heavily redacted. Some judges treated the matter as a political question that was beyond their competence, which Rudenstine finds unpersuasive. "As a general idea," he says, "the fact that some law is secret is an oxymoron and undemocratic. After all, how are the people to have an effective voice in governing themselves if the laws themselves are secret? And how is the average person to comply with the law if the law itself is secret?" During litigation involving al-Awlaki, the Second Circuit demonstrated a greater willingness to exercise judicial independence when examining executive claims.

As Rudenstine notes, judges who dismiss cases on the ground of deference to the executive branch should know that "they are shielding arguably unlawful conduct and creating a dynamic that encourages future unlawful conduct." Such judicial reasoning "permits, if not invites, public officials to violate the law with impunity." The Supreme Court "gains public trust when it takes its independence seriously and holds the executive legally accountable."

To protect the rule of law and constitutional values, Rudenstine urges courts "to abandon a posture of acquiescence." The problem is not merely judicial acquiescence and deference. The imbalance in our constitutional results also results from

judicial rulings that deliberately expand independent presidential power in external affairs. The seminal case is *United States v. Curtiss-Wright Export Corp.* (1936), which Rudenstine does not discuss. The constitutional issue in that case was whether Congress could delegate to President Franklin D. Roosevelt authority to impose an arms embargo on a region in South America. Roosevelt acted solely on legislative authority. At no time did he or anyone in the executive branch claim any independent or exclusive power over external affairs.

After upholding the delegation, the Supreme Court proceeded to add pages of extraneous and erroneous dicta, claiming that it was not dealing merely with an assertion of legislative power, "but with such an authority plus the very delicate, plenary and exclusive power of the president as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." Anyone reading Articles I and II of the Constitution would easily recognize that authority over international relations is allocated to both Congress and the president. Why did the Court say that the president is the "sole organ" of the federal government in international relations?

The Court in *Curtiss-Wright* borrowed the term "sole organ" from a speech that John Marshall gave in 1800 when he served in the House of Representatives. When one reads the speech, it is evident that Marshall was defending President John Adams not on the grounds of some kind of exclusive presidential power, but for an entirely different reason. Adams had turned over to England Thomas Nash, a native Irishman charged with murder. Adams acted under Article 27 of the Jay Treaty, which authorized the president to extradite to England British citizens charged with murder or forgery. Thus, Marshall simply defended Adams for carrying out a treaty provision, which is the president's constitutional duty under Article II, § 3, which requires him to "take care that the laws be faithfully executed." Adams was not making foreign policy unilaterally. He was not the "sole organ" in formulating the treaty. Instead, he was the sole organ in *implementing* it.

From 1936 forward, scholars denounced the Court for misrepresenting Marshall's speech. Nonetheless, the erroneous dicta survived decade after decade, eagerly cited by the executive branch to promote the theory

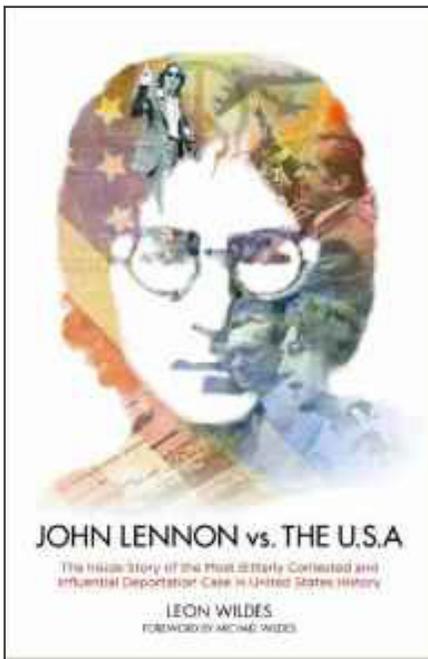
of plenary and exclusive presidential power in foreign affairs. Not until *Zivotofsky v. Kerry*, decided on June 8, 2015, did the Court jettison the sole-organ doctrine, but in doing so it manufactured a new model that is a close cousin to it. In upholding for the first time an exclusive power of the president to recognize foreign governments, the Court said that only the president can speak with "one voice," offer "unity" at all times, and speak "for the nation." Relying on an essay by Alexander Hamilton, it argued that, "with unity comes the ability to exercise, to a greater degree, '[d]ecision, activity, secrecy, and dispatch.'" The Court seemed unaware that a president in possession of those powers can do great harm to the nation, as occurred with Lyndon B. Johnson's escalation of the Vietnam war, Richard Nixon's Watergate, Ronald Reagan's Iran-Contra scandal, and George W. Bush's decision to go to war against Iraq based on six false claims that Saddam Hussein possessed weapons of mass destruction.

