

**Power and Constraint:
The Accountable Presidency After 9/11¹**

Reviewed by Major Ryan A. Howard*

At the close of the Constitutional Convention of 1787, a woman queried Dr. Benjamin Franklin as he left Independence Hall, "Well Doctor what have we got—a republic or a monarchy?" The Doctor replied, "A republic . . . if you can keep it."²

I. Introduction

In the years following 9/11, the executive branch amassed tremendous power to address national security challenges. While a temporary increase in executive power is customary during a time of war, many believe this era of persistent conflict has resulted in a permanent transfer of power to the executive branch.³ In this context, Jack Goldsmith⁴ counters that presidential power remains checked by a "remarkable and unnoticed revolution in wartime presidential accountability."⁵ Although Goldsmith's conclusion is well supported overall, his argument is both weakened by relying on extra-governmental actors and limited by the executive branch's ability to adapt moving forward. Nonetheless, Goldsmith's insider account of executive power is informative and well supported. In sum, *Power and Constraint* offers readers remarkable insights into the constraints placed on the executive branch in the decade following 9/11.⁶

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

² MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, vol. 3, app. A, at 85 (1911, reprinted 1934), available at <http://www.bartleby.com/73/1593.html>.

³ Numerous texts have recently concluded that modern day executive power is largely unchecked. See, e.g., MATTHEW CRENSON & BENJAMIN GINSBERG, *PRESIDENTIAL POWER: UNCHECKED & UNBALANCED* (2007); RACHEL MADDOW, *DRIFT: THE UNMOORING OF AMERICAN MILITARY POWER* (2012); DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* (2012).

⁴ Jack Goldsmith is an expert on matters of national security law, international law, and presidential power. In addition to publishing numerous national security periodicals, he is the author of *The Terror Presidency* and *The Limits of International Law*. Goldsmith served as Assistant Attorney General, Office of Legal Counsel from 2003 to 2004 and Special Counsel to the Department of Defense from 2002–2003. Currently, Goldsmith is the Henry L. Shattuck Professor of Law at Harvard Law School. Goldsmith's curriculum vitae is available at <http://www.jackgoldsmith.org/jackgoldsmithcv.pdf> (last visited Jul. 10, 2013).

⁵ GOLDSMITH, *supra* note 1, at xi.

⁶ Christopher Caldwell's review of *Power and Constraint* offers an excellent summary and insight into the text. See Christopher Caldwell, *Vetted, Altered, Blessed 'Power and Constraint,'* by Jack Goldsmith, N.Y. TIMES, June 8, 2012 (describing the text as "bone dry and tightly reasoned" and concluding Goldsmith's legitimated policies represent a "dangerous melding of powers"); see also Gary Schmitt, *Safety First: the constitutional*

II. Executive Power in Context

Making few assumptions, Goldsmith thoroughly yet efficiently addresses the history of executive power. Traditionally, the executive branch has accumulated power during times of national crisis.⁷ Prior to World War II, the executive branch surrendered the additional power following each conflict.⁸ After World War II, however, the executive departed from this pattern and accumulated more and more power with each successive crisis.⁹ Executive power appeared to reach its zenith in the early 1970s when several scandals triggered congressional intervention.¹⁰ The executive branch, however, was able to evade these reforms and further accumulate national security power throughout the 1980s and 1990s.¹¹ Following 9/11, executive power grew even more robust as President George W. Bush's administration asserted itself on rendition, indefinite detention, interrogation, targeted killing, surveillance, and state secrets.¹² Many believe these recent expansions represent a permanent increase in executive power as President Barack Obama has maintained, largely unchanged, many of these policies.¹³

seesaw in the war on terror, WKLY. STND., Apr. 30, 2012; Roger Lowenstein, *Obama's Anti-Terror Program Is More or Less Bush's*, SAYS BOOK, BUS. WK., Apr. 4, 2012; and Anthony Dworkin, *Power and Constraint: The Accountable Presidency after 9/11* by Jack Goldsmith and Democracy's Blameless Leaders: From Dresden to Abu Ghraib, How Leaders Evade Accountability for Abuse, Atrocity, and Killing by Neil James Mitchell, WASH. POST, May 18, 2012.

⁷ GOLDSMITH, *supra* note 1, at 33.

⁸ Goldsmith documents this pattern with Abraham Lincoln during the Civil War, Woodrow Wilson during World War I, and Franklin D. Roosevelt during World War II. See *id.* at 31.

