

**THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE
THE BUSH ADMINISTRATION¹**

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*The Terror Presidency's most fundamental challenge is to establish adequate trust with the American people to enable the President to take the steps needed to fight an enemy that the public does not see and in some respects cannot comprehend.*³

In July 2004, Jack Goldsmith⁴ resigned as Assistant Attorney General, Office of Legal Counsel (OLC), less than ten months after assuming that position.⁵ During his brief tenure as the “chief advisor . . . about the legality of presidential actions,”⁶ Goldsmith wrestled with some of the most important and controversial issues surrounding the war on terror: the applicability of the Geneva Conventions to Iraqi insurgents,⁷ the Terrorist Surveillance Program,⁸ and, most famously, the interrogation policy.⁹ To his utter astonishment, Goldsmith concluded within two months of taking office that several OLC opinions authored by his predecessors were “deeply flawed”¹⁰ and that consequently, “some

¹ JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

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⁵ GOLDSMITH, *supra* note 1, at 9, 18.

⁶ *Id.* at 9.

⁷ *See id.* at 32, 39–42.

⁸ *See id.* at 181–82. Although the author describes putting the Terrorist Surveillance Program on sound legal footing as the most difficult task he ever faced in government service, he was constrained by the program's classification from discussing it in detail in this book. *Id.* at 182.

⁹ *See id.* at 141–72.

¹⁰ *Id.* at 10.

of our most important counterterrorism policies rested on severely damaged legal foundations.”¹¹ In the following months, against the backdrop of a terrorist threat level “that was more frightening than at any time since 9/11,”¹² Goldsmith’s efforts to place the Bush administration’s antiterrorism policies on a more firm legal footing would inexorably place him “on a collision course with powerful figures in the administration,”¹³ ultimately leading to his resignation.

In *The Terror Presidency: Law and Judgment Inside the Bush Administration*, Jack Goldsmith describes the insular practices, unprecedented pressures, and peculiar philosophies of presidential power that shaped the Bush administration’s counterterrorism policies following the terrorist attacks of 9/11. While it may disappoint readers expecting either a chronological, blow-by-blow account of the debates in President Bush’s inner circle or a legalistic issue-by-issue rebuttal to former OLC lawyer John Yoo’s¹⁴ *War by Other Means*,¹⁵ *The Terror Presidency* is nonetheless an informative and worthwhile synthesis of lessons learned from the Bush administration’s approach to the war on terror. In both criticizing and defending this approach, Goldsmith first examines the organizational structure and legal conditions that led to “the surprisingly central and sometimes unfortunate role that lawyers played in determining counterterrorism policy.”¹⁶ Using several representative policy examples, he then skillfully contrasts the Bush presidency with the “crisis presidencies”¹⁷ of Abraham Lincoln and Franklin Roosevelt to support his overall thesis: that in seeking to maximize the President’s

¹¹ *Id.*

¹² *Id.* at 74; see also GEORGE TENET, *AT THE CENTER OF THE STORM: MY YEARS AT THE CIA* 245–46 (2007) (discussing an unusually detailed and credible threat to financial institutions in New York, New Jersey, and Washington during the spring and summer of 2004).

¹³ GOLDSMITH, *supra* note 1, at inside front cover.

¹⁴ While Yoo served as deputy to Goldsmith’s predecessor, Jay Bybee, in practice he had primary responsibility for counterterrorism policies from 2001–2003 due to his unique expertise. See *id.* at 23; CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* 79–82 (2007). Yoo has become infamous as the author behind the so-called “torture memos.” See, e.g., Mark Mazzetti, ‘03 U.S. Memo Approved Harsh Interrogations, N.Y. TIMES, Apr. 2, 2008, at A1; Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

¹⁵ JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* (2006).

¹⁶ GOLDSMITH, *supra* note 1, at 12. John Yoo echoes the central role of OLC lawyers. Yoo, *supra* note 15, at 20.

