

## BARACK OBAMA'S WAR ON TERROR

**POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11.** Jack Goldsmith.<sup>1</sup> New York: W. W. Norton & Co. 2012. Pp. xvi + 311. \$26.95 (Cloth).

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President Barack Obama's updated version of the so-called war on terror has received something of a "free pass" from most political and legal scholars.<sup>3</sup> To be sure, civil libertarians at the ACLU, Center for Constitutional Rights, and other activist organizations,<sup>4</sup> as well as liberal voices on the editorial pages of the *New York Times*,<sup>5</sup> have pilloried Obama for his failure to fulfill what appeared to be a heartfelt 2008 campaign promise to dramatically reverse his conservative predecessor's controversial counterterrorism policies. Yet nothing akin to the avalanche of critical books or journal articles burying President George W. Bush's policies has emerged thus far. In part, the difference stems from Obama's admirable decision to abandon the Bush Administration's embrace of so-called "enhanced interrogation" (i.e., torture).<sup>6</sup> The silence likely stems as well from the partisan preferences of law professors and political scientists, many of whom instinctively sympathize with Obama and his Democratic Administration. Those defensive instincts have surely been reinforced, albeit inadvertently, by right-wing critics like Dick Cheney and Rudy Giuliani, neither of whom seems willing to miss an opportunity to appear before the TV cameras in order to denounce Obama for being "weak on terrorism."<sup>7</sup>

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3. I thank my colleague Sumit Ganguly for the (hopefully) felicitous phrasing here.

4. See, e.g., *Rights Groups File Challenge to Killings of Three Americans in U.S. Drone Strikes*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/newsroom/press-releases/rights-groups-file-challenge-killings-of-three-Americans-U.S.-drone-strikes> (last visited Dec. 28, 2012).

5. See, e.g., *No Penalty for Torture*, N.Y. TIMES, Sep. 4, 2012, at A26.

6. See Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

7. See, e.g., Kevin Robillard, *Cheney: Obama is Worse than Carter*, POLITICO (July

So it probably should come as no surprise that the best available account of the Obama Administration's version of the war on terror comes from one of our leading conservative jurists, Jack Goldsmith, in his new and provocative volume. More unexpected is that if Goldsmith's description of Obama's policies and his Administration's legal justifications is to be believed, some of the President's vocal critics on Fox News can probably calm down: as Goldsmith for the most part convincingly outlines, continuities outnumber discontinuities as far as Obama's relationship to his Republican forerunner goes (pp. 3–48). Most surprising perhaps, Goldsmith seems at least broadly appreciative of—if not always enthusiastic about—the basic outlines of Obama's present political and legal brew, seeing in it the product of fruitful institutional learning that has characterized U.S. policy since 9/11 (p. xii). For those vexed about indefinite detention, Abu Ghraib, and Guantanamo Bay, Goldsmith offers some reassuring words. Despite some blemishes, the U.S. polity, blessed with a thriving civil society and firmly institutionalized checks and balances operating effectively to counter extreme policies, has in fact performed reasonably well since 9/11: President Bush was eventually forced to reconsider counterproductive and legally dubious policies (e.g., torture) (p. xii). Because of our resilient and indeed self-correcting constitutional system, fruitful pushback not only encouraged officials to abandon such policies, but along the way vital lessons have been learned about how best to navigate what Goldsmith sees as a more-or-less permanent state of emergency (pp. xiv–xvi). Although Obama's present-day policies are by no means flawless, he has not only built on the lasting achievements of the Bush Administration's version of the war on terror, but has also sensibly tried to render them consonant with longstanding U.S.-backed legal ideals (pp. 5–20). Best of all, Obama has been driven to do so partly because he faces pressures like those which similarly forced President Bush to give ground (p. 24). *Pace* scholars on both the left and right who depict the present-day presidency as effectively uncontrolled by institutional and constitutional means, Goldsmith underscores crucial ways in which it continues to confront oftentimes imposing constraints.<sup>8</sup>

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30, 2012), <http://www.politico.com/news/stories/0712/79112.html>.

8. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); MATTHEW CRENSON & BENJAMIN GINSBERG, *PRESIDENTIAL POWER: UNCHECKED AND UNBALANCED* (2007); ERIC A. POSNER & ADRIAN VERMEULE, *THE*

Providing a hardheaded yet surprisingly sympathetic look at President Obama's policies, Goldsmith's volume provides illuminating reading for anyone interested in the political and legal vagaries of post 9/11 U.S. counterterrorism. Unfortunately, the author's insufficiently critical view of the U.S. constitutional system leads him not only to exaggerate its successes in dealing with terrorism, but also to distort some of the complexities of counterterrorism under the Obama Administration.

