

Tulsa Law Review

Volume 48 | Number 2

Winter 2012

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Recommended Citation

Mariah Zeisberg, *Review of Jack Goldsmith, Power and Constraint: The Accountable Presidency After 9/11*, 48 *Tulsa L. Rev.* 195 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol48/iss2/4>

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POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11

Mariah Zeisberg*

JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012). Pp. 311. \$26.95.

How significant are the constitutional differences between President George W. Bush, “lawless cowboy,” and President Barack Obama, former professor of law?¹ According to Jack Goldsmith’s new book, not very. Goldsmith’s book narrates this conclusion with a compelling examination of the many sources of presidential constraint. He does not link his argument to any major scholarship on the presidency, nor does the book offer new theoretical insights. From David Truman, Richard Neustadt, and Terry Moe, it has long been clear that presidential power is as much a problem to be solved as a resource to be deployed.² But Goldsmith brings relevance and interest to the idea of a constrained presidency with interviews, stories, and histories that richly illustrate the security dilemmas of two administrations often contrasted. His own (fraught) position in the Bush administration as an Assistant United States Attorney General for the Office of Legal Counsel (“OLC”) in the Department of Justice — a position from which he ultimately resigned after withdrawing the OLC’s infamous torture memo — gave him an engaging perspective on the broad and quiet forces of Bush reactionism. The book is worth reading for its rich narration of how these forces were ultimately able to re-order the Bush administration’s priorities and methods in the war on terror, while at the same time entrenching a set of security policies which then served as Obama’s inheritance.

Goldsmith deftly advances a series of important points. First, he emphasizes the role of both criticism and bipartisanship in legitimating security policies.³ That candidate Obama was a critic of President Bush made President Obama’s rhetoric on the dangers

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1. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 40 (2012).

2. See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* (Macmillan Publ’g Co., 2d ed. 1990); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267 (John E. Chubb & Paul E. Peterson eds., 1989); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (1951).

3. GOLDSMITH, *supra* note 1, at 40.

of terrorism more publicly credible.⁴ At the same time, the decision of a Democratic president to continue certain terrorism policies of a Republican administration legitimated, and hence empowered, presidential power in the “war on terror.”⁵ Second, Goldsmith emphasizes the interconnectedness of law, military power, and effectiveness in war. Law, no less than military force, is a tool in the war on terror.⁶ Law helps the United States not just by creating pathways to impound the funds of terrorist organizations, but also by creating pathways for achieving international and domestic legitimacy for detention and interrogation practices, bolstering the legitimacy of U.S. military action more broadly.⁷ Third, like many constitutional scholars, Goldsmith links constraint to presidential empowerment. The constraint of inter-branch review has been, he argues, empowering of the presidency in national security policy.⁸ For example, after an extensive review of U.S. detention policies in the legislature and courts, Goldsmith applauds the fact that by 2011 “the United States was holding more than three times as many detainees in Afghanistan as in 2009 with many fewer complaints from the Afghan government or U.S. allies,”⁹ with “over 170 terrorist soldiers in GTMO without charge or trial.”¹⁰ Beyond detention, Goldsmith argues that surveillance and other security powers would not have been delegated by Congress if not for credible accountability mechanisms and procedures within the executive branch.¹¹ Relatedly, Goldsmith’s stories remind us that the “checks” of separate branches reviewing one another do not always add up to more vigorous protection of rights. Sometimes Congress has “checked” the Obama presidency by restricting, not enhancing, individual rights.¹²

Goldsmith also provides a breathtaking sense of the feelings of responsibility executive branch officials were fielding in the wake of 9/11. I found it interesting that in the context of this anxiety, Goldsmith portrays executive branch deliberations as focused more on being *tough* in fighting terrorism than on being *smart* about it.¹³ Of course, sometimes it is very smart to be tough. It is notable how deeply worries about appearing “passive” apparently permeated executive branch decision-making, especially in its deliberations over torture.¹⁴ Goldsmith notes that John A. Rizzo, General Counsel of the CIA, “was approached to vet the inchoate [interrogation] program in the spring of 2002,” despite having “no experience with interrogation or detention or the law surrounding it, and no insight into the efficacy of what was being proposed.”¹⁵ Lacking knowledge or experience, Rizzo was guided by a motivation to avoid being seen as a “puss[y],” and so

4. *Id.*

5. *Id.*

6. *See id.* at 223–33.

