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Going it Alone: The Terror Presidency: Justice and Judgment Inside the Bush Administration

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Jack Goldsmith is a widely admired professor now at Harvard Law School who spent ten months in the Bush administration during 2003–04 as the head of a special Justice Department office responsible for giving authoritative interpretations of law to the executive branch. It was the Office of Legal Counsel that, in 2002, produced the infamous “torture memos”, and that, the following year under Goldsmith, took them back again. Now it is again in the news, as controversial memos regarding harsh interrogation issued by one of Goldsmith’s OLC successors surface in the newspapers. Goldsmith’s part-memoir, part-historical analysis, *The Terror Presidency*, examines not just the Bush administration’s “war on terror”, but the enormous pressures and constraints on future American Presidencies confronting the threat of terrorism. The book is superb – deceptively casual and eminently readable, yet profoundly considered and argued.

Goldsmith is a conservative; “I am not”, he says unequivocally, “a civil libertarian.” He expresses no discomfort with the Bush administration’s fundamental approach to 9/11 – he believes, that the United States is indeed “at war with terrorists”. Looking forward to future Presidential administrations, he sees a need to reshape the struggle against terrorism in ways that get beyond the permanent use of emergency presidential powers; he acknowledges that the terminology of “war on terror” has lost its utility, but he urges retaining the strategic understanding of a war against trans-national terrorism even if its legal contours shift. The difficulty faced by Goldsmith, however, was that his role in government was to give binding legal advice to an executive branch hemmed in by a thicket of laws, complicated, vague and often imposing personal criminal liability on officials. Goldsmith believes these laws, mostly dating from the 1970s, are historically unprecedented, sometimes constitutionally dubious, and leave little room for manoeuvre to government officials who are under enormous pressures both to keep the population safe from terrorism and to protect rights and liberties by not acting aggressively. The threat of criminal enforcement naturally disinclines lower-level officials – in particular, the ones who actually carry out policy – to take the personal legal risks of criminal prosecution that the aggressive pursuit of counter-terrorism might entail.

The Terror Presidency reaches beyond personal memoir to offer a historical comparison of the legal powers available to Presidents in time of war and emergency, under Lincoln, Roosevelt and Bush. Lincoln and Roosevelt operated, of course, under immensely fewer legal constraints than the Bush administration. Lincoln undertook many legally dubious actions, suspending habeas corpus, for example, and imprisoning large numbers of suspected Southern sympathizers without legal recourse; Roosevelt, under the thinnest cover of complaisant legal opinions issued by his Attorney General, Robert Jackson, ignored laws passed by Congress explicitly aimed at keeping the United States out of war. He could not even plead the exigencies of war at that point, because war was precisely what Congress had legislated to avoid. But even before 9/11, the Bush administration – particularly Vice President Dick Cheney, through his mysterious counsel and chief of staff, the ascetic, iron-willed David Addington – was

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committed to rolling back what it saw as the dangerous erosion of Presidential power since the Vietnam war. After 9/11, success in the war on terror was viewed as identical to the restoration of executive discretion. Comparing Lincoln and Roosevelt to Bush is therefore to say that they had far more discretionary power, and that this discretionary power needed to return to the Presidency.



The White House Chief of Staff Andrew Card informing President George Bush that a second plane has crashed into the World Trade Center, September 11, 2001

Goldsmith’s point is subtler, however. It was not so much executive discretion that allowed Lincoln and Roosevelt to act decisively. It was, rather, that while each was politically attuned to Congress’s sensitivities, because they and their subordinates did not face today’s Congressional restrictions on Presidential discretion, they thus had a “less pressing need to assert presidential prerogatives vis-à-vis Congress”. Lincoln and Roosevelt were politically wary of discretion’s possible excesses; and they could direct themselves wholly to the substantive struggles at hand.