### I. IN GEORGE W. BUSH'S FOOTSTEPS

Many readers of this journal are already familiar with the fact that Goldsmith served as Assistant Attorney General in the Office of Legal Counsel between October 2003 and June 2004, before running afoul of precisely those Bush Administration officials who supported far more outlandish views about executive prerogative.<sup>9</sup> So his present volume represents an implicit attempt to provide an *ex post facto* justification for the more moderate course he advocated under President Bush, as well as a clear suggestion that voices like his won the war even if they lost the internecine bureaucratic battles: counterterrorism law and policy not only positively evolved in the direction sought by moderate conservatives like Goldsmith who were abrasively pushed aside by their rivals, but President Obama has relied heavily on the Bush Administration's approach between 2006 and January 2009: "The bottom line is that it copied most of the Bush counterterrorism program as it stood in January 2009, expanded some of it, and narrowed a bit" (p. 5).

To be sure, Goldsmith concedes that Obama has broken decisively with his precursor's positions in some crucial arenas. Most dramatically, Obama has disavowed the Bush Administration's early endorsement of torture (p. 14), and despite sizeable political opposition also released significant quantities of previously classified documents about recent U.S. interrogation practices, some of which provide absolutely harrowing details.<sup>10</sup> Obama also cut loose from Bush by closing

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EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010); FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR (2007); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009).

9. For his own perspective on his battles within the Bush Administration, see JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007).

10. Al-Qaeda militants Abu Zubaydah and Khalid Sheikh Mohammed "were

down so-called offshore “black sites” where suspected terrorists were subjected to controversial forms of interrogation and detainment, while forthrightly reaffirming the U.S. commitment to the relevant Geneva conventions concerning the humane treatment of prisoners (p. 16). He also has moved away from making constitutionally tendentious claims concerning inherent executive power, instead tending to appeal to statutory legislation (e.g., Congress’s September 18, 2001 authorization “to use all necessary and appropriate forces” against those aiding or abetting the 9/11 attacks) as a legal justification for his actions (pp. 39–41). As part of a noteworthy shift in the rhetorical (and sometimes legal) framework under which counterterrorism is now waged, the bellicose language of “war on terror” has pretty much vanished from Administration statements, the dubious legal category of “enemy combatant” is no longer deployed, and, most importantly, even when pursuing actions seemingly reminiscent of his predecessor’s, the Obama Administration generally highlights their alleged compatibility with basic rule of law virtues (e.g., the right to a fair hearing) (pp. 40–41). Even though Goldsmith sometimes wants to downplay the degree to which this move represents significantly more than improved political “packaging”,<sup>11</sup> he concedes that Obama’s rule of law rhetoric has not only generated political capital for the president, but has also shaped some key facets of U.S. counterterrorism (pp. 39–48).

Admitting that such changes remain considerable, Goldsmith nonetheless proceeds to make a strong case in defense of his thesis that “Obama [has] continued almost all of his predecessor’s counterterrorism policies” (p. x). In this vein, Obama has publicly renewed President Bush’s declaration of a “national emergency” from September 14, 2001, and elsewhere has frequently taken over—or at most modestly altered—core Bush-era legal arguments and doctrines. Although its public rhetoric might suggest otherwise, the Administration continues to insist that the U.S. remains *at war* with Al-Qaeda, and it still asserts far-reaching executive authority to combat terrorism by appealing to the vast and arguably unwieldy delegations of

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waterboarded hundreds of times. Others were subjected to eleven straight days of sleep deprivation.” DANIEL KLADMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 73–74 (2012).

11. For an alternative view that takes Obama’s rule of law “packaging” somewhat more seriously, see David Cole, *Obama and Terror: The Hovering Questions*, N.Y. REV. BOOKS (July 12, 2012) <http://www.nybooks.com/articles/archives/2012/jul/12/obama-and-terror-hovering-questions/>.

authority promulgated right after the 9/11 attacks (e.g., the congressional declaration of war against Al-Qaeda) (pp. 5–6). Like his conservative predecessor, Obama relies on the controversial Patriot Act—whose renewal he supported—to legitimize some of his policies (p. 16). Nor has the Obama Administration bothered to explain when, if ever, the ongoing war on terror and/or “state of emergency” will conclude (p. 21–22). Not surprisingly, the Administration has continued many and perhaps most of the extensive forms of intelligence gathering and surveillance employed by Bush (pp. 16–17). As Goldsmith points out, Obama has even tellingly “approved the construction of a \$1.5 billion, one-million-square-foot NSA data center” in Utah equipped with state-of-the art cybersecurity tools (p. 17).

Despite Obama’s initial promise to close it down, Guantanamo Bay (GTMO) remains open and operative, albeit on a smaller scale (i.e., with only 167 detainees<sup>12</sup>) than under Bush (pp. 11–12). Even if blame for this failure can by no means be placed solely or perhaps even chiefly at Obama’s feet, he has followed Bush in endorsing indefinite detention for some suspected terrorists, many of whom will apparently remain in more-or-less permanent limbo at GTMO (pp. 12–13). Similarly, the Obama Administration reformed, but by no means abandoned, the system of military commissions inherited from the Bush Administration (p. 9). While the commissions now look quite different from the kangaroo courts initially sought by former Secretary of Defense Rumsfeld and others, in part because of some real procedural improvements (p. 187), the overall picture remains sobering: the Administration is still fighting off legal challenges to its attempt to give base commanders carte blanche authority over visits by legal counsel, along with discretion to decide how lawyers can use classified information they may glean from detainees they represent.<sup>13</sup>

Again reminiscent of its forerunner, the Obama Administration continues to practice rendition, and though most evidence suggests that it has done so more humanely, the legal test it employs for determining where to send accused terrorists remains unchanged: only if there is more than a 50% chance of

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12. *U.S. Names 55 Set for Transfer from Guantanamo*, N.Y. TIMES, Sep. 21, 2012, at A6.