⁹ Goldsmith points to Harry Truman's actions during the Soviet threat as the clear demarcation of the pattern of returning power to Congress. See *id.* at 32.

¹⁰ Goldsmith offers My Lai, Watergate, and the Pentagon Papers as scandals that triggered congressional action in the form of "the War Powers Resolution, the Foreign Intelligence Surveillance Act, the Presidential Records Act . . . a revised Freedom of Information Act, [and] the Privacy Act." See *id.* at 34.

¹¹ See, e.g., *id.* at 35 (providing historical examples of Grenada, Lebanon, Iran, Libya, Panama, Haiti, Bosnia, [and] Kosovo.)

¹² *Id.* at 37.

¹³ Goldsmith persuasively and objectively argues that the Obama administration largely maintained many of the Bush administration's policies. See *id.* at 5–20 (citing Dafna Linzer, *Obama Makes Indefinite*

III. Checking Presidential Power

Goldsmith's thesis rests on constraints arising from within the federal government, the legislative and judicial branches, and by forces external to the federal government, the press corps and civil society.¹⁴ In making his case, Goldsmith organizes his text around a series of compelling case studies that demonstrate how various institutions checked executive power in the years following 9/11.¹⁵

In the aggregate, these case studies offer readers a pattern. Investigative journalism, legal discovery, or a leak from within the executive branch moves information into the public square. Once in the open, the information catalyzes action by civil society to engage the judiciary or Congress, who in turn, move to check executive power. For example, Goldsmith draws on Dana Priest's journalism concerning CIA secret prisons¹⁶ to demonstrate how an article in the Washington Post set the conditions for the Detainee Treatment Act¹⁷ and the Supreme Court's application of the Geneva Conventions to Al Qaeda.¹⁸ Ultimately, Goldsmith concludes that this process has refined and strengthened national security policy by both legitimating executive power and securing an equilibrium between the competing branches of government.¹⁹ This is Goldsmith at his best.

IV. A Weakened Argument

Goldsmith's thesis is supported by two categories of constraints: those arising from within the federal government and those imposed by civil institutions outside the federal government. While the constraints imposed by the legislative and judicial branches provide a solid foundation for Goldsmith's conclusion, his heavy reliance on extra-governmental institutions to constrain executive power weakens his argument. Moreover, his position is further

Detention and Military Commissions His Own, PRO PUBLICA, Mar. 8, 2011 (indefinite detention and military commissions); Charlie Savage, *Detainees Barred from Access to U.S. Courts*, N.Y. TIMES, May 21, 2010 (Habeas Corpus at Guantanamo Bay); Scott Shane, Mark Mazzetti & Robert F. Worth, *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES, Aug. 14, 2010 (targeted killing); Lisa Mascaro, *Patriot Act Provisions Extended Just in Time*, L.A. TIMES, May 27, 2011 (surveillance); and Charlie Savage, *Court Dismisses a Case Asserting Torture by CIA*, N.Y. TIMES, Sept. 8, 2010 (state secrets)).

¹⁴ GOLDSMITH, *supra* note 1, at xiii.

¹⁵ While Goldsmith could have organized his text by institution (e.g., the judiciary, Congress, press, and civil society), readers are offered a far more interesting journey through a series of compelling narratives.

¹⁶ GOLDSMITH, *supra* note 1, at 55 (citing Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005).

¹⁷ Detainee Treatment Act, 42 U.S.C. § 2000dd (2006).

¹⁸ Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

¹⁹ GOLDSMITH, *supra* note 1, at 243.

eroded by relying on constraints that harm the federal government as a whole.

Goldsmith's argument is strongest when he outlines the checks on executive power that arise from within the federal government. Goldsmith makes clear that the judicial and legislative branches are critical to constraining and legitimating executive power.²⁰ Moreover, the interplay of the three branches demonstrated that the Framers' brilliant separation of powers scheme was flexible enough to address the most modern and unique challenges.²¹ In response to executive action following 9/11, debate within the public square gave rise to meaningful constraints imposed by the Supreme Court²² and Congress.²³ Goldsmith summarizes, "the virtue of the system lies in its ability to self-correct: democratic and judicial forces change presidential authorities and actions deemed imprudent or wrong and constrain presidential discretion in numerous ways."²⁴

Goldsmith also heavily relies on civil institutions located outside the federal government. These extra-governmental constraints, largely the press corps and civil society,²⁵ provide shaky support to Goldsmith's thesis. According to James Madison, these external institutions check presidential power less effectively than the limitations engineered into the checks and balances of the federal government itself:

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by

²⁰ *Id.* at 209.

