
POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER

9/11

BY JACK GOLDSMITH

*Reviewed by Paul E. Mirengoff**

In *Power and Constraint: The Accountable Presidency After 9/11*, Jack Goldsmith painstakingly describes the constraints on the President's power to combat terrorism that emerged in response to Bush Administration policy. Goldsmith, a key legal adviser during portions of President Bush's first term, thereby performs a great service.

Goldsmith also presents two theses. The first is that pushback against Bush's anti-terrorism policies produced a consensus about what tools the President can use in fighting terrorism, which explains why President Obama retained so many of Bush's policies as they stood in 2009. The second is that we should be relatively sanguine about the process that produced the current consensus, and about that consensus itself.

In my view, Goldsmith's first thesis is debatable and his second is incorrect. But *Power and Constraint* is compelling reading by virtue of the story it tells, whatever one thinks about its conclusions.

Goldsmith divides his story into four sections. They deal with the constraints imposed on presidential power by journalists, military lawyers, and courts, and with the persecution of CIA agents for actions taken in response to 9/11.

"Secrecy," Goldsmith stipulates, "is vital in wartime to avoid tipping off the enemy about government plans and operations and to promote candid deliberation inside the government about these plans and operations." After 9/11, however, journalists saw their function as "piercing the government's secrecy system."

They succeeded. "Very soon after top-secret counterterrorism programs became operational, they were discussed in some detail on the front page of the Washington Post and elsewhere," Goldsmith reports. The programs publicly discussed included monitoring of international financial transfers that support terrorism, data-mining techniques, interrogation techniques, CIA renditions, and secret prisons.

Consequently, General Michael Hayden declared that there are only a "very narrow number of specific operational acts" he was involved with that are as secret now as the day they were conceived. After 9/11, Hayden served in one key intelligence leadership position after another. Thus, he knew most if not all of America's important intelligence secrets. So, apparently, did journalists and, in many instances, their readers, including the terrorists we were fighting.

Should we be sanguine about this state of affairs? According to Goldsmith, President Obama is not. And Obama's

* Mr. Mirengoff is a retired attorney in Washington, D.C. and is a blogger at powerlineblog.com.

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Under Secretary of Defense for Intelligence has testified to Congress that leaks of classified information "place[] our forces, our military operations, and our foreign relations at risk."

Goldsmith, though, is relatively sanguine. He recognizes the harms that have resulted from the disclosure of secrets, but considers them a fair price to pay because disclosure increases the ability of the public and its representatives to evaluate the soundness of the executive's wartime efforts.

But wartime efforts become less sound when the enemy receives notice of their nature. And the public can evaluate the efficacy of the executive's efforts by looking at results.

Satisfactory results are sometimes achieved through debatable methods or in spite of the methods used. But our elected representatives have broad powers with which to ascertain what methods the executive is employing and with what efficacy. Thus, the executive can be held accountable without its secrets being splashed onto the front page of the newspaper.

Goldsmith notes that Congress has often been reluctant to become significantly involved. Presumably, this reluctance reflects public indifference to anything other than results. Wartime efforts should not be compromised to provide the public and its representatives with information they don't particularly care to know.

Goldsmith contends that "the United States has basically decided" that the benefits derived from publication of government secrets outweigh the harm to national security that sometimes results. He points out that Congress hasn't given the President much power to prosecute leakers and Presidents have been reluctant to use the power they possess.

It may be a stretch to characterize this inaction, probably caused by unwillingness to antagonize the press, as a decision based on the weighing of costs and benefit. In any event, the "decision" should be re-visited, and might very well be in the next serious crisis.

"Lawfare" refers to the relatively recent phenomenon of law and lawyers affecting the conduct of war. Lawyers, Goldsmith shows, are now at the heart of the military decision-making process. They not only review operational plans in advance, but also participate in the field, providing counsel to commanders regarding proper targets, for example.

This had been true for some time. But given the urgency of a strong response to attacks on our homeland, many expected the influence of lawyers over military operations to diminish after 9/11. Instead, Goldsmith shows, military lawyers became more deeply integrated than ever in military decision-making. They also grew closer to the fight, with two to three lawyers deployed with every army brigade, and a lawyer deployed for many special operations forces down to the battalion level.

Goldsmith makes clear that the constraining function of military lawyers goes beyond applying their view of the law. Lawyers also advise commanders on whether particular actions will pass "the CNN test." And even when it's not possible for lawyers to be present, they constrain action through the rules of engagement they write. These rules, too, embody not just legal considerations, but also political and diplomatic ones.

Goldsmith finds that "lawfare" constraints have impeded our military operations and increased the number of U.S.

casualties. They even enabled Mullah Omar, the leader of the Taliban, to escape after a lawyer dissuaded the military from striking a building because civilians were probably present. As Goldsmith explains, “[S]urrounded by law and under the gaze of many potential retroactive critics, it is entirely rational for soldiers up and down the chain of command to hesitate before acting.” Such hesitation is sometimes incompatible with waging effective warfare.

How did we get to the point where lawyers help manage, and adversely affect, combat operations? We got there, Goldsmith shows, mainly through the efforts of what he calls “warrior-lawyers.”

These JAGs possess both a military and a legal education. The combination appears to be a heady mix. For example, General Mark Martins, Goldsmith’s protagonist warrior-lawyer, claims that “law embodies and summarizes human experience about right action in a particular context.”