13. See e.g., Jane Sutton, *U.S. Judge Blocks New Restrictions on Guantanamo Lawyers*, REUTERS (Sept. 6, 2012), <http://www.reuters.com/article/2012/09/06/us-usa-guantanamo-idUSBRE8851E720120906>.

detainees facing torture in a particular country are officials prohibited from sending them there (p. 15). Similarly, even though it has improved screening and procedural protections for detainees, the Administration also argues that basic habeas corpus protections do not cover those captured overseas (e.g., in Afghanistan) (p. 13). It seems as well to have appropriated the Bush Administration's hard line views on state secrecy, fighting no less aggressively in using it to dismiss lawsuits challenging its policies (e.g., in recent legal challenges to "targeted killings" of suspected terrorists) (pp. 13–14, 17–19). Like the Bush Administration, Obama's Administration insists on its right to engage in forum shopping: only when it is legally and politically convenient will suspected foreign-born terrorists get their day in civilian court (pp. 10–11). Moreover, as the *New York Times* editors recently commented, "[a]ny remaining hope for imposing meaningful accountability for torture and other abuses committed" under the Bush Administration has "for all practical purposes" now ended.<sup>14</sup> Even those CIA interrogators who likely tortured prisoners to death, going well beyond even those suspect interrogation practices condoned by President Bush, will not be facing prosecution under Attorney General Eric Holder.<sup>15</sup>

Last but by no means least, the Obama Administration has gone beyond anything President Bush attempted in one major area: he has dramatically ramped up the targeted killing of suspected terrorists abroad, even claiming legal authority to kill—and then proceeding to do so—a U.S. citizen, Anwar al-Aulaqi, and then turning to Bush-era legal doctrines to beat back a courtroom challenge from the ACLU (pp. 13–14, 18–19). As *Newsweek* journalist Daniel Klaidman shows in his aptly entitled *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, an insightful account of the Administration's internal battles about counterterrorism, targeted killings, preferably by means of drones, quickly became the Administration's favored device for combating terrorism for a mix of interlocking political and legal imperatives.<sup>16</sup> They allow the Administration to minimize unnecessary U.S. military casualties in a seemingly endless war on terror, while typically garnering strong public support and permitting Obama to accentuate his image as a strong leader tough on national

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14. *No Penalty for Torture*, N.Y. TIMES, Sept. 15, 2012, at A22.

15. *Id.*

16. See KLAIDMAN, *supra* note 10, at 117–43.

security issues.<sup>17</sup> Just as conveniently, they do not require capturing and detaining dangerous terrorists, which has become a political and legal morass given congressional hostility to trying foreign terrorists in ordinary courts as well as the Administration's own commitment to downsize Gitmo and other offshore detention centers.<sup>18</sup> Despite widespread condemnation from abroad, the Administration continues to favor targeted killings as its weapon of choice in the war on terror. In fact, they have even garnered the unlikely imprimatur of one of the Administration's most prominent liberal jurists, State Department Legal Advisor and Yale Law School professor Harold Koh, who interprets them—when targets are properly selected—as legitimized by the U.S. declaration of war against Al-Qaeda.<sup>19</sup> Nonetheless, they remain controversial for one straightforward reason: President Obama has taken it upon himself to serve as judge, jury, and executioner even in cases involving U.S. citizens.

Civil libertarians may be exaggerating somewhat when they dub Obama's war on terror "Bush Lite." Nonetheless, a powerful case can be made that Obama has in fact mostly followed in his predecessor's footsteps, and that at least in one arena (i.e., targeted killings) he has in fact radicalized employment of one suspect, controversial Bush-era antiterrorism tool.

## II. BARACK OBAMA AS ENIGMA

Such continuities leave us with an obvious enigma. As Goldsmith recounts, in 2008, Obama campaigned aggressively against the Bush Administration's counterterrorism program and its embrace of torture (p. 4). Of course, presidents often fail to fulfill promises made on the campaign trail. Yet Obama's commitment to a fundamental overhaul seemed to represent something more than the usual political tool employed to win over some segment of the electorate. A longstanding and eloquent defender of the rule of law, former editor of the *Harvard Law Review*, protégé of some of our most prominent liberal jurists (e.g., Laurence Tribe), and former law professor at

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17. *Id.* at 119–22.

18. In Pakistan, between 2004 and 2007, there were nine drone attacks authorized by the Bush Administration; in 2010 Obama authorized 111. KLAIDMAN, *supra* note 10, at 117.

