

ALBERTO GONZALES LECTURES JACK GOLDSMITH ABOUT PERCEPTION VERSUS REALITY IN A DEMOCRACY

I never, never imagined I'd see the day when Alberto Gonzales would school Jack Goldsmith on how to defend democracy.

Once upon a time, remember, it fell to Goldsmith to school Gonzales that the President (or Vice President) could not simply unilaterally authorize torture and surveillance programs that violate the law by engaging in cynical word games.

But now, Goldsmith is the one befuddled by word games and Gonzales is the one reminding that rule of law must operate in the realm of truth, not propaganda.

In a widely circulated NYT op-ed last week, Goldsmith warned that democracy may suffer from the January 6 indictment of Donald Trump because of the perceived unfairness (Goldsmith doesn't say, perceived *by whom*) of the treatment of Trump.

This deeply unfortunate timing **looks political** and has potent political implications even if it is not driven by partisan motivations. And it is the Biden administration's responsibility, as its Justice Department **reportedly** delayed the investigation of Mr. Trump for a year [1] and then rushed to indict him well into the G.O.P. primary season. The **unseemliness** of the prosecution will most likely grow if the Biden campaign or its proxies use it as a weapon

against Mr. Trump if he is nominated.

This is all happening against the backdrop of **perceived unfairness** in the Justice Department's earlier investigation, originating in the Obama administration, of Mr. Trump's connections to Russia in the 2016 general election. Anti-Trump texts by the lead F.B.I. investigator [2], a former F.B.I. director who put Mr. Trump in a bad light through **improper disclosure** of F.B.I. documents and information [3], transgressions by F.B.I. and Justice Department officials in securing permission to surveil a Trump associate [4] and more were **condemned** by the Justice Department's inspector general even as he found no direct evidence of political bias in the investigation. The discredited Steele dossier, which played a consequential role in the Russia investigation and especially **its public narrative**, grew out of opposition research by the Democratic National Committee and the Hillary Clinton campaign. [5]

And then there is the **perceived unfairness** in the department's treatment of Mr. Biden's son Hunter, in which the department has once again violated the cardinal principle of avoiding **any appearance of untoward behavior in a politically sensitive investigation**. Credible whistle-blowers have **alleged wrongdoing** and bias in the investigation [6], though the Trump-appointed prosecutor denies it. And the department's plea arrangement with Hunter Biden came apart, in ways that fanned suspicions of a sweetheart deal, in response to a few simple questions by a federal judge [7]. [my emphasis; numbers added]

Rather than parroting perceptions, in his op-ed,

Gonzales corrects a core misperception by pointing out a key difference between Hillary's treatment and Trump's: Hillary cooperated.

I recently heard from friends and former colleagues whom I trust and admire, people of common sense and strong values, who say that our justice system appears to be stacked against Trump and Republicans in general, that it favors liberals and Democrats, and that it serves the interests of the Democratic Party and not the Constitution. For example, they cite the department's 2018 decision not to charge Hillary Clinton criminally for keeping classified documents on a private email server while she was secretary of state during the Obama administration.

I can understand the skepticism, but based on the known facts in each case, I do not share it.

[snip]

A prosecutor's assessment of the evidence affects decisions on whether to charge on a set of known facts, and government officials under investigation, such as Clinton, often cooperate with prosecutors to address potential wrongdoing. By all accounts, Trump has refused to cooperate.

By contrast, Goldsmith simply ignores the backstory to virtually every single perceived claim in his op-ed.

1. Aside from a slew of other problems with the linked Carol Leonnig article, her claims of delay in the investigation do not account for the overt investigative steps taken against three of

Trump's co-conspirators in 2021, and nine months of any delay came from Trump's own frivolous Executive Privilege claims

2. Trump's Deputy Attorney General chose to release Peter Strzok's texts (which criticized Hillary and Bernie Sanders, in addition to Trump), but not those of agents who wrote pro-Trump texts on their FBI devices; that decision is currently the subject of a Privacy Act lawsuit
3. After Trump used Jim Comey's gross mistreatment of Hillary in actions that was among the most decisive acts of the 2016 election as his excuse to fire Comey, DOJ IG investigated Comey for publicly revealing the real reason Trump fired him
4. No Justice Department officials were faulted for the Carter Page errors, and subsequent reports from DOJ IG revealed that the number of Woods file errors against Page were actually fewer than in other applications; note, too, that Page was a former associate of Trump's, not a current one
5. Investigations against both

Hillary (two separate ones predicated on *Clinton Cash*) and Trump were predicated using oppo research, but perceptions about the Steele dossier ended up being more central because in significant part through the way Oleg Deripaska played both sides

6. One of the IRS agents Goldsmith treats as credible refused to turn over his emails for discovery for eight months when asked and the other revealed that he thought concerns about Sixth Amendment problems with the case were merely a sign of "liberal" bias; both have ties to Chuck Grassley and one revealed that ten months after obtaining a laptop that appears to have been the result of hacking, DOJ had still never forensically validated the contents of it
7. In the wake of that organized campaign against Hunter Biden, a Trump appointed US Attorney limited the scope of the plea which led to a Trump appointed judge refusing to accept it

Goldsmith cites – again, without explaining who is doing the perceiving – there’s a backstory of how that perception was constructed.

