An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith's Power and Constraint

Baher Azmy

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil
Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/jil/vol45/iss1/3

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith’s Power and Constraint

Baher Azmy
AN INSUFFICIENTLY ACCOUNTABLE PRESIDENCY: SOME REFLECTIONS ON JACK GOLDSMITH’S POWER AND CONSTRAINT

Baher Azmy*

In his insightful and highly readable new book, Power and Constraint, Jack Goldsmith argues that contrary to popular perception, executive branch activity in our enduring, post-9/11 era has been adequately constrained by a range of novel forces such human rights groups, government lawyers and journalists and that such constraints have, in turn, produced a public and political consensus that the current balance between national security policies and civil and human rights is “legitimate.” This review takes issue with Goldsmith’s perspective on the capacity of the entities he praises to meaningfully check wartime Executive Branch practices and contests Goldsmith’s methodologically flawed attempt to transform his positivist description of the way things are into a normative conclusion that this is the way things ought to be in our constitutional system. This review also identifies a perceptible bias in Goldsmith’s analysis that heavily preferences an aggressive national security regime, while discounting harms to the victims of that regime’s excesses, and argues that Goldsmith undervalues important metrics of accountability that should cause us to doubt seriously that we have a properly constrained the presidency or that our current state of affairs is constitutionally legitimate.

CONTENTS

I. INTRODUCTION ............................................................................. 24

II. A ROSY PRESIDENTIAL SYