WHEN GOVERNMENTS BREAK THE LAW

THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION

EDITED BY
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NEW YORK AND LONDON
www.nyupress.org

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Library of Congress Cataloging-in-Publication Data

When governments break the law : the rule of law and the prosecution of the Bush administration / edited by Austin Sarat and Nasser Hussain.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978–0–8147–4139–9 (cl : alk. paper)
ISBN-10: 0–8147–4139–8 (cl : alk. paper)
ISBN-13: 978–0–8147–3985–3 (pb : alk. paper)
ISBN-10: 0–8147–3985–7 (pb : alk. paper)
[etc.]
1. War on Terrorism, 2001–2009. 2. Rule of law. 3. Administrative responsibility. 4. International offenses. 5. United States—Politics and government—2001-2009. 6. Terrorism—Prevention—Law and legislation—United States. I. Sarat, Austin. II. Hussain, Nasser, 1965-
KZ6795.T47W48 2010
340'.115—dc22 2010015386

New York University Press books are printed on acid-free paper, and their binding materials are chosen for strength and durability. We strive to use environmentally responsible suppliers and materials to the greatest extent possible in publishing our books.

Manufactured in the United States of America
c 10 9 8 7 6 5 4 3 2 1
p 10 9 8 7 6 5 4 3 2 1

When Governments Break the Law

To my son Ben, with love and pride (A.S.)
To William (N.H.)

Acknowledgments

We gratefully acknowledge financial support from the Corliss Lamont Fund at Amherst College. We would like to thank Megan Estes and Samia Hesni for their help. We also want to thank our colleagues in Amherst's Department of Law, Jurisprudence, and Social Thought for helping to create such a congenial and stimulating intellectual environment. Last, we want to say publicly how much we value the chance to work with each other. This is our second book project, and we look forward to doing others in the future.

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Introduction

Responding to Government Lawlessness: What Does the Rule of Law Require?

NASSER HUSSAIN AND AUSTIN SARAT

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. The government is the potent omnipresent teacher. For good or ill it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.
>
> —Justice Louis Brandeis, *Olmstead v. United States*, 277 US 438, 485 (1928)

> Accountability is the first step toward deterrence. With criminal offenses like this, it is necessary to send a clear message: No one is above the law, no matter their intentions. The security of any country can only exist within the rule of law. The war on terror is no exception.
>
> —Gonzalo Boyé, Spanish lawyer working to indict members of the Bush Administration, interview with *Mother Jones Magazine* (2009)

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Today, as in the past, Americans pride themselves on their commitment to the rule of law.[1] This commitment is deeply rooted in America's history, or so the story goes, and it has been renewed from one generation to the next. From Tocqueville's observation that "the spirit of the laws which is produced in the schools and courts of justice, gradually permeates . . . into the bosom of society"[2] to the present, numerous commentators have said that America has the "principled character . . . of a Nation of people who aspire to live according to the rule of law."[3]

Invocations of the rule of law as a constitutive boundary separating this country from the rest of the world are pervasive.[4] Thus Ronald Cass, former dean of the Boston University Law School, observes that the commitment to the rule of law is "central to our national self-definition. . . . For most of the world . . . the nation most immediately associated with the rule of law—is the United States of America. The story of America . . . is uniquely the story of law." [5] The philosopher Michael Oakeshott suggests that "[t]he rule of law is the single greatest condition of our freedom, removing from us that great fear which has overshadowed so many communities, the fear of the power of our own government."[6] Similarly, former Secretary of Housing and Urban Development Henry Cisneros argues that "the fundamental identity of the U.S. is not an identity based on how people look, what language they learnt first or over how many generations they absorbed Anglo-Protestant values. Rather it is based upon acceptance of the rule of law."[7]