¹⁷ GOLDSMITH, *supra* note 1, at 12.

formal power to do whatever he thought necessary to respond to the terrorist threat, the Bush administration's "go-it-alone"¹⁸ approach—characterized by "minimal deliberation, unilateral action, and legalistic defense"¹⁹—instead diminished the presidency's informal power and credibility.²⁰

In the opening chapter, Goldsmith sets the stage for the prominence of lawyers in post-9/11 policymaking by describing the OLC as an arm of the Department of Justice empowered to issue legal opinions that are "binding throughout the executive branch"²¹ and that, if reasonably relied upon, effectively preclude subsequent prosecution.²² Thus, "[i]n an administration bent on pushing antiterrorism efforts to the limits of the law, OLC's authority to determine those limits made it a frontline policymaker in the war on terrorism."²³ While the OLC has a tradition of giving "detached, apolitical legal advice,"²⁴ Goldsmith recognizes the reality that OLC lawyers usually are "philosophically attuned"²⁵ to the current administration, resulting in a role that is "something inevitably, and uncomfortably, in between" that of a neutral court and a zealous private attorney.²⁶

Unfortunately for Jack Goldsmith, in October 2003 he took the helm of an OLC which the administration expected to be more akin to the latter. Goldsmith inherited a set of legal opinions largely authored by former OLC deputy John Yoo,²⁷ whose expansive view of unconstrained presidential war powers pervaded these opinions and fell in line with other like-minded individuals in the Bush administration, such as David Addington, the Vice President's Counsel.²⁸ More dangerously, Yoo's

¹⁸ *Id.* at 123.

¹⁹ *Id.* at 205.

²⁰ *Id.* at 140, 215.

²¹ *Id.* at 23.

²² *Id.* at 23, 96. For example, the CIA referred to the infamous "torture memo" as a "golden shield." *Id.* at 144.

²³ *Id.* at 42.

²⁴ *Id.* at 33.

²⁵ *Id.* at 34; *see also* YOO, *supra* note 15, at 19 (describing himself as sharing the Bush administration's philosophy).

²⁶ GOLDSMITH, *supra* note 1, at 35.

²⁷ *Id.* at 22–23; *see also* SAVAGE, *supra* note 14, at 79; YOO, *supra* note 15, at 20, 33.

²⁸ *See* GOLDSMITH, *supra* note 1, at 97–98. Goldsmith devotes a large part of Chapter 3 to the overwhelming influence that the expansive views of executive power held by David Addington and Vice President Dick Cheney had in the development of the Bush administration's antiterrorism policy. *See id.* at 76–90.

concept of executive power often caused his legal reasoning to go far beyond what was necessary,²⁹ reinforcing the administration's go-it-alone approach. In fact, Goldsmith's very first opinion as OLC head, in which he determined that the Fourth Geneva Convention applied even to Iraqi insurgents, was also the first time that the Bush administration had been told "no" on its antiterrorism policies.³⁰ Not surprisingly, he encountered everything from puzzled disbelief by then-White House Counsel Alberto Gonzales, to outright hostility by Addington, who barked, "The President has already decided that terrorists do not receive Geneva Convention protections. . . . You cannot question his decision."³¹

After laying out the institutional backdrop for his first OLC opinion, Goldsmith takes the first of several historical detours in order to examine why his conclusion was accepted, albeit grudgingly, by an administration used to getting its way. He traces the evolution from the predominantly political constraints on presidential power that challenged Franklin Roosevelt's actions during World War II,³² to the legalization and criminalization of warfare that plagued the Bush administration.³³ Not

²⁹ See, e.g., Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 3 (Karen J. Greenberg & Joshua L. Dratel, eds., 2005) (concluding that Congress cannot place any limits on the President's response to any terrorist threat).

³⁰ GOLDSMITH, *supra* note 1, at 41.

³¹ *Id.* Addington was mistakenly referring to President Bush's February 2002 decision that the Third Geneva Convention did not confer prisoner-of-war status on Al Qaeda or Taliban detainees. See Memorandum from President George W. Bush to the Vice President, the Sec'y of State, the Sec'y of Def., the Attorney Gen., Chief of Staff to the President, Director of Cent. Intelligence, Assistant to the President for Nat'l Sec. Affairs, and Chairman of the Joint Chiefs of Staff, Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 29, at 134. Although he was not yet at the Office of Legal Counsel at the time of this decision, Jack Goldsmith agrees that it was the proper interpretation of the law. GOLDSMITH, *supra* note 1, at 110.