19. *Id.* at 215–20 (discussing Koh's evolving views on targeted killing).

the University of Chicago, Obama seemed genuinely committed to dramatic policy and legal changes. Based on his own legislative record, as well as his soaring rhetoric, and last but not least the fact that popular anxiety about terrorism was no longer dominating the U.S. political landscape by 2008 and 2009, many observers quite sensibly expected that we would see major changes in counterterrorism. Adding to the enigma's complexity is a large body of recent evidence corroborating the deeply rooted nature of Obama's constitutionalist and legalist instincts; Klaidman's *Kill or Capture* describes numerous episodes in the last four years when the President at least initially joined forces with so-called "idealistic" defenders of the rule of law (in particular, Attorney General Holder) in opposition to political operatives (e.g., Rahm Emmanuel) whose primary job was to guarantee their boss's political success rather than restore the rule of law.<sup>20</sup> At least on some occasions (for example, when supporting the release of secret documents about U.S. interrogation practices), he did so at considerable political risk.

So why has Obama failed to transform U.S. counterterrorism policy? The most obvious answer is one Goldsmith fails to examine at length, even though it has garnered a sizeable following among Obama's disappointed liberal supporters as well as some journalists like Klaidman. It zeroes in on Obama's failings as a political leader: his Administration has simply messed things up, with an indecisive chief executive too often ineptly overseeing an array of top-level officials and advisors deeply divided over how and when to overturn Bush-era policies on terrorism. President Obama has failed decisively to set the agenda, either vis-à-vis his own cabinet, or in relation to the public at large. As David Cole has recently pointed out in this vein, President Obama has given up even trying to employ the presidential bully pulpit, here as in other policy arenas too often letting demagogical critics define the terms of the debate.<sup>21</sup> Predictably perhaps, he has ended up deferring at crucial junctures to the "old hands" in the federal security and intelligence apparatus. As Goldsmith accurately chronicles, many of Obama's top advisors on terrorism have in fact been rather conservative political figures, a number of whom worked for President Bush (Secretary of Defense Robert Gates, for example) (p. 27). His point man on counterterrorism, CIA

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20. See, e.g., KLAIDMAN, *supra* note 10, at 61–63 (discussing the decision to release the torture memos).

21. See Cole, *supra* note 11.



Director John Brennan, previously spent twenty-five years in intelligence and served as George Tenet's Chief of Staff while the Bush Administration pursued its new interrogation program (pp. 28). Not surprisingly, when push came to shove, Obama opted to pursue a cautious path, following the advice of those deeply enmeshed in the apparatus of the national security state while regularly ignoring dissenting voices from the human rights community and his own home base, the liberal legal academy.

Even if this explanation carries some weight, it suffers from one glaring weakness: as Klaidman's own useful play-by-play political account nicely lays out, when in 2009 Obama *did* arguably try to lead the way in pursuing an alternative policy course, in part by means of a series of forceful public pronouncements about the need to redesign counterterrorism more in sync with U.S. legal ideals, his efforts ignited destructive political fires within his "own" Democratic Congress and outside of it as well. Most obviously, his modest but eloquently articulated efforts to close down GTMO and try Al-Qaeda leaders like Khalid Sheik Mohammed in federal court were aggressively rebuffed by Congress, which quickly and overwhelmingly moved to prohibit him from transferring detainees to prisons within the U.S.<sup>22</sup> (The vote in the Democratic controlled Senate was 90–6 against Obama, with only six Democrats supporting his efforts; the House vote in favor of the revealingly entitled "Keep the Terrorists Out of America Act" drew similarly massive bipartisan support.<sup>23</sup>) Revealingly, Klaidman chronicles that with Obama's stamp of approval, Attorney General Holder released classified materials about Bush-era torture practices in part probably hoping for a public outcry which might then open the door to a congressional investigation and perhaps criminal prosecution.<sup>24</sup> Holder in fact got his outcry; however, it took a different tone than he apparently expected: the conservative right—in alliance with Fox News and other major media outlets—provided the Attorney General with his first (of many) political shellackings.<sup>25</sup> Obama and Holder soon found themselves running for political cover, mercilessly abandoned even by Senator Harry Reid and other

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22. See KLAIDMAN, *supra* note 10, at 105–72.

23. *Id.* at 89, 156.

24. *Id.* at 73.

25. Trish Ponder, *Republicans Holding Obama Nominees Hostage to Block Release of Bush Torture Memos*, PENSITO REV. (Apr. 10, 2009), <http://www.pensitoreview.com/2009/04/10/republicans-holding-obama-nominees-hostage-to-block-release-of-bush-torture-memos/>.

prominent members of the president's own party when word leaked about the plan to relocate Uighur GTMO detainees.<sup>26</sup>

So it is perhaps wishful thinking to believe that if Obama had been more effective at using his political capital he might also have been much more successful in changing Bush-era policies. Even if political errors were undeniably made, this explanation underplays the key role of what now appears to be deeply rooted opposition within both Congress and what now passes in the U.S. for civil society to a genuine liberalization of U.S. counterterrorism. Needless to say, this political climate raises many fundamental questions about contemporary U.S. democracy and the apparent willingness of so many of its key players to sacrifice basic legal protections and rule of law guarantees in the face of terrorist threats, real or otherwise. These unsettling trends perhaps stem in part from the modern presidential executive's oftentimes neglected links to traditional monarchy, whose main function as "protector of the realm" had far-reaching institutional as well as symbolic implications.<sup>27</sup> Not surprisingly perhaps, contemporary proponents of an outsized executive increasingly seem willing to embrace and even celebrate the U.S. presidency's monarchical origins.<sup>28</sup>

In any event, Obama perhaps should have done more to change the political climate. However, one can also easily understand why competing political pressures (e.g., his commitment to getting health care reform through Congress) soon encouraged him to place the battle for a revised counterterrorism program on the back burner: the opposition to real change seemed so deep, and the political costs of challenging it correspondingly exorbitant.