Recent controversies surrounding the war on terror and American intervention in Iraq and Afghanistan have brought rule of law rhetoric to a fevered pitch, with public officials and commentators uncritically linking it to America's boundary-marking values and arguments about America's distinctiveness. Typical was the statement of Jonathan Lippman, Chief Administrative Judge of the State of New York, who said, "The rule of law is what separates us from those who seek to defeat our democratic institutions and way of life through violence and terror."[8] Commenting on the scandal at Abu Ghraib, former Defense Secretary William Cohen argued, "The strength of this country is its insistence that we adhere to the rule of law."[9] A particularly bellicose version of such arguments took the following form: "The rule of law separates civilized societies from despotic societies. Unlike Iraq, the United States is a nation of laws, not men. . . . Yet if we blatantly violate the Constitution by pursuing an undeclared war, we violate the rule of law."[10]

Similar invocations of the rule of law have framed the ongoing debate about prosecuting Bush Administration officials with regard to domestic surveillance, authorizing the use of torture, and falsifying the case for going to war. Thus Elaine Scarry argues that, "If the country is to renew its commitment to the rule of law, that outcome will require reeducating ourselves about what the law is. The law aspires to symmetry across cases. . . . The international rules against war crimes and torture do not allow prosecution to be thought of as discretionary; they do not allow an escape provision based on electoral euphoria or on one's doubts about one's own stamina in fighting injustice. . . . So too the Convention against Torture requires that states 'sub-

mit' cases to the 'competent authorities for the purposes of prosecution.' This means . . . that where persons under color of law commit acts of torture in a country that is a party to the Torture Convention, the Convention requires prosecution."[11] Or, as the writer Glenn Greenwald puts it, "There is simply no way to (a) argue against investigation and prosecutions for Bush officials and simultaneously (b) claim with a straight face to believe in the rule of law, that no one is above the law, and that the U.S. should adhere to the same rules and values it attempts to impose on the rest of the world."[12]

More urgently, some worry that without legal consequences there will be no effective deterrence for the repetition of such acts in the future.[13] Michael Ratner, President of the Center for Constitutional Rights, insists that "only prosecutions can draw the clear, bright line that is necessary to insure that this will never happen again."[14] For Ratner and others,[15] putting the past behind us means leaving the historical record muddied, acquiescing in criminal wrongdoing, and turning the rule of law into an empty slogan.

Yet while President Obama has repeatedly emphasized his administration's commitment to transparency and the rule of law, nowhere has this resolve been so quickly and severely tested than with the issue of the possible prosecution of Bush Administration officials. Before his inauguration, Obama asserted his "belief that we need to look forward as opposed to looking backwards."[16] Since then, the president has seemed unenthusiastic about the prospect of launching an investigation into allegations of criminal wrongdoing by former President Bush, Vice President Cheney, Secretary Rumsfeld, members of the Office of Legal Counsel, and so on.[17]

Even some critics of the Bush Administration agree with Obama that we should avoid such confrontations, that the price of political division and of a bitter fight that could cripple Obama's ability to achieve his priorities is too high.[18] They also argue that the previous administration acted in the perilous context of a devastating attack and a new and confounding war and enemy.[19]

New York Times columnist Thomas Friedman's op-ed piece, "A Torturous Compromise" provides one example of this kind of argument.[20] Friedman observes that President Obama's decision to renounce torture, open up previous aspects of the program to public scrutiny, and yet reassure the lawyers and interrogators connected with the program of his intention not to pursue prosecutions is a justifiable compromise. This is because, according to Friedman, any prosecution down the chain, "taken to its logical end here would likely require bringing George W. Bush, Donald Rumsfeld and other senior officials to trial, which would rip our country apart." To proponents of prosecution, of course, that would be the point of proceeding; even so Friedman

alerts us to the difficulty of fashioning a narrow inquiry, and to how complex and far-ranging such an effort could quickly become.

But Friedman's main objection to prosecutions involves what he sees as a ruthless and murderous enemy, "undeterred by normal means." Friedman here mixes familiar claims that emergencies require exceptions to the usual rules (an argument we will take up later) with a specific claim about the war on terror. "So, yes," he admits, "people among us who went over the line may go unpunished, because we still have enemies who respect no lines at all. In such an ugly war, you do your best."