Many experienced lawyers across a wide range of practice areas may find this statement naïve. They may also wonder about the quality of a summary of human experience under which suspected terrorists can be killed without legal process by drone strikes but, if captured in the hope that they will provide valuable intelligence, cannot be slapped in the face.

According to Goldsmith, the post-9/11 policies of the Bush Administration were “a direct affront to the JAG view of the world.” And animated by an unrealistic view of the law and an emphasis on their personal honor, these warrior-lawyers seem to have forgotten that in the United States, civilians control the military, and the Commander-in-Chief is the chief law interpreter for the executive branch.

The JAGs set out to undermine Bush policy through all available means, including leaks, public testimony, coordination with sympathetic politicians, and even assistance from human-rights groups with whom, says Goldsmith, “they had a greater commonality of interest than with the President.” Through these methods, they were able substantially to constrain their adversary, the President of the United States.

The JAGs could not have accomplished this had they not already gained vast influence within their base of operations, the military. They gained that influence primarily because they helped commanders identify and circumvent legal landmines.

But the JAGs were not the passive beneficiaries of a windfall of law they were then asked to help cope with. For decades, Goldsmith reports, they worked with human rights groups with whom they came to share a general outlook.

Not surprisingly, then, the JAGs were instrumental in the decision by the U.S. military to follow many aspects of customary international law, and in the writing of ever-expanding legal and policy manuals that they could then interpret and apply. And not surprisingly, when the Bush Administration sought greater flexibility through measures inconsistent with the shared outlook of the JAGs and their friends in the human-rights community, the JAGs counterattacked with great success.

Goldsmith appears troubled by the military’s undermining of the President’s ability to interpret the law on behalf of the executive branch. He also recognizes that the injection of lawyers into battle harmed U.S. counterterrorism efforts. Ultimately,

he is agnostic as to whether the harm is outweighed by the possible prevention of misguided policies and the blowback they would have caused.

Goldsmith’s agnosticism is understandable. Both sides of the cost-benefit equation are impossible to measure. But this much should be clear: our elected executive is responsible for making the cost-benefit decisions. His decisions may be subject to judicial review, but they should not be undermined or thwarted by military lawyers. It also seems clear that in war, including war on terrorism, the president should err in favor of defeating the enemy, rather than minimizing “blowback.”

The Supreme Court constrained presidential power after 9/11 in several landmark decisions. *Power and Constraint* deals with this development mainly by describing the work of the “GTMO Bar.” Goldsmith admires its efforts, and justifiably so. Members of the GTMO Bar persuaded the Supreme Court to issue landmark decisions overturning Administration policy even though precedent was against them.

Power and Constraint does not pass on the merits of Supreme Court decisions. Goldsmith argues, persuasively, that the decisions should be understood in the context of both press reports about alleged government abuses and the anti-administration drumbeat emanating from military lawyers. This cacophony helped trump precedent even though courts had (1) no way of knowing the degree to which press reports were accurate (government refutation might well have compromised secrecy in many cases) and (2) no apparent sense of the extent to which the JAGs were an ideologically-driven interest group attempting to protect their turf.

Perhaps the saddest part of Goldsmith’s story is the persecution of CIA agents. In a time of crisis, CIA agents obtained valuable information from terrorist detainees. That information led to the capture or killing of terrorists bent on attacking the U.S. It may well have prevented attacks.

The techniques used by the CIA agents were approved in advance by the Department of Justice. As Goldsmith puts it, “[t]he CIA sought all of the right assurances up front for its detention and interrogation mission; it dutifully reported its subsequent mistakes; and it cooperated with the many resulting investigations.”

None of this mattered much. Sweeping initial internal investigations caused approximately twenty cases to be referred to the Justice Department for potential criminal prosecution. Only one resulted in prosecution, but the others were referred back to the CIA, which then considered whether to punish the agents. Some agents were cleared, some were punished, and some quit.

Then, Attorney General Holder ordered the reopening of cases that the Justice Department had already deemed unworthy of prosecution. Thus, agents who had been told the matter was finally behind them once again had to lawyer up, refresh their memories, and face a grand jury. Most agents eventually were cleared again, but the process demoralized the CIA.

Goldsmith believes that these experiences will make the CIA far more cautious and less inclined to take the initiative the next time the threat environment becomes severe. This ethos, he assures the human-rights lobby, provides a safeguard against future abuse. But Goldsmith can provide no assurances to those

who fear that, due to caution and risk aversion, the CIA will be less effective in combating terrorism the next time around.

Goldsmith also believes that the process by which executive power was constrained produced a consensus about what the law permits in the context of counterterrorism, and that thanks to this consensus Obama retained a great many of Bush's policies as they stood in 2009. It is true that presidential power was constrained prior to 2009 and that Obama retained most of the Bush policies as of that date. But does a causal relationship exist?

Goldsmith assumes that, had the Bush Administration not changed its policies, the Obama Administration would have abandoned many of them. But we know that Presidents are loath to give away their powers, and Obama has been no exception.

Having vocally denounced many of Bush's early policies, Obama was under great pressure to alter them. But suppose the media had not pierced the Administration's secrecy system and that military lawyers had not worked to undermine Administration policy? In this scenario, Obama likely would have inherited the largely uncontested ability to exercise more power with less constraint. Would Obama have imposed constraints on his own power? It's a question Goldsmith does not consider.

Goldsmith also does not consider the extent to which Bush's policies received pushback that would not have been directed at the same policies if initiated by a liberal Democratic President. But little else goes unconsidered in this valuable study.