²¹ *Id.*

²² See, e.g., *id.* at 164 (citing Rasul v. Bush, 542 U.S. 466 (2004) (holding that foreign nationals detained at Guantanamo Bay had the right to file habeas corpus petitions in federal court)); *id.* at 179 (citing Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that Common Article 3 of the Geneva Conventions applied to the conflict with al Qaeda)); and *id.* at 189 (citing Boumediene v. Bush, 553 U.S. 723 (2008) (holding that the Military Commissions Act of 2006 was unconstitutional and extending habeas corpus to foreign nationals detained at Guantanamo Bay)).

²³ *Id.* at 185–87 (citing the Detainee Treatment Act, 42 U.S.C. § 2000dd (2006) for the proposition that legislative action effectively ended the CIA's interrogation program and the Military Commissions Act, Pub. L. No. 111-84, 123 Stat. 2574 (2009) for the proposition that Congress reformed the military commissions).

²⁴ GOLDSMITH, *supra* note 1, at xv.

²⁵ *Id.* at 38.

their mutual relations, be the means of keeping each other in their proper places.²⁶

Ironically, Goldsmith relies on Federalist 51, but his argument cites only the portion extolling the virtues of internal constraints and wholly omits the portion finding external constraints inadequate.²⁷

External constraints are weaker because they are discretionary—the check on the executive depends on their decision to constrain the executive. In other words, these external checks are voluntary in contrast to the compulsory checks engineered into the separation of powers. Goldsmith makes this point himself in an insightful discussion concerning the voluntary nature of civil society’s check on executive power. Specifically, executive power is often unchecked when presidential action runs counter to the partisan expectations of civil society.²⁸ When the public expects a president to aggressively assert national security powers, they trust executive action that shows restraint.²⁹ Conversely, when the public expects a president to exercise “soft” power, they trust aggressive action by the executive branch.³⁰ The inverse relationship between trust and constraint allow for the executive branch to operate unchecked when presidential action defies expectations. Goldsmith’s reliance on extra-governmental institutions to check executive power weakens, but does not debunk, his thesis.

Goldsmith then needlessly obscures his argument by including information leaks and bad bureaucracy within his calculus of executive limitations. While these variables certainly limit the executive branch, they offer a dubious means to check power. These checks corrode the federal government as a whole, rather than providing a healthy and proper check on executive power.

Goldsmith finds that information leaks “operate as an important check on the presidency by spurring Congress, the courts, and civil society to action.”³¹ Goldsmith illustrates this constraint with WikiLeaks and PFC Bradley Manning.³²

²⁶ THE FEDERALIST NO. 51 (James Madison).

²⁷ GOLDSMITH, *supra* note 1, at 243 (citing THE FEDERALIST NO. 51 (James Madison) (“A well structured government is one in which ‘its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.’”)).

²⁸ GOLDSMITH, *supra* note 1, at 47.

²⁹ *Id.* (The public supported President Bush’s decision to prosecute terrorists in civilian courts, while President Obama faced significant resistance to similar civilian trial objectives.).

³⁰ *Id.* (Civil society largely supports President Obama’s aggressive national security policies, while President Bush was heavily criticized for similar, if not identical, policies).

³¹ *Id.* at 69.

Goldsmith then captures the impact of leaks. According to Michael Hayden, former director of the CIA, “there are a few operational things I have done that are as secret now as the day they were conceived.”³³ In sum, the executive branch is constrained by leaks because there are fewer secrets.

Additionally, Goldsmith determines that bureaucracy constrains the executive branch by requiring various echelons of consensus-building and legal reviews.³⁴ Goldsmith offers the example of a CIA covert operation, which requires “more than 100 executive branch officials, including ten or so lawyers [to] . . . weigh in” prior to presidential approval.³⁵ Executive action is limited by the national security bureaucracy.

The Founders established the separation of powers to strengthen the system of federal government in support of a “more perfect union.”³⁶ Leaks and bureaucracy only serve to undermine that goal. While these factors constrain executive power, Goldsmith dilutes his argument by relying on constraints that corrode, rather than strengthen, the federal government as a whole.