³² GOLDSMITH, *supra* note 1, at 43–53.

³³ See *id.* at 53–70 (discussing the rise of the human rights culture, the development of the concept of universal jurisdiction, and the establishment of the International Criminal Court). High ranking officials in the Bush administration felt personally threatened by what they termed "lawfare"—"the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective." *Id.* at 58 (quoting Charles J. Dunlap, Jr., Air Combat Command Staff Judge Advocate, Address at the Air and Space Conference and Technology Exposition: The Law of Armed Conflict (Sept. 13, 2005), *available at* http://www.afa.org/Media/scripts/Dunlap_conf2005.asp).

only did the Bush administration worry about international law and the threat of foreign courts exercising universal jurisdiction over U.S. officials,³⁴ but also it had to contend with a multitude of domestic statutes, such as the Foreign Intelligence Surveillance Act, the War Crimes Act, and the Torture Statute.³⁵ Goldsmith invokes the two dominant forces that arose from this legal framework—the fear of tying the President’s hands and the fear of prosecution by subsequent administrations for its wartime decisions³⁶—to explain, and to some extent defend, the legalistic stance that many of the administration’s policies took, which have caused them to be “criticized as a conspiracy to commit a war crime.”³⁷

The most infamous example of this notion of providing official cover for potentially illegal acts is the so-called “torture memo” authored by John Yoo on 1 August 2002,³⁸ the withdrawal of which became the legacy of Jack Goldsmith’s time as the head of OLC. In contrast to his efforts to explain other policies, Goldsmith finally takes the gloves off. He blasts Yoo’s opinion for defining “torture” too narrowly and for looking to a statute authorizing health benefits, of all places, to explore its contours.³⁹ He further chastises Yoo for irresponsibly concluding, without any basis in law, that *any* congressional regulation whatsoever of the interrogation of detainees was an unconstitutional infringement on the President’s authority as commander in chief.⁴⁰ “In sum, on an issue that demanded the greatest of care,” Goldsmith chides, “OLC’s analysis of the law of torture . . . was legally flawed, tendentious in substance and tone, and overbroad and thus largely unnecessary.”⁴¹ Unable to salvage

³⁴ *Id.* at 55–64.

³⁵ *Id.* at 66.

³⁶ *Id.* at 12, 67–68.

³⁷ *Id.* at 68.

³⁸ Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to White House Counsel Alberto Gonzales, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 29, at 172. Although it was signed by Jay Bybee, his deputy John Yoo was the author. GOLDSMITH, *supra* note 1, at 142. In a second, still-classified August 2002 opinion, Yoo applied his theoretical analysis to approve specific interrogation techniques for use by the CIA. *Id.* at 151.

³⁹ GOLDSMITH, *supra* note 1, at 144–45. Specifically, Yoo looked to a statute authorizing health benefits for “emergency medical condition[s]” in order to define “severe pain,” reasoning that only the infliction of “severe pain” would amount to torture. As Goldsmith points out, this move was rather “clumsy” given that the health benefit statute itself did not define “severe pain.” *Id.* at 145.

⁴⁰ *Id.* at 148–49.

⁴¹ *Id.* at 151.

its legal reasoning, Goldsmith officially withdrew the August 2002 opinion and tendered his resignation.⁴² While John Yoo has used the fact that the separate opinions authorizing specific interrogation techniques remained intact to argue that the withdrawal of the “torture memo” was merely a political panic move in response to the Abu Ghraib scandal,⁴³ Yoo’s stubborn defense of the opinions is widely condemned.⁴⁴