Goldsmith pays more attention to another explanation we might characterize as the "institutional realist" position. According to this view, governing is different from campaigning. Now sitting in the Oval Office, and forced to read daily briefings about ongoing terrorist plots against U.S. citizens, the world inevitably looks very different to Obama than it did from the U.S. Senate or on the campaign trail in Iowa or Oregon (p. 25). "[T]he grim reality of presidential responsibility" inexorably

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26. KLAIDMAN, *supra* note 10, at 109.

27. For a critical take on the monarchist attributes of the U.S. presidency, see William E. Scheuerman, *American Kingship?: Monarchical Origins of Modern Presidentialism*, 37 *POLITY* 24–53 (2005).

28. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

transformed Obama (p. 26). Obama inherited a vast array of institutions, practices, and norms, many of which are relatively impermeable to dramatic alteration for reasons known to anyone familiar with the workings of complex bureaucracies. In this vein, GTMO was only the most egregious constitutional and political mess dropped at Obama's front door at his new home in the White House (p. 27). Not surprisingly, the choreography of closing down GTMO rapidly turned out to be more complex than Obama anticipated, in part because of its estimated forty-four hardcore detainees, many of whose rights had been violated by "enhanced interrogation," leaving Obama with the unenviable and perhaps impossible task of closing down GTMO without simultaneously releasing genuine security threats who could no longer be successfully prosecuted in ordinary courts because of tainted and probably inadmissible evidence.<sup>29</sup> From Obama's perspective, the choice must have appeared tragic: he could let Al-Qaeda sympathizers—and likely some of its most heinous masterminds—go free and thereby uphold the rule of law, but only at the cost of a potential security disaster and massive political backlash.

Even if this narrative provides part of the solution to the enigma, it still misses something fundamental. For example, it probably fails to account for the surprisingly across-the-board contours of the continuities between Bush and Obama. While one can easily grasp why the mess at GTMO proved so burdensome, it remains more difficult to understand why internal institutional imperatives necessarily forced Obama to continue his predecessor's surveillance policies, or why they preclude prosecution of egregious human rights violations. Nor can they easily explain Obama's apparent enthusiasm for targeted killings. With every new resident in the White House there is always an unavoidable element of bureaucratic continuity. But why do we now observe so much of it precisely where we might have predicted far-reaching reform?

To his credit, Goldsmith undertakes to provide an alternative explanation; most of his volume is devoted to providing a detailed defense of it. While the ACLU and other civil libertarian groups are deeply worried about Obama's borrowings from Bush, he sees them as basically praiseworthy. In this account, a beneficial process of institutional learning has transpired since 9/11, with U.S. officials coming to grasp that

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29. KLAIDMAN, *supra* note 10, at 147.

excessive assertions of executive prerogative, go-it-alone unilateralism, and kneejerk anti-legalism are ineffective and counterproductive in fighting terrorism (p. 38). According to Goldsmith, by the final years of the Bush Administration, many of the most important lessons had already been learned; Obama's main policy-level contribution has been to fine-tune Bush era policies and legal doctrines that were pretty much in place by 2006 (pp. 38–39). What we now have is something approaching a rough consensus concerning the broad outlines, though not always the particulars (about which partisans will legitimately continue to differ), concerning the appropriate policy and legal bases of the war on terror. To be sure, the learning process has been difficult and sometimes painful: Congress, the courts, as well as civil society organizations like the ACLU, whose positions Goldsmith otherwise criticizes, had to fight back hard against President Bush (pp. 95–118). The same institutional and civil society-based pressures, Goldsmith tells us, have restrained President Obama: “Obama too felt the sting of checks and balances when he tried and failed to close the Guantanamo Bay detention facility and to prosecute 9/11 mastermind Khalid Sheikh Mohammed in civilian court” (p. xiii). Nonetheless, the good news consists not only of our now much improved counterterrorism programs, but also the fact that checks and balances have worked along the lines pretty much sought by James Madison and other Framers, even if they have sometimes operated in a manner which might have surprised them (p. xiii).

For Goldsmith, a “traditional focus on the President, Congress, and the Supreme Court” needs to be supplemented by a careful examination of “surprising lower-level forces, inside and outside the government, that have been so consequential in shaping presidential action” (pp. xiv–xv). Forces in civil society, in conjunction with institutional innovations potentially overlooked by a conventional view of the separation of powers, have revitalized the U.S. version of checks and balances in accordance with contemporary needs. Even if one might second guess elements of President Obama's version of the war on terror, Goldsmith argues, because of our political system's resilience it has done a quite respectable job at grappling with terrorism (pp. xv–xvi).