The controversy surrounding the question of prosecution was vividly exemplified when Attorney General Eric Holder tasked a career prosecutor to investigate alleged CIA interrogation abuses, including episodes that resulted in prisoner deaths. Indeed Holder himself noted, "I fully realize that my decision to commence this preliminary review will be controversial." However, he claimed that "As Attorney General, my duty is to examine the facts and to follow the law. In this case, given all of the information currently available, it is clear to me that this review is the only responsible course of action for me to take."[21]

Measured or partisan, scholarly or journalistic, clearly the debate about accountability for the alleged crimes of the Bush Administration will continue for some time.[22] This book enters this debate not to advocate a single position on prosecution—our contributors take distinct positions for and against the proposition, offering revealing reasons and illuminating alternatives—but rather to use the debate as a prompt, as an invitation of sorts, to figure out what the commitment to a rule of law demands when governments break the law. The focus of our book, therefore, is not the substantive question of whether any Bush Administration officials, in fact, violated the law, but rather the procedural, legal, political, and cultural questions of what it would mean either to pursue criminal prosecutions or to refuse to do so. In short, by presuming that officials *could* be prosecuted, we ask, *should* they be prosecuted?[23] By phrasing the demands of a rule of law as a question we hope to highlight the capacious nature of that concept,[24] and the fact that the demands of a rule of law in the case of political crimes are not self-evident.[25]

In what follows we summarize the principal charges against the Bush Administration and review factors that illuminate the question of how we should respond when governments break the law. We take up the meaning of a rule of law, the role of emergency, the relation of a rule of law to international law, and finally the lessons of transitional justice.

The Charges

Numerous and varied charges have been leveled against the Bush Administration. While some are uncorroborated, many others have been corroborated and confirmed. They have been public for some time, yet important details, such as the vice president's possibly illegal concealment of a secret assassination program from Congress, have surfaced more recently.[26] For the sake of clarity we divide the charges into three categories: unauthorized domestic surveillance; misrepresenting to Congress and the American people the case for going to war in Iraq; and the use of torture. While we address each in turn, we will not provide a comprehensive summary of each charge, for to do so would take us beyond the scope of this essay and also duplicate much existing scholarly and journalistic literature. We briefly survey each charge, paying attention to the particular laws under which an indictment might be fashioned and the contingent circumstances in each case that would effect choosing to move forward or not. We base our summary, wherever possible, on investigative reports by various agencies of the U.S. government, from congressional committees to reports of inspectors general.

Unauthorized Domestic Surveillance

On December 16, 2005, the *New York Times* published a story about a decision by President Bush, following the attacks of 9/11, to ask the NSA to eavesdrop on Americans and others inside the United States, bypassing the existing procedure for obtaining warrants for such activity.[27] Those procedures, stipulated by the 1978 Foreign Intelligence Surveillance Act or FISA, "provide legislative authorization and regulation for all electronic surveillance conducted within the United States for foreign intelligence purposes."[28]

The Act requires that a special court issue a warrant for any surveillance of communications for foreign intelligence purposes, permitting only court-authorized surveillance of American citizens if they are shown to be agents of a foreign power. While the proceedings of the Court are classified, we know that the Court has issued warrants in nearly all instances in which they were requested. Nonetheless, as the *Times* reported, the Bush Administration decided to bypass FISA, citing gaps in the law and delays in the system. Since the publication of the initial story there have been numerous investigations, culminating in a single comprehensive report by the inspectors general of the Department of Defense, Department of Justice, the CIA, the National Security Agency, and the Office of the Director of National Intelligence.

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The Report traces the inception of the program, initially referred to by the Bush Administration as the Terrorist Surveillance Program (TSP), but now simply called the President's Surveillance Program (PSP), to the months following 9/11. According to the Report, after 9/11 the NSA was pushed to produce more surveillance and information. NSA director Michael Hayden told the White House that "nothing more could be done within existing authorities" but that with additional authorization he could produce more information.[29] Soon after, the president gave the go-ahead for the NSA to initiate new (still highly classified) activities under a single Presidential Authorization, which was renewed every forty-five days based on "scary" memos produced by the CIA outlining the continuing terrorist threat and the need for additional surveillance. According to the Report, "[S]everal different intelligence activities were authorized in Presidential Authorizations, and the details of these activities changed over time."[30]

The program was given legal cover by a November 2, 2001 memorandum prepared by John Yoo in the Justice Department's Office of Legal Counsel, without the supervision or even knowledge of his immediate supervisor, Jay Bybee, a fact that left Bybee "surprised" and "a little disappointed."[31] The Report offers a sum and substance of the classified memo, in which Yoo argued that while FISA purported to be the exclusive mechanism for conducting surveillance for foreign intelligence, "such a reading of FISA would be an unconstitutional infringement on the President's Article II authorities."[32] Ignoring a section of FISA that explicitly deals with wartime situations and created a fifteen-day exemption for obtaining warrants, Yoo argued that FISA did not mention or concern the president's national security obligations as Commander-in-Chief.