7. *Id.* at 146, 149.

8. *Id.* at 208–09.

9. *Id.* at 156.

10. *Id.* at 194.

11. *Id.* at 107–08.

12. *Id.* at 45.

13. *Id.* at 96.

14. *Id.*

15. *Id.*

supported the development of interrogation guidelines that were permissive of torture.¹⁶ Would that research and careful thought had prevailed over gendered performance anxiety. A wealth of research was available before September 11 arguing for torture's limited value in eliciting useful information.¹⁷ If the permissive, uniformed, and (understandably) anxious deliberative atmosphere surrounding torture in the White House was in any way linked to what happened at Abu Ghraib, then these executive deliberations were partially responsible for one of the greatest military setbacks of the war on terror.

At its core the book has a political point and an institutional one. Politically, Goldsmith argues that the Obama administration has not, in fact, brought much change to important security policies of the Bush administration.¹⁸ Goldsmith explains this non-event institutionally: the modern presidency is shot through with mechanisms of accountability such that presidential behavior is highly constrained.¹⁹ These mechanisms of accountability are disaggregated: legal advocacy groups (some of whose work is government subsidized); inspectors general; involved congressional committees; competitive executive bureaucracies who value their credibility with Congress and the public more than the president's agenda (including the FBI and JAG Corps); lawyers deeply integrated within the military structure; post-Watergate reporting requirements on intelligence and operations, which leave paper trails and create vulnerability to leaks; the Freedom of Information Act; federal courts; military needs surrounding new forms of war and nation-building; the press; and new technologies for surveillance of government — all significantly curtailing any particular president's scope for action.²⁰ In Goldsmith's account, these forces — not, by and large, the political agenda of an incoming president — set the terms of national security today.²¹

Despite the book's highly engaging, on-the-ground look at these disaggregated forces, I remain skeptical that presidential power is as thoroughly constrained as Goldsmith argues. The book would be more persuasive if it carried its argument through a broader time period. Specifically, Goldsmith understates the political, discretionary, and non-constrained choices of the early Bush years and the extent to which those choices decisively transformed American security politics. The early Bush years, no less than the late ones, are part of the modern presidency. But Goldsmith downplays the significance of the unreviewable choices made during those years. For example, in discussing Bush's responsibility for the 9/11 attacks, Goldsmith cites as a "main criticism" of the government that "intelligence and law enforcement agencies did not share, analyze, and coordinate the information properly,"²² but omits the concern that the

16. *Id.*

17. Whether torture has generated actionable intelligence in the war on terror is disputed. See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 155–57 (2008); Ali Soufan, *My Tortured Decision*, N.Y. TIMES, Apr. 23, 2009, at A27.

18. See GOLDSMITH, *supra* note 1, at 25–29.

19. See *id.* at 34–39.

20. See *id.* at 205–43.

21. See *id.*

22. *Id.* at 244.

Bush administration made a political choice to de-prioritize Islamic terrorism, a choice some believe was rooted in its antipathy to Clinton-era priorities.²³ Goldsmith portrays Bush's controversial legal claims — for example, the creation of a brand new category of “illegal enemy combatants” without Geneva Convention rights, or his torture policy — as either solidly, or at least reasonably, “backed by . . . legal precedents.”²⁴ This second argument was particularly odd because Goldsmith's own resignation seemed linked to his decision to withdraw the OLC's torture memos.

The book is loose on whether Obama adopted so many of Bush's policies because he came to believe they were wise, or because of policy entrenchment. Obama's continuation of Bush's programs on military detention without trial and military commissions is described as his “learn[ing] what it [meant] to be commander in chief,”²⁵ when confronted with the “grim reality of presidential responsibility,”²⁶ but these stories are also plausibly read as Obama's decision to follow a path of least resistance or to defer to the “equilibrium” of a preexisting legal and political settlement now “irreversibly woven into the fabric of the national security architecture.”²⁷ I think Goldsmith would agree that the Obama administration has both learned and accommodated itself to entrenched realities. But obscuring the difference between these obscures the alternative models of presidential power that are at stake in the book.