In an era of permanent emergency, none of us can perhaps sleep soundly anymore. Yet those vexed about Obama's policy debts to Bush, as well as the alleged but unproven institutional

weaknesses of the U.S. version of liberal democracy, can now put at least some of their anxieties to rest.

### III. NOT YOUR MOTHER'S CHECKS AND BALANCES

Goldsmith outlines the successes of our updated system of “distributed checks and balances” in his volume’s central chapters (pp. 51–204). Unfortunately, he overstates them.

For example, he begins by describing a thriving culture of “accountability journalism,” to which he ascribes “hundreds of astounding journalistic successes since 9/11 in disclosing deep governmental secrets” (p. 56). Equipped with the new technologies of the digital age, journalists and activists have been able to exploit the Achilles heel of a sprawling intelligence and security apparatus, allegedly characterized by a “[w]idespread disrespect of the secrecy system,” to unmask the details of even some highly classified materials (p. 71). Although he worries that the trend towards transparency risks going too far, he tends to praise the efforts of oftentimes solitary journalists, bloggers, and others in spreading the word about some of the more extreme measures pursued by the Bush Administration, and he views their efforts as crucial for understanding why the war on terror no longer rests on shaky legal and humanitarian foundations (pp. 79–82). Providing a fresh reminder of their sometimes heroic role in opposing both an Administration hostile to its efforts, as well as public opinion supportive of an aggressive military response to Al-Qaeda, Goldsmith reminds us of the decisive role played by Mark Danner, Seymour Hersh, Jane Mayer, and many others in generating public criticism of indefinite detention, torture, and other controversial counterterrorist instruments (pp. 65–67).<sup>30</sup>

Unfortunately, the argument suffers from two flaws. First, some of the alleged successes stories he recounts easily lend themselves to a less optimistic gloss. As Goldsmith notes, as early as October 2001 foreign journalists were reporting about secret offshore U.S. prisons and controversial interrogation practices (pp. 63, 65). Yet the story made little headway in the U.S. until 2004 or so, when *The New Yorker* and other

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30. See also MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004); SEYMOUR HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

publications began devoting significant attention to it (p. 66). As Goldsmith admits, it was not until September 2006 that the Bush Administration in fact acknowledged the existence of the secret prisons and starting to clear them out (p. 67). A success story perhaps, yet nonetheless one in which the Bush Administration was able to pursue harsh interrogation measures with little public scrutiny for a number of years, and in fact continued doing so undeterred for nearly five years.

More fundamentally, here as elsewhere in his volume, Goldsmith sometimes has a hard time showing exactly how diffuse political pressures from civil society get effectively funneled and employed by Congress and the Supreme Court in order to rein in the presidency. He sometimes simply asserts the existence of a connection between the two. A related tendency to clump together—both analytically and empirically—civil society with institutional checks and balances engenders another problem: it becomes impossible to figure out exactly which factors in his narrative are doing the real work of checking the executive. Is it the free press and/or certain advocacy groups, the traditional separation of powers and checks and balances, new institutional devices which perhaps challenge our conventional tripartite vision of government, or some combination thereof? At least in principle, for example, political pressures from civil society might restrain government officials even absent a Madisonian version of institutionalized checks and balances.<sup>31</sup>

When Goldsmith addresses the role of institutional checks, rather than that played by journalists and activists in civil society, he similarly exaggerates their successes in restraining the executive. During much of the Bush presidency, Congress remained at most a junior partner in the war on terror, regularly bending over backwards to grant the executive discretionary power to wage the war against Al-Qaeda as the executive alone saw fit. To be sure, there were some exceptions, most notably the Detainee Treatment Act of 2005, which took aim at the Bush Administration's excesses (pp. 185–86). But even Goldsmith inadvertently concedes that many of Congress' at first glance far-reaching attempts to regulate the Administration's treatment of detainees proved modest at best. For example, while struggling to defend his idiosyncratic view of the Military Commissions Act of 2006 "as a defeat for the presidency and a victory for

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31. See POSNER & VERMEULE, *supra* note 8, at 4 (arguing that political but not Madisonian legal or constitutional restraints now check the executive).

Congress,” he still admits that it “reaffirmed Congress’s reversal of the Supreme Court’s *Rasul* decision and once again eliminated statutory habeas corpus review for GTMO detainees[,]” while giving “the President many things he wanted” (p. 187). If this represents defeat for the presidency, what constitutes victory?