In his concluding chapter, Rudenstine states that, because "judicial abdication has resulted in profoundly harmful consequences to the nation, without necessarily protecting the nation's security," members of the Supreme Court "need to free themselves from the juristic mind that embraces undue deference and reshape the entire range of doctrines the Court has crafted over decades that combine to insulate the executive from meaningful judicial accountability." As an important first step, he urges the Court to modify the state secrets privilege to increase judicial independence in scrutinizing claims by the executive branch. In particular, courts "must review the actual documents in dispute." Moreover, the presence of opposing counsel with requisite security clearances would assist judges "in assessing the merits of the executive's claims" during *in camera* review.

Rudenstine correctly faults Congress for failing to "assert its own responsibilities over specific military and foreign affairs as well as more general national security matters." He does not mention that Congress, aware of the misuse of the state secrets doctrine after Sept. 11, held hearings to improve judicial independence when reviewing executive branch assertions about the need to withhold sensitive documents. The House and Senate Judiciary Committees reported legislation to substantially strengthen the federal courts and to improve the rights of private parties in litigating their claims. Unfortunately, no action was taken on the floor to move these

bills to passage. That should be done. Reform of the state secrets privilege requires action by both the judicial and legislative branches. Upon taking office, President Barack Obama stated that the George W. Bush administration had “over-used” the state secrets privilege. The promised reforms adopted by the Obama administration have proven to be largely a continuation of practices and attitudes followed by the Bush administration. ©

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John Lennon vs. The USA: The Inside Story of the Most Bitterly Contested and Influential Deportation Case in United States History

By Leon Wildes

American Bar Association, Chicago, IL, 2016.

384 pages, \$35.

Reviewed by R. Mark Frey

The recent publication of noted immigration attorney Leon Wildes' *John Lennon vs. The USA* brings back vivid memories of an era marked by conflict in matters involving war and national security, civil rights, law and order, and the Silent Majority. In some ways, these matters are eerily similar to today's concerns with ISIS/ISIL, Black Lives Matter, and Donald Trump's presidential campaign call to Make America Great Again.

In the 1960s, John Lennon, as a member of the Beatles, unleashed a creative force in music that reverberates to this day. Following the breakup of the Beatles in 1970, Lennon continued his influence, with solo projects and populist-flavored political activism, speaking out against the war in Vietnam and advocating for civil rights. That activism created consternation and alarm on the part of President Richard Nixon as he geared up for his 1972 reelection, fearful of the youth vote after the 1971 ratification of the 26th Amendment giving 18-year-olds the vote for the first time.

In gearing up, Nixon actively sought to eliminate possible threats to his reelection, including those he or his staff feared Lennon presented with his activism and influence among young people. How exactly was the effort against Lennon carried out? The federal government used the Immigration and Naturalization Service (INS) to effectuate the deportation of Lennon and his wife, Yoko Ono, relying on his drug conviction as the basis. Both Lennon and Ono were legally in the United States seeking to locate and gain court-granted custody of Yoko's daughter, Kyoko, from her former husband, Tony Cox. They had successfully entered the United States with visitor visas and a waiver of John's 1968 marijuana (actually cannabis resin) conviction in Great Britain. This was all well and good until Lennon and Ono faced the end of their stay in January 1971 without having resolved the custody matter involving Kyoko. They needed more time in the United States.