Based on this memo alone, Attorney General Ashcroft certified the "legality" of the President's Surveillance Program. Yet the Report suggests that the need for the Justice Department's blessing was, in the words of Alberto Gonzales, who became attorney general after Ashcroft, "purely political," as it would provide value "prospectively" in the event of a future investigation.[33] Providing cover for a criminal act through a transparently false legal rationale does not, so the argument goes, immunize participants in that act. Indeed, some might argue that it evidences the kind of culpable intent necessary to prove criminal conspiracy.

While the inspectors general avoid calling either this threadbare legal justification, or the surveillance program itself, illegal, they make clear that many others certainly found them to be of questionable legality. Indeed, in March 2004 Yoo's successors at the OLC, Patrick Philbin and Jack Goldsmith

(and Acting Attorney General Comey) refused to reauthorize the program based on Yoo's reasoning, forcing a showdown between the vice president's office and the Justice Department.[34] When the White House suggested that the program continue without DOJ authorization, a number of officials, including FBI Director Mueller, threatened to resign.

The dénouement to this story of warrantless wiretapping came in July 2008, when Congress (with a yes vote from then-Senator and presidential candidate Barack Obama) passed the FISA Amendment Act. The Act allows the attorney general in concert with the director of national intelligence to authorize surveillance programs for up to one year. The Act also allows for emergency surveillance without a warrant for seven days, after which, if a warrant is not granted, the government may still continue the surveillance during the appeals process and retain the information it gathers. Finally, the FISA Amendment Act retroactively immunizes from liability communications service providers who participated in the original program—a signal that even if the original program was illegal, there is little interest in prosecuting those involved.

This last fact has direct implications for our discussion of the demands of the rule of law. On the one hand, the rule of law does not prohibit Congress from retroactively immunizing such a program; on the other hand, to the extent that specific officials have *not* been immunized by Congress, the question remains: is proceeding with further investigations and prosecutions for violating FISA still in order?

The Case for War with Iraq

By now the broad outlines of the various misrepresentations in the case for war with Iraq are well known. By all accounts, the Bush Administration was fixated on Iraq even before 9/11, but that event provided new impetus for their desire to take action. Their case for war depended ultimately on two claims which, when put together, would paint a scenario of a devastating and imminent threat: the first was that Saddam Hussein had, or was acquiring, weapons of mass destruction, including nuclear weapons, and the second was that Hussein had contacts with al-Qaida to whom he would potentially hand over these weapons for use in new and catastrophic attacks. We now know, of course, that both these claims were false. What constitutes the crux of the debate now, and what would be the main focus of any future investigation or prosecution, is whether the administration made a mistake based on faulty intelligence or knowingly distorted or fabricated intelligence findings in order to support its own position.

Over time information supporting the conclusion that intelligence was distorted has been trickling out. For example, in 2006 Michael Isikoff and David Corn published *Hubris*, an exhaustive account of one of the central claims in the lead-up to the Iraq war: the alleged sale by Niger of yellowcake uranium (a key ingredient in the making of nuclear weapons) to Saddam Hussein.[35] Their book details how the claim was based on a file of documents acquired in 2002 by an operative in Italy. When Simon Dodge of the State Department reviewed the documents, he quickly declared them to be a hoax. That was not, however, the end of the story. As Isikoff and Corn explain it, partly by accident but also somewhat willfully (again the blurring of distortion and outright deception), the White House uncritically used the documents, enabling President Bush to say in his 2003 State of the Union address that Iraq was in the process of acquiring uranium to build nuclear weapons.