Lincoln and Roosevelt, unlike the Bush administration, anticipated the famous dictum of Justice Jackson that the executive achieves its maximum power acting in conjunction with the other political branch of government, Congress. Lincoln, ever the lawyer, remained “anxious about his unprecedented assertions of presidential power” and “almost always sought congressional support”. Roosevelt on certain crucial issues did not go to Congress, but still he did not use his prerogatives as “part of an aggressive program to expand presidential power for its own sake”. By contrast, Cheney and Adding-

ton “shared a commitment to expanding presidential power” that – although in their eyes was necessarily co-extensive with prevailing in the war on terror – to outside observers forced a choice at key moments between the war on terror and the abstract principle of executive power for its own sake. In this, Lincoln and Roosevelt each chose differently, opting not to go it alone, but instead to work with Congress towards an agreement that maximized Presidential power because it would represent the two political branches of government. The Bush administration has adamantly refused to follow this course, for the foolish lawyerly reason that asking Congress to roll back its fettering laws would imply an acceptance that Congress had such fettering powers in the first place.

The grand irony, Goldsmith observes, is

But there is no going it alone in a system of divided constitutional powers. If not Congress, it will be the Court – or more exactly, as Benjamin Wittes has noted, the inconstant Justice Anthony Kennedy, the Supreme Court’s swing vote – that endorses policy. In pursuing unfettered executive power to act alone, the administration has made Justice Kennedy its five-star general, its very own Douglas MacArthur in the war on terror. On the infrequent occasions when the administration has been forced by the Court to go to it for authority, it has been denied practically nothing. It has not so far mattered that the Bush administration is a lame duck, or whether Congress is in Republican or Democratic hands.

The administration seems not to have understood that what lives by executive discretion dies by executive discretion. If the Bush administration took counterterrorism as seriously as it took the abstraction of executive power, it would have thought ahead to its own departure from office. If it truly believed that its approach to counterterrorism was correct, then from the first day of its second term it would have engaged with Congress to create institutions to outlive any particular Presidency. It would have thought about the example of the Cold War and how a democracy deals with a genuine threat to a whole way of life. In retrospect, the democratic institutions of the Cold War did a remarkable job of balancing safety and liberty over decades; pure executive discretion cannot possibly promise the same. The administration having undertaken none of these things, US counterterrorism policy today flails without long-term strategic guidance or institutional stability.

Yet any future institutional settlement for counterterrorism inevitably bumps up against the contradictory impulses of government officials who confronted Goldsmith on his entry into the OLC and impelled his departure not many months later. *The Terror Presidency* says repeatedly that government policy after 9/11 was Bush’s instruction to the then Attorney General, John Ashcroft: “Don’t ever let this happen again”. For Goldsmith, every Presidency for the foreseeable future will be characterized by an “unremitting fear of devastating attack, an obsession with preventing the attack, and a proclivity to act aggressively and preemptively to do so”. No matter what might get said in the course of an election campaign, a Democratic administration once in office, “will be even more anxious than the current President to thwart the attack”. In order to act as aggressively as the spirit of the age demands, however, government officials

in the CIA and elsewhere must have confidence that apparently authorized aggressive actions that turn out to be mistaken, unnecessary, excessive or cause collateral damage to innocents will not be judged after the fact by a different set of standards than those going in. The criminal laws now in place make it very difficult, however, for operational officers of government, whether in detention, interrogation, surveillance or other covert activities, to have such confidence. The criminal laws use vague terms such as “inhumane”, “degrading” or “humiliating” that practically invite after-the-fact revisionism, creating legal uncertainties that become insurmountable obstacles to action. Congress and the administration, in the seemingly perverse desire to have it both ways – encourage action but have the option to prosecute it afterwards – refuse to be specific as to what is actually permitted and not. Operational officials therefore respond rationally to the disincentives to act created by legal uncertainty.