At that point, immigration attorney Leon Wildes was called upon to render legal advice. The couple's initial meeting with Wildes, on Jan. 14, 1971, led to a brief assessment of their case as well as a promise to explore further prospects. Wildes advised the couple to seek an extension of their visitor stay, given the unresolved matter involving custody of Yoko's daughter, Kyoko, and also permanent residence on the basis of a type of visa available to those with ex-

ceptional abilities in the arts or sciences and who would “substantially benefit prospectively the ... cultural interests of the United States.”

Wildes, noting that “It's a game of chess ... and there are a number of moves we'd have to make,” outlined his strategy for Lennon and Ono, arguing that relevant U.S. immigration law, while addressing narcotics and marijuana in the context of admissibility, did not contemplate cannabis resin in the mix. He stressed, as well, that *no mens rea* (knowledge) element was required in the United Kingdom for Lennon's drug conviction, observing that in the United States it was required for a lasting immigration effect. Lastly, Wildes intended to pursue rumors and complaints that certain members of the police in the United Kingdom had planted drugs on the premises of certain high profile individuals there.

Lennon and Ono agreed to the strategy, and it soon became apparent that something was amiss as Wildes attempted to obtain a simple extension of their visitor stay, but encountered much resistance and their eventual placement in deportation proceedings. The U.S. government wanted Lennon and Ono out of the country, the quicker the better, leading Wildes to ask why this case was being treated so differently from others he had worked on over the years. Through tenacious effort, Wildes was able to keep Lennon and Ono in the United States through years-long litigation before the Board of Immigration Appeals and in the federal courts. The litigation had much to do with the issues presented in their deportation hearing and also with information coming to light through requests under the Freedom of Information Act. In fact, Wildes found orders from high up in the Nixon administration to get rid of Lennon and Ono. They were not processed as were others within the immigration legal system but were selectively targeted for removal from the United States, all on account of Lennon's views and exercise of his free speech rights. As the Court of Appeals for the Second Circuit noted in its decision issued on Oct. 8, 1975, “The courts will not condone selective deportation based upon secret political grounds.”

At the same time, through the Freedom of Information Act, Wildes discovered a process that could have benefitted Lennon and Ono. It allowed for prioritization of certain individuals' removal in the most

difficult immigration cases. The process, known then as non-priority status, allowed some without any hope for relief from deportation to remain in the United States on humanitarian grounds. In other words, their deportation order was placed at the bottom of the bureaucratic pile. Decisions made under this process were made within the immigration bureaucracy on a subjective basis unbeknownst to the affected parties. It seemed odd to Wildes that this process was hidden from view.

As a result of Lennon and Ono's experience with the U.S. immigration legal system, this process, later known as deferred action and prosecutorial discretion, has become more formalized and available for application on a case-by-case basis, gaining attention today as the inspiration for President Barack Obama's Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).

This fascinating book is many things at once: a political thriller reporting on the

nefarious operations of the Nixon administration; a discussion of legal and constitutional issues in a key immigration case; a memoir by one of our most venerated immigration attorneys, "finally putting it all down" about his work with John Lennon and Yoko Ono; and a comprehensive overview of the case in all of its aspects, including an explication of a little known mechanism that the immigration service uses to prioritize the removal of people based on humanitarian considerations.

Leon Wildes, ever the teacher and consummate attorney, observed, "John Lennon left a legal legacy that still represents a huge contribution to the practice of my profession. In the field of immigration law today, no one has done more for people under deportation than my old friend John. Whether you call it non-priority status, deferred action, or prosecutorial discretion, as it's become known more recently, this remains the only remedy available in many of the most difficult immigration cases."

Well said, Mr. Wildes, well said.¹ ☺

Endnote

¹See also Shoba Sivaprasad Wadhia's, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases*, a fine companion to this book. My review of that book appeared in the October 2016 issue of *The Federal Lawyer*.

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