The remainder of *The Terror Presidency* is devoted to advancing Goldsmith’s thesis and providing a roadmap for future presidencies when dealing with the terror threat. Acknowledging that the success in preventing new attacks “has had the self-defeating effect of enhancing public skepticism about the reality of the threat,”⁴⁵ Goldsmith looks to President Roosevelt’s strategy of gaining support for aiding Great Britain despite the neutrality laws and despite the fact that most Americans did not perceive the threat posed by Nazi Germany.⁴⁶ Roosevelt’s success illustrates the importance of educating the public on the nature of the crisis, consulting widely with the press, Congress, and the political opposition, and narrowly tailoring presidential actions taken on the edge of legality to go no further than necessary.⁴⁷ Goldsmith deftly applies these lessons to the contemporary crisis. When the President finally went to Congress in 2006 after the Supreme Court struck down its plan for military commissions in *Hamdan v. Rumsfeld*,⁴⁸ Congress gave the President virtually everything he wanted, putting his policy on sound constitutional footing.⁴⁹ “Forcing Congress to assume joint responsibility weakens presidential prerogatives to act unilaterally. But it strengthens presidential power overall,”⁵⁰ Goldsmith counsels. Even John Yoo, while vehemently defending the legality of the go-it-alone approach, nonetheless admits that the administration may have been better served

⁴² *Id.* at 151–61.

⁴³ See YOO, *supra* note 15, at viii, 171–72, 181–82.

⁴⁴ See, e.g., Michiko Kakutani, *What Torture Is and Isn’t: A Hard-Liner’s Argument*, N.Y. TIMES, Oct. 31, 2006, at E1 (describing Yoo’s book as “strewn with preposterous assertions, contorted reasoning, and illogical conclusions”).

⁴⁵ GOLDSMITH, *supra* note 1, at 188. *But see* Alexander Mooney, Poll: Concerns About Terrorist Attacks at Lowest Level Since 9/11 (Sept. 11, 2008), <http://www.cnn.com/2008/POLITICS/09/11/terrorism.poll/index.html> (reporting that Americans have given little credit to the President Bush for preventing terrorist attacks).

⁴⁶ See GOLDSMITH, *supra* note 1, at 192–205.

⁴⁷ *Id.* at 197–98, 202–04.

⁴⁸ 548 U.S. 557 (2006).

⁴⁹ GOLDSMITH, *supra* note 1, at 138–40, 207–08 (discussing the Military Commissions Act of 2006).

⁵⁰ *Id.* at 207.

by appealing to Congress and the public.⁵¹

Although it extracts valuable lessons from the Bush administration, *The Terror Presidency* has its weaknesses. First, the book does not quite live up to the expectations created by its marketing hook. Notwithstanding a front cover that prominently features President George W. Bush and Vice President Dick Cheney and an inside cover that states that the author's job "was to advise President Bush,"⁵² Jack Goldsmith was *not* a direct legal advisor to the President. His daily interactions were not with the President and Vice President, but rather with their lawyers: Alberto Gonzales and David Addington, respectively. Even with these surrogates, Goldsmith focuses on the general themes that characterized the policy debates, at the expense of detailing their views on specific issues. The quotes interspersed throughout the book, while often dramatic, are more expressions of emotion—Gonzales's incredulity and Addington's blustery anger—in response to Goldsmith's actions than real insights into their positions. Moreover, Goldsmith barely mentions the roles that the State Department and military lawyers played. Irrespective of its conclusions, Yoo's *War by Other Means* does a much better job of laying out the counterterrorism policies in a logical order and describing the competing viewpoints.

A second weakness of the book is that the author does not, or cannot, fully deliver the inside look a reader may expect. Goldsmith concedes, "Much of what I learned must remain hidden behind thick walls of classified information"⁵³ Consequently, he sometimes leaves the reader wondering. For example, Goldsmith links an angry remark by Addington that "the blood of the hundred thousand people who die in the next attack will be on *your* hands" only to "an important counterterrorism initiative."⁵⁴ Likewise, after reading how Goldsmith left intact the opinions authorizing specific interrogation techniques,⁵⁵ the reader is bound to wonder whether waterboarding, which has received

⁵¹ See YOO, *supra* note 15, at viii, 119, 126–27.

⁵² GOLDSMITH, *supra* note 1, at inside front cover.

⁵³ *Id.* at 12.

⁵⁴ *Id.* at 71. I have concluded that he was most likely referring to the Terrorist Surveillance Program.