V. A Limited Argument

While Goldsmith provides readers with a thorough retrospective on executive power and limitations, he fails to address how these constraints would or should shape executive power in the next crisis.³⁷ Goldsmith’s thesis, looking back on the last decade, is very well supported.³⁸ Looking forward, however, this thesis is of less value to the reader because the executive branch will adapt and navigate around the constraints developed over the last decade.³⁹

³² *See id.* at 73 (a “Compressed Split File” was released to the world through WikiLeaks).

³³ *Id.* at 68.

³⁴ *Id.* at xvi.

³⁵ *Id.* at 89.

³⁶ U.S. CONST. pmb1.

³⁷ While Goldsmith does reference drones and cyber conflicts, GOLDSMITH, *supra* note 1, at 13, 17, he fails to explain how the constraints outlined in his text, relating largely to detention operations, limit executive power moving forward.

³⁸ Goldsmith makes clear that the judicial and legislative branches greatly shaped and limited executive power in the areas of interrogation, indefinite detention, habeas corpus, and military commissions. *See supra* notes 23 and 24.

³⁹ “The making of foreign policy is infinitely harder than it looks from the ivory tower.” *See* GOLDSMITH, *supra* note 1, at 22 (quoting Harold Hongu Koh, Legal Advisor, Dep’t of State, Speech at the American Society of International Law: The Obama Administration and International Law (May 25, 2011) available at <http://www.state.gov/s/l/releases/remarks/139119.htm>).

First, Goldsmith's thesis is limited because the executive branch will be able to distinguish the next crisis from the post-9/11 conflicts that gave rise to the current regime of constraints. When the nature of the conflict changes,⁴⁰ existing case law and legislation will offer only a tangential check on executive power. How will Hamdan and the Military Commissions Act of 2009 limit executive power during a cyber war? The unique nature of future conflicts will limit the applicability of post-9/11 constraints moving forward and, accordingly, limit the relevance of Goldsmith's thesis to his readers.

Second, the executive branch may avoid these constraints altogether by altering the strategies and tactics employed to achieve the Commander in Chief's desired end-state. For example, some believe the executive branch has shifted away from strategies that trigger the complex process governing "capture" operations.⁴¹ Instead, the executive has embraced a strategy of leveraging drones to target and kill high value targets.⁴² The relevance of Goldsmith's thesis is limited by the executive's ability to adapt and employ techniques that sidestep existing constraints.

VI. Conclusion

Goldsmith serves up an uncommonly neutral, thorough, and insightful summary of executive power and national security policy following 9/11. Goldsmith concludes that the judicial and legislative branches, assisted by civil society

and the press, effectively constrain the president. His thesis is well supported by the powerful actors internal to the federal government who move to check executive power—the judicial and legislative branches. However, Goldsmith's argument is weakened, but not debunked, by relying too heavily on external actors to constrain the executive branch. Specifically, civil society and the press offer less meaningful checks on presidential power because they have the choice to act and their action is not engineered into the separation of powers. Furthermore, the relevancy of his thesis is limited as the executive branch demonstrates its ability to navigate around existing constraints to meet tomorrow's national security challenges. Nevertheless, given the breadth and depth of Goldsmith's summary and analysis of executive power, this text is essential reading for all judge advocates and national security attorneys. Goldsmith's *Power and Constraint: The Accountable Presidency After 9/11* provides readers with a history of presidential power, a primer of national security law in the decade following 9/11, and an intriguing argument that presidential power is constrained even in a time of persistent conflict.

⁴⁰ Many are debating whether the United States has terminated counterinsurgency operations. See, e.g., Robert Haddick, *This Week at War: End of the COIN Era?*, FOREIGN POL'Y, June 23, 2011, available at http://www.foreignpolicy.com/articles/2011/06/23/this_week_at_war_end_of_the_coin_era.

⁴¹ See, e.g., *Questions and Answers on the 9/11 War Crimes Trial*, ASSOC. PRESS, June 8, 2012.

⁴² See, e.g., Jo Becker & Scott Shane, *'Secret Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, available at <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qadea.html?pagewanted=all> ("Their policy is to take out high-value targets, versus capturing high-value targets," said Senator Saxby Chambliss of Georgia, the top Republican on the intelligence committee. "They are not going to advertise that, but that's what they are doing.").