The presidency's agency is also downplayed in Goldsmith's choice to treat as parallel a President who seeks legal guidance and political accountability, and one who resists review of any kind, as long as the two arrive at similar policy outcomes. In some cases the Obama administration's parallel outcomes are due to legislative resistance rather than presidential power grabbing.²⁸ Obama even rejected legislative offers for new detention powers out of concern that Congress might cede too much.²⁹ Goldsmith calls Obama's concerns for legalizing executive power “prettier wrapping,”³⁰ but the difference between a presidency accepting limitations on its own accord, and one dead-set on struggling against them, is tremendous in terms of time, energy, and national focus. It takes work to overcome an oppositional president. Goldsmith invokes the concept of a self-correcting system, but most politics are not really self-correcting.³¹ Political advocates had to work to restrict a lawless presidency. That work is costly. If President Bush had been friendlier to the rule of law and to civil liberties in the early years, then Congress' passivity in its relationship to Bush would have mattered less. And

23. See, e.g., RICHARD CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 227–32 (2004); TIMOTHY NAFTALI, *BLIND SPOT: THE SECRET HISTORY OF AMERICAN COUNTERTERRORISM* 288–98 (2006) (discussing the intelligence community's lack of anticipation of a direct attack on U.S. soil); NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT*, 198–205 (2004); GEORGE TENET WITH BILL HARLOW, *AT THE CENTER OF THE STORM: MY YEARS AT THE CIA* 130–31 (2007).

24. GOLDSMITH, *supra* note 1, at 166–67, 174, 236.

25. *Id.* at 27.

26. *Id.* at 26.

27. *Id.* at 27, 210. See also *id.* at 191.

28. See *id.* at 42.

29. *Id.*

30. *Id.* at 41.

31. *Id.* at 209.

surely if the early Bush years had been friendlier to civil liberties, the Center for Constitutional Rights could have found other tasks to occupy its time.

Goldsmith's investigation into the robustness of presidential constraint is also underdeveloped in places. When comparing Presidents Bush and Obama, Goldsmith insists that despite its "rhetoric" of presidential power, the Obama administration's policy outputs are strikingly similar to those of the late Bush presidency.³² But when analyzing judicial checks, Goldsmith takes rhetoric at face value. This is a problem because, however bold the Court's rhetoric in the *Hamdi*,³³ *Padilla*,³⁴ *Rasul*,³⁵ *Hamdan*,³⁶ and *Boumediene*³⁷ cases, the Court was highly deferential on the concrete policy outcomes these rulings would require from the government.³⁸ Kim Scheppele argues that by ruling in favor of petitioners' habeas rights, but repeatedly deferring the question of what the content of those rights amounted to, the Supreme Court created a new and insidious form of judicial deference.³⁹ The courts after 9/11 were "very active, right from the start . . . [But] what does it mean to keep winning cases if nothing in fact changes?"⁴⁰ It is unclear to what extent these judicial interventions should be construed as "constraining." Goldsmith's book could have illuminated that question had it offered a more thoughtful and consistent standard on the question of whether rhetoric, or only policy, is a notable political outcome.

The book's difficulty with the concept of rhetoric creates burdens for Goldsmith's engagement with one of the presidency's most important discretionary powers — its agenda-setting powers. Goldsmith notes Lincoln's opposition to the "broad . . . war powers" that Polk exercised prior to the Mexican War without being specific as to what exactly was so controversial.⁴¹ From one point of view, all Polk did was move troops around in Texas.⁴² But by moving troops into an area where they would be attacked, Polk was able to *frame the debate* about the Mexican War in terms of defensive security necessity.⁴³ Congress debated a defensive response, not whether to embark on an offensive war of acquisition. Polk's critical power was a naming power, a power to launch a discourse within which all other decisions, accountable or not, would be made.

Goldsmith says little on how a president's framing of an event creates the context within which the forces of constraint and power play out. Here, I will boldly suggest that some engagement with political science's rich presidency scholarship would have

32. *Id.* at 40–41.

33. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

34. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

35. *Rasul v. Bush*, 542 U.S. 466 (2004).

36. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

37. *Boumediene v. Bush*, 549 U.S. 1328 (2007).

38. See Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1012, 1028–62 (2008); Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89 (2012).

39. Scheppele, *supra* note 38, at 153–54.

40. *Id.* at 154.