⁵⁵ See *id.* at 152–58.

considerable scrutiny in the press,⁵⁶ was among those still-approved techniques. More significantly, when Goldsmith excuses his own six-month delay in withdrawing the August 2002 torture opinion by stating that it “wasn’t the most difficult or consequential of the flawed legal opinions that needed fixing at the time,”⁵⁷ the reader is not only forced to take his word for it, but also left incredulous as to what could possibly be worse. In fact, though Goldsmith “rescinded more OLC opinions than any of [his] predecessors,”⁵⁸ he neglects to list any others. The end result is that many of the events that Goldsmith *does* discuss actually occurred *outside* of his nine-month tenure. While his discussions of such matters are very informative, they sometimes lack the insight and credibility of a firsthand observer.⁵⁹

These criticisms, however, belie the overall strength and value of *The Terror Presidency*. Although Jack Goldsmith’s time as head of the OLC was relatively brief, he was nonetheless a key figure in the struggle between law and necessity in the early years of the war on terror, giving him a unique perspective that few other authors could have. In fact, several contemporary books on the subject cite Jack Goldsmith as their authority.⁶⁰ Moreover, the author’s status as a “conservative lawyer” ideologically in tune with the Bush Administration’s goals⁶¹ lends added import to his criticisms of its approach. Likewise, Goldsmith’s candor in telling what went wrong bolsters his assertion that despite their mistakes, all of the players in the administration, including Yoo and Addington, were acting in good faith.⁶² Finally, since *The Terror Presidency* is more a synthesis of lessons learned than a detailed account of how each policy came to be, what the author has gleaned from the work of his predecessors, as well as from his involvement in the still-secret debates he cannot reveal, is just as important as what he can tell us firsthand.

The lessons abound. The war on terror requires “forward-looking

⁵⁶ See, e.g., Walter Pingus, *Waterboarding Historically Controversial*, WASH. POST, Oct. 5, 2006, at A17; Philip Shenon, *Panel Pushes for Nominee to Denounce Harsh Tactic*, N.Y. TIMES, Oct. 24, 2007, at A16.

⁵⁷ GOLDSMITH, *supra* note 1, at 156.

⁵⁸ *Id.* at 161–62.

⁵⁹ For example, in his discussion about how the August 2002 torture opinion could have been written, Goldsmith concedes that he can only “hazard some informed guesses.” *Id.* at 165; see also *id.* at 165–72.

⁶⁰ See, e.g., JANE MEYER, *THE DARK SIDE* 261–69, 281–82, 287–94 (2008); BENJAMIN WITTES, *LAW AND THE LONG WAR* 51–52, 58, 63–64 (2008).

⁶¹ GOLDSMITH, *supra* note 1, at inside front cover.

⁶² See *id.* at 128–29, 167.

problem solvers,” not “backward-looking rationalizers.”⁶³ Lawyers advising on national security issues must not let the pressures of events and personalities overcome their reasoned judgment. They must explore the limits of legality while realizing that “even blurry chalk lines delineate areas that are completely out of bounds.”⁶⁴ They must consult widely when acting on the edges of the law and go no further than the exigencies of the situation require. And they must be aware that there are many more factors besides the *law* that make up sound *policy*, such as “context of action, political support, credibility, and reputation.”⁶⁵

Thus, though it may fall short of expectations in some respects, the true value of *The Terror Presidency* lies not in the delivery of riveting behind-the-scenes drama or formal legal arguments, but rather in Goldsmith’s ability to reflect candidly on his experiences and synthesize the lessons learned from the Bush administration into advice for the next “terror presidency.” These lessons will give this book contemporary relevance for the foreseeable future, especially as the Obama administration formulates its own approach to the “war on terror.” Moreover, the *Terror Presidency* will remain a valuable resource for anyone, including Judge Advocates, involved in the application of the law, or the development of policy, pertaining to national security.

⁶³ *Id.* at 133.

⁶⁴ *Id.* at 78. “Often the best a lawyer can do is to lay out degrees of legal risk, and to advise that the further the client pushes into the dark gray areas of legal prohibitions, the more legal risk he assumes.” *Id.* at 93.

⁶⁵ *Id.* at 133.