There have been many other accounts of this kind, but surely the most systematic and comprehensive is the Senate Intelligence Committee's June 2008 "Report on Whether Public Statements Regarding Iraq By U.S. Government Officials Were Substantiated By Intelligence Information."[36] The result of a multiyear investigation, it chronicles a consistent gap between the Bush Administration's statements on Iraq and the then-existing intelligence. Thus, on the question of Iraq's acquisition of nuclear materials and capabilities, the Report describes several policy speeches by the president and vice president in which they made unequivocal claims that Iraq had restarted its nuclear program. In one speech in Cincinnati on October 7, 2002, President Bush claimed that Iraq had purchased aluminum tubes needed for the construction of centrifuges, and was "moving ever closer to developing a nuclear weapon."[37] This was, in fact, a clear distortion of the intelligence estimates. The Report notes that there was a split in the intelligence community (principally it seems between the State Department's Bureau of Intelligence and Research and the CIA) over not just the particular purpose of the tubes, but also the general conclusion that Iraq had restarted its nuclear program. Some of this disagreement was recorded in the October 2002 National Intelligence Estimate. Yet none of it made it into any of the administration's speeches. The Report goes on for dozens of pages with similar exercises, the cumulative effect of which is to reveal a consistent pattern of distortion and deception around the two main arguments that shaped the push for war: Iraq's acquisition of WMDs and its association with al-Qaida.

What, however, is the crime here? The president lying to Congress is certainly a deeply corrosive element in any constitutional democracy; it is, however, an impeachable offense, not a crime, for which the Constitution lays

down detailed and specific procedures. However, the attorney and author Vincent Bugliosi argues that the crime with which President Bush could and, in his view, should, be charged is conspiracy to commit murder. Bugliosi proposes that jurisdiction for such prosecution might be lodged in any state from which at least one serviceman has died.[38]

The Minority Report, written by the Republicans on the Senate Intelligence Committee, raises some equally disturbing questions about Congress's own lapses and rush to judgment, lapses which in the view of some commentators would doom any effort to prosecute Bush Administration officials.[39] Thus, staying with the same example of the October 2002 NIE and claims made around that time about Iraq's nuclear ambitions, the Republicans point out that numerous Democratic senators with access to the NIE, including senators Clinton, Schumer, Edwards, and Kerry, made equally forceful warnings about Iraq's nuclear program in October 2002. In short, the Minority Report accuses the Democrats of "seeking cover."[40]

Of course, this may just be partisan bickering, but we believe that it is important for two reasons. First, it points to a complete absence of any bipartisan support for an investigation or prosecution for misrepresentations in the run-up to the war. Second, and we think more importantly, the partisan flavor of the Minority Report reminds us of the important fact that Congress was a willing partner in the Bush Administration's war effort. Individual senators may now claim that they were misled, but they did little to initiate any of their own investigations or to make any effort to slow down the rush to war.

The war efforts of modern governments are large scale and involve multiple political actors, complicating the legal case against the president alone. The trial at Nuremberg certainly highlights this fact, even as it involved a case of criminal conspiracy for crimes against peace by the leaders of the German Reich. While there may be a seductive simplicity in focusing responsibility on President Bush—such as Bugliosi's call for indicting the president for conspiracy to commit murder—that approach raises legitimate questions. Thus in a response to Bugliosi, Professor Carl Boggs asks, "[W]hy limit criminal indictments to Bush alone when the trail of culpability is so lengthy?"[41]

Torture

Of all the charges against the Bush Administration, the charge of torture has gained the most traction, bringing inchoate moral, legal, and political objections into sharp focus. In some ways this is not surprising. Descriptions of torture and abuse, and even more so perhaps photographs, such as the pic-

tures from Abu Ghraib, provoke deep moral revulsion.[42] Moreover, as Scarry noted, torture is a domestic and international crime, for which there are no exceptions for wartime or for national security. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that no exceptional circumstances whatsoever may be invoked as a justification for torture (Article 2); creates a universal jurisdiction by treating offenses "as if they had been committed not only in the place in which they occurred but also in the territories of states required to establish their jurisdiction" (Article 8); and demands that states incorporate the Convention into their domestic criminal law (Article 4).[43] In accordance with the demands of Article 4, the United States prohibits torture in domestic law.[44]