41. See GOLDSMITH, *supra* note 1, at 23.

42. For a brief discussion of Polk's actions during the Mexican-American War, see STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 170–74 (1993).

43. See *id.* at 171.

deepened the book, or at least allowed for a more careful framing of its central point.⁴⁴ The power Bush exercised in offering a frame interpreting 9/11 as an event of war was tremendous and essentially unreviewable. Bush's ensuing rhetorical decision to set the goal of the war in very broad terms — to eliminate the threat of terrorism to the American way of life — was also highly discretionary.⁴⁵ Not much later, Bush's arguments about Iraq's complicity in 9/11 again *created* a security politics of the Iraq War. The Bush administration put a great deal of energy into exercising this rhetorical power. Its efforts to sell the Iraq War "consumed" the administration for some months.⁴⁶ The decision to publicly argue for a link between the terrorism of 9/11 and Saddam Hussein was not in any way a legally constrained choice. Highly relevant for the book's thesis, none of the Iraq War dilemmas that Goldsmith grapples with would have existed if Bush had been unsuccessful in launching a discourse of pre-emptive security. The concepts of "balance," "equilibrium," and "self-correction" endemic in the book obscure attentiveness to this problem of context.⁴⁷ "Balance" of what? In what context?

Goldsmith's neglect of presidential rhetoric also obscures the extent to which much of the modern accountability state is driven by those crises of public confidence generated when presidents use their words to lie. Goldsmith notes that the national security state was revamped after Watergate, and again after Iran-Contra, but he views these events as harbingers of constraint, "baselines of opprobrium" rather than warnings about the possibilities of an abusive power that can always exceed the law.⁴⁸ So too, Goldsmith notes that the press is no longer willing to trust the executive branch when it asks to suppress stories on a vague national security basis, but will instead only respect particular, concrete, and highly limited appeals.⁴⁹ Government over-classification has diminished the press' trust that classified documents must remain secret. Here too, the "word" of the government has been corrupted by deceitful communication. This power to corrupt words is a dangerous one. In the context of today's politics, Goldsmith does not mention the Valerie Plame affair or speculate on whether the Bush administration's

44. See generally PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* (2002) (discussing the issues past presidents have had with using and abusing their executive powers); WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003) (evaluating a president's broad powers); ROGER T. LARocca, *THE PRESIDENTIAL AGENDA: SOURCES OF EXECUTIVE INFLUENCE IN CONGRESS* (2006) (examining the president's influential power over Congress); SKOWRONEK, *supra* note 42 (arguing that presidents significantly facilitate change); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987) (examining the many dimensions to a successful presidency); Randall L. Calvert, Mathew D. McCubbins & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588 (1989) (discussing new theories of political control and agency discretion and current applications); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999) (examining the origin and effects of a president's ability to act unilaterally).

45. NSPD-9: *Combating Terrorism*, FED'N OF AM. SCIENTISTS (Oct. 25, 2001), <http://www.fas.org/irp/offdocs/nspd/index.htm>; see also NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 23 at 333–34; President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1142 (Sept. 20, 2001).

46. Timothy Naftali, *George W. Bush and the "War on Terror,"* in *THE PRESIDENCY OF GEORGE W. BUSH* 59, 76 (Julian E. Zelizer ed., 2010).

47. GOLDSMITH, *supra* note 1, at 209–10.

48. *Id.* at 34–35, 240.

49. *Id.* at 55.

leak of her identity might have weakened the press' commitment to protecting the identity of CIA agents.⁵⁰ In Watergate, Iran-Contra, and the Valerie Plame affair, *words* had tremendous power. But the choice that a president has to say one thing or another is really not one that can be disciplined by the disaggregated forces of constraint named in the book.

Despite these objections, I highly recommend the book. Goldsmith has a singular perspective on the internal politics of the Bush administration and a sharp way of communicating the relationship between everyday politics and the role of law in politics. Although its thesis and central categories of analysis are underdeveloped, students and scholars will find it rewarding to encounter the book's many rich insights into the practical realities of presidential constraint.

50. *Id.* at 79. For information on the Valerie Plame affair, see *Appeals Court Rules Against Reporters in CIA Leak Case*, USA TODAY (Feb. 15, 2005), http://usatoday30.usatoday.com/news/washington/2005-02-15-reporters-cia_x.htm.