As noted above, Congress has in fact pushed back forcibly against President Obama. However, its main efforts have consisted of resisting his cautious quest to place the war on terror on firmer legal footing by closing GTMO for example, or placing accused terrorists under the auspices of the ordinary courts. Especially since falling under Republican control in 2010, Congress has typically tried to advance and sometimes codify even more punitive and repressive policies than those sought by Obama. Most recently, the 2012 defense appropriations bill codifies indefinite military detention and effectively prohibits the President from trying to bring accused terrorists before ordinary courts.<sup>32</sup> Because of political pressure, Obama ultimately decided to sign it, before then proceeding to ameliorate some—but hardly all—of its draconian attributes.<sup>33</sup> In short, Goldsmith’s thesis that checks and balances have worked effectively to counter executive excesses in the war on terror only makes sense if you place recent attempts by President Obama to move beyond his predecessor’s arguably extreme policies in the same category as President Bush’s advocacy of them. Congress has in fact constrained the presidency, but not in a manner which might have comforted James Madison: it has waged battle against Obama’s uneven efforts to dismantle some features of the modern imperial presidency.<sup>34</sup>

Too often, Goldsmith’s assessment of our political system’s alleged institutional successes depends on underlying political judgments, such as the tendentious view that President Obama’s liberal “excesses” can be treated as functionally equivalent to the excesses of his predecessor. Unfortunately, this not only tends to distort key features of the story, but it also leads the

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32. DEP’T OF DEFENSE APPROPRIATIONS BILL OF 2012, HR 1540, 112th Cong. (2012).

33. See *Talking Points: 2012 National Defense Authorization Act (NDAA)*, ACLU, <http://www.aclu.org/national-security/talking-points-2012-national-defense-authorization-act-ndaa> (last visited Jan. 3, 2013) (describing the ACLU’s opposition to many of the sordid provisions); see also KLAIDMAN, *supra* note 10, at 230–31.

34. ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* (2006) (updating the “imperial presidency” thesis of executive power).

author to find success where others might legitimately remain deeply concerned: the baseline for “success” in institutional terms unavoidably points to basic normative and political preferences, whose centrality to his broader account Goldsmith downplays. So he concludes by boldly declaring that “never before has the Commander in Chief been so influenced, and constrained, by law” (p. 208), triumphantly describing ours as a system in which the executive is now checked and rendered accountable in far-reaching and perhaps unprecedented ways. What then about the obvious counterargument that no high-level official who condoned torture, or even low-level interrogators who practiced it, have yet to face prosecution? According to Goldsmith, we need not worry too much because “[t]he legality of the original CIA interrogation techniques under the purposefully loophole-ridden torture law was always a closer question than critics have publicly acknowledged,” with “many outstanding lawyers” concluding that “if exercised with care” they “were lawful under then prevailing law” (p. 236). In other words, his own judgment that we should be less alarmed than many others have claimed (e.g., the ACLU) about what transpired in the aftermath of 9/11 functions as an implicit standard for praising our system of checks and balances. His claim is rendered all the more odd since the volume’s main thesis is that productive institutional learning countered extreme and counterproductive policies pursued by Bush. But which policies does Goldsmith in fact have in mind if even the legality of torture represents a “closer question” than civil libertarians admit?

Analogously, Goldsmith sees the Supreme Court rulings in *Rasul*, *Hamdi*, and *Hamdan*, and *Boumediene* as having regularly “had a constraining impact on the President, his senior national security advisers, and soldiers in the field” (p. 194). To his credit, Goldsmith here effectively links institutional checks on the executive to the civil society-based efforts of activists and lawyers, many of whom have now fought for more than a decade to guarantee that GTMO detainees and others enjoy basic rights (pp. 194–96). Although much undoubtedly can be said in favor of this view, Goldsmith only acknowledges—but never really takes seriously—the position held by many of the actual activists and lawyers about whom he reports, namely that their struggles have chiefly produced limited and sometimes superficial alterations to what remains a fundamentally immoral and unconstitutional system for regulating detainees. In the blunt



words of Michael Ratner at the Center for Constitutional Rights: “We lost on the preventive detention issue, more or less. We lost on the military commission issue, more or less” (p. 195). In short, Goldsmith fails to consider sufficiently the substantive possibility that the courts have done “too little, too late” in upholding basic rights, while simultaneously ignoring an emerging scholarly literature suggesting that the impact of even seemingly major Supreme Court decisions has been limited.<sup>35</sup> Here again, Goldsmith’s own politically conservative preferences directly shape his institutional analysis. In contrast, those readers of a libertarian or left-liberal bent, more disappointed by the judiciary’s record since 9/11, might quite legitimately question his relatively optimistic gloss on the post 9/11 courts.

For that matter, how secure will the institutional learning process described by Goldsmith prove, for example, if Republicans soon gain control of the presidency and Senate? During the 2011 and 2012 Republican presidential primary debates, the candidates at times struggled to outshine one another in endorsing waterboarding and other suspect interrogation techniques.<sup>36</sup>

The book’s most innovative section covers easily overlooked but key lower-level institutional mechanisms within our novel system of “distributed checks and balances.” Goldsmith writes at length and oftentimes insightfully about what is now widely described as “lawfare,” i.e., the tendency to embed lawyers directly in military and security affairs, including the nitty-gritty of the battlefield itself (pp. 223–33). Another illuminating section discusses the increasingly major role of Inspector Generals “sprinkled around the executive branch” and given mandates to prevent wrongdoing and serve as internal watchdogs (p. 99). Yet even if Goldsmith sometimes succeeds in showing how such creative institutional innovations help guarantee the executive’s fidelity to the law, they remain fundamentally *internal* to the executive branch, and thus ultimately accountable—in both formal and countless informal ways—to the president. At the very least, they diverge at least

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35. See, e.g., Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385 (2010) (discussing the limited impact of *Boumediene*). Revealingly, Klaidman’s insider-focused account of Obama Administration battles on the war on terror barely mentions the judiciary; it does not seem to have figured much at all in their political calculations. See KLAIDMAN, *supra* note 10.