Given what we already know about practices such as waterboarding, there is also a pragmatic dimension to the focus on torture. Attorney Scott Horton accurately notes, "In weighing the enormity of the administration's transgressions against the realistic prospect of justice, it is possible to determine not only the crime that calls most clearly for prosecution but also the crime that is most likely to be successfully prosecuted. In both cases, that crime is torture."[45]

There is by now a large literature on the use of torture or "enhanced interrogations," including a substantial investigative report by the Senate's Armed Services Committee.[46] After 9/11, a number of administration officials believed that preventing another attack depended upon gathering information from "high value" detainees. This conclusion would not by itself have led to the interrogation practices we now know so much about but for the fact that the president had declared that the Geneva Conventions did not apply to the detainees, coupled with Vice President Cheney and Secretary of Defense Donald Rumsfeld's belief, in stark disagreement with veteran FBI interrogators, that only a "gloves off" approach would produce needed information.[47] In fact, even before the president's decision not to apply Geneva to the detainees, the Department of Defense General Counsel's office had approached the Joint Personal Recovery Agency (JPRA), which is responsible for overseeing the SERE (Survival Evasion Resistance and Escape) training program for captured U.S. servicemen. In effect, what JPRA produced was a "reverse engineering" of SERE's tactics, which included sleep deprivation, stress positions, exposure to extreme temperatures, and waterboarding.

Just as questionable as the provenance of the new interrogation tactics used on detainees was the legal reasoning produced to justify them. Once the decision was made to "enhance" interrogations, lawyers at the Department of Defense and the Office of Legal Counsel in the Department of Justice went to work. The main policy memo, innocuously titled "Counter Resistance Tech-

niques," was drafted by William Haynes, General Counsel to Donald Rumsfeld, and signed by the latter on December 2, 2002.[48]

Even before that memo, however, a series of memos were written by members of the Office of Legal Counsel. In particular, Jay Bybee's August 2002 memo manipulates the definition of torture beyond recognition.[49] Bybee argues that only something akin to "organ failure" would violate the injunction against severe physical pain; severe mental pain, he argues, should not be read as meaning mental suffering imposed at the moment but "significant psychological harm of significant duration, e.g. lasting for months or even years."[50] Even more explicit legal cover came later with John Yoo's March 14, 2003 memo arguing that criminal laws such as the federal torture statute would not apply to military interrogations.[51]

The role of the OLC lawyers and their legal memoranda represents a particularly vexing aspect of the debate on prosecutions.[52] While many other legal experts, including lawyers who came later to the Office of Legal Counsel, repudiated the reasoning of these opinions, it is still a large step from regarding these memos as examples of egregious legal thought (perhaps even warranting professional sanctions such as disbarment) to treating them as evidence of complicity in war crimes.[53]

The British lawyer Phillipe Sands takes up these questions in his book *Torture Team*, a careful reconstruction of the trail from the memos of Yoo and Bybee to the interrogation procedures drafted by Haynes and signed by Rumsfeld.[54] Mindful of the difficulty of trying to assign criminal guilt to professional lawyers, Sands notes that there is only one real precedent for such an action—the Altsttoter case (also known as the Justices case) at Nuremberg that found "legal advisors who prepare legal advice that is so erroneous as to give rise to an international crime are themselves subject to the rules of international criminality."[55] Sands's ultimate conclusion is that the OLC lawyers bear "direct responsibility" for policies that led to violations of the Geneva Convention.

Read together, various official reports offer a seemingly exhaustive catalog of questionable practices and possible legal violations throughout the Bush Administration. The sheer scope of these reports—the Senate reports on the case for war and on interrogation are multiyear, multivolume efforts—makes clear that legal violations were neither isolated nor confined to a couple of individuals. As Scott Horton puts it, "[T]he administration did more than commit crimes. It waged war against the law itself."[56]

Horton's argument leads to the sobering realization that the case for prosecutions will have to be made with care, for the "very breadth and audacity of the administration's activities would make the process so complex as to defy

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