Understanding the *raison d’être* of the torture memos issued by OLC in 2002, prior to Goldsmith’s arrival, is nearly impossible without understanding their relationship to the vagaries of these criminal laws. The role of the OLC for some fifty years has been to give authoritative advice to the executive branch on legality and constitutionality. As Goldsmith notes, of necessity its opinions are often secret and not reviewable by any court. This is not as strange as it sounds. It is a part of the executive’s obligation to “faithfully

execute” the laws; to do that, the executive must know what the laws are and what they mean – a function always delegated, however, to the Attorney General, constitutionally obliged to give advice on “questions of law when required by the President of the United States”. In practice, however, this might easily tempt lawyers in the OLC to write tendentious briefs to justify what the executive already intends to do, under circumstances in which judicial review may not be possible.

The OLC has so far insulated its lawyers from pressure by the executive. In matters of national security law, those OLC opinions operate as immunity against criminal prosecution of officials who act in good faith even if, ultimately, wrongly. It is almost impossible for the Justice Department to prosecute an official when that same department’s OLC has blessed the conduct. The torture memos therefore purported to define torture for purposes of guiding what the executive might lawfully do. From the standpoint of CIA agents and other officials, these opinions offered immunity for their actions if they acted in reasonable reliance on them. The OLC in 2002 offered opinions on the definition of torture that certainly fulfilled this function; but they did so in ways that Goldsmith could not sustain, drafted as tendentious and conclusory briefs.

Worse, they did so not within bounds of what actual administration interrogation policy might be – waterboarding, for example – but instead within the maximal legal bounds offering the most iron-clad protection possi-

ble against criminal liability for anything. Goldsmith says that he was not disturbed by the exploration of the outermost limits of the law against torture as such, but these memos had a purpose fundamentally different from simply setting out boundaries. They more or less authorized anything short of Saddam’s infamous meat grinder, and then, for good measure, added that in any case the President was not bound by any of this. The memos were disastrous because they left the understanding that these hypotheticals at the outer orbits of law constituted a statement of the government’s actual policy proposals. Goldsmith observes that although the charge is frequently made that the Bush administration is “lawless”, it is better understood as the most over-lawyered in US history.

Goldsmith was pilloried in press articles suggesting that he had authored the torture memos. Only later did it emerge that he had in fact withdrawn them. This has caused Goldsmith to be treated in the media as a kind of hero, a whistle-blower, though Goldsmith himself feels uncomfortable with “the Manichean tone . . . one sees so often when press and intellectuals criticize the Bush administration’s attempts to balance liberty and security”. His discomfort is evident from the fact that he is contributing his profits from this book to charity and that he has refrained from wholesale criticism of the Bush administration. As custodian of the OLC, Goldsmith believed he had a constitutional obligation to offer opinions that were not merely briefs in

support of a preordained position. Withdrawing the torture memos also meant, as he well knew, withdrawing immunity upon which mid-tier government officials and agents had relied in good faith. Goldsmith’s exit from government was not on account of his being fired; indeed, the Attorney General or the President could have overruled him and did not. No one stopped Jack Goldsmith from withdrawing the torture memos; but having “reversed or rescinded more OLC opinions than any of my predecessors”, he wrote many people “lost faith in me. What else might I withdraw and when?”

Many people believe that the terror threat is overrated, the problem is to “manage” rather than defeat it. Goldsmith acknowledges this emerging view, and while rejecting it does not seek to refute it. America will live the Terror Presidency, Goldsmith says, with its dense moral ambiguities unfolding deep within a democracy’s many necessary bureaucracies and institutions. The moral uncertainties, lest anyone mistake his meaning, are captured with brutal precision by Goldsmith’s own last words on the torture memos:

Some people have praised my part in withdrawing and starting to fix the interrogation opinions. But it is very easy to imagine a different world in which my withdrawal of the opinions led to a cessation of interrogations that future investigations made clear could have stopped an attack that killed thousands. In this possible world my actions would have looked pusillanimous and stupid, not brave.