36. Casey Glynn, *Cain, Bachmann Say They Would Support Waterboarding*, CBS NEWS (Nov. 13, 2011, 12:01 AM), [www.cbsnews.com/8301-503544-162-57323716-5035441/cain-bachmann-say-they-would-support-waterboarding/](http://www.cbsnews.com/8301-503544-162-57323716-5035441/cain-bachmann-say-they-would-support-waterboarding/).

somewhat from what Madison typically had in mind. To be sure, Madison was no defender of a pure separation of powers, but instead sought a system in which institutions were intermeshed and expected to cooperate.<sup>37</sup> Yet checks and balances could only work if differentiated institutions possessed effective tools (e.g., the executive veto) with which they could counter rivals. Probably in part because of the unduly vague way in which Goldsmith conceptualizes checks and balances and their ties to civil society, his narrative generally occludes the degree to which new institutional mechanisms do not in reality represent a mere updated variant of “the framers’ original design of making presidential action accountable” (p. 209). Regrettably, his failure to do so forecloses a serious consideration of the possibility that the U.S. constitutional system has developed useful new restraints on the executive only by means of devices incongruent with original Madison’s vision.

#### IV. CONCLUDING REMARKS

Even though Goldsmith’s book succeeds in documenting myriad ways in which President Bush has determined the outlines of his successor’s modestly revised version of the war on terror, it suffers from two interconnected flaws. First, Goldsmith never fully puts to rest the legitimate concern that our system is now an imbalanced system of government, in which the executive remains best situated to exploit terrorist threats, real or otherwise, in order to expand its authority, and where neither civil society nor institutional checks and balances work sufficiently to restrain it. Tellingly, when Congress has recently pushed back forcefully against the executive, it oftentimes has done so in order to ward off cautious attempts to downsize the imperial presidency and the weighty powers it has accrued over the last decade. When checks and balances *have* come into play since 9/11, they sometimes did so *not*—as Madison and other classical writers hoped—in order to rein in executive excess, but rather in order to provide it with a stronger statutory footing. Second, Goldsmith ultimately offers a self-satisfied and occasionally even smug view of the U.S. political system’s response to 9/11, praising its ability to learn from its mistakes and correct them. Yet that assessment tends to depend on implicit political and normative preferences, many of which will

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37. *But see* Posner & Vermeule, *supra* note 8, at 19–25 (arguing that Madison also envisioned competition as a way for the branches to check and monitor each other).

strike at least some readers as controversial and even troublesome. For anyone more worried than Goldsmith apparently remains about indefinite detention, targeted killings, or the fact that presidential candidates from at least one of our major parties continue to endorse torture, the last decade hardly represents a bright spot in the long annals of U.S. constitutional government.

So is our attempt to evaluate our political system's response to 9/11 nothing more than a reflection of underlying political and moral preferences? Of course not. If we are to solve the enigma of Obama's war on terrorism, we will need a systematic comparative examination of how our presidential system has performed in the face of terror attacks when compared to other (e.g., parliamentary or semi-presidential) versions of liberal democracy, in which checks and balances operate quite differently.<sup>38</sup> Goldsmith is right to seek a solution to the enigma by turning to an examination of U.S. constitutional mechanisms and the separation of powers. However, his efforts founder in part because they refuse to step outside the U.S. legal academy's usual comfort zone and engage works in political sociology and political science that raises broader questions of comparative institutional design. Even if such comparative institutional and legal inquiries still contain unavoidably normative moments, they can provide us with a sounder empirical baseline for what constitutes a "successful" response to terrorism.<sup>39</sup> Like too many others in the legal academy, Goldsmith seems uninterested in making such comparisons, let alone in the possibility that we might have something vital to learn from other countries' political experiences with terrorism or emergency government. Yet without pursuing such comparisons in a systematic and rigorous manner, how can we be so sure that U.S. presidential democracy has done reasonably well in fighting terrorism, or even that it represents a sufficient institutionalization of modern liberal and democratic ideals?

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38. See William E. Scheuerman, *Presidentialism and Emergency Government*, in *EMERGENCIES AND THE LIMITS OF LEGALITY* 258–86 (Victor V. Ramraj ed., 2008) (describing the specific pathologies of presidentialism in the context of crisis or emergency government).

39. *THE "WAR ON TERROR" AND THE GROWTH OF EXECUTIVE POWER: A COMPARATIVE ANALYSIS* (John E. Owens & Riccardo Pelizzo, eds., 2010) (offering a preliminary contribution to a broader comparative analysis).