Which is the more important insight Gonzales offers: That perceived unfairness Goldsmith merely parrots, unquestioned? Trump deliberately *created* it.

[A]s I watched a former president of the United States, for the first time in history, **be arraigned in federal court** for attempting to obstruct official proceedings and overturn the results of the 2020 presidential election, I found myself less troubled by the actions of former president Donald Trump than by the response of a significant swath of the American people to Trump’s deepening legal woes.

[snip]

While Trump has a right to defend himself, **his language and actions since 2016 have fueled a growing sense among many Americans that our justice system is rigged and biased against him** and his supporters.

Sadly, this has led on the right to a growing distrust of and rage against the Justice Department.

[snip]

We have a duty as Americans not to blindly trust our justice system, but we also shouldn’t blindly trust those who say it is unjust. Our government officials have a duty to act at all times with integrity, and when appropriate to inform and reassure the public that their decisions are consistent based on provable evidence and in accordance with the rule of law.

Defendants do not have the same duty. They can, and sometimes do, say almost

anything to prove their innocence – no matter how damaging to our democracy and the rule of law. [my emphasis]

Trump's false claims of grievance, his concerted, seven year effort to evade any accountability, are themselves the source of damage to democracy and rule of law, not the perception that arises from Trump's propaganda.

Which brings me back to the question of *who* is perceiving this unfairness. By labeling these things "perceived" reality, Goldsmith abdicates any personal responsibility.

Goldsmith abdicates personal responsibility for debunking the more obvious false claims, such as that Hunter Biden, after five years of relentless attacks assisted by Bill Barr's creation of a way to ingest known Russian disinformation about him without holding Rudy legally accountable for what he did to obtain it, after five years of dedicated investigation by an IRS group normally focused on far bigger graft, somehow got a sweetheart deal.

More troubling, from a law professor, Goldsmith abdicates personal responsibility for his own false claims about the legal novelty of the January 6 indictment against Trump.

The case involves novel applications of three criminal laws and raises tricky issues of Mr. Trump's intent, his freedom of speech and the contours of presidential power.

One reason the investigation took so long – one likely reason why DOJ stopped well short of alleging Trump incited the violence on the Capitol and Mike Pence personally, in spite of all the evidence he did so deliberately and with malign intent – is to eliminate any First Amendment claim. One might repeat this claim if one had not read the indictment itself and instead simply repeated Trump's lawyers claims or the reports of political journalists

themselves parroting Trump's claims, but not after a review of how the conspiracies are constructed.

As to the claim that all three statutes are novel applications? That's an argument that says a conspiracy to submit documents to the federal government that were identified as illegal in advance is novel. Kenneth Chesbro wrote down in advance that the fake elector plot was legally suspect, then went ahead and implemented the plan anyway. John Eastman acknowledged repeatedly in advance that the requests they were making of Mike Pence were legally suspect, but then went ahead and told an armed, angry crowd otherwise.

The claim that all three charges are novel applications is especially obnoxious with regards to 18 USC 1512(c)(2) and (k), because the application has already been used more than 300 times (including with people who did not enter the Capitol). The DC Circuit has already approved the treatment of the vote certification as an official proceeding. And – as I personally told Goldsmith – whatever definition of “corruptly” the DC Circuit and SCOTUS will eventually adopt, it will apply *more easily* to Trump than to his 300 mobsters. And if SCOTUS were to overturn the application of obstruction to the vote certification – certainly within the realm of possibility from a court whose oldest member has a spouse who might similarly be charged – the response would already be baked in.

To argue that 300 of Trump's supporters should be charged and he should not is simply obscene.

American democracy, American rule of law, is no doubt in great peril and the prosecutions of Donald Trump for the damage he did to both will further test them.

But those of us who want to preserve democracy and rule of law have an ethical obligation not just to parrot the manufactured grievances of the demagogue attempting to end it, absolving

ourselves of any moral responsibility to sort through these claims, but instead to insist on truth as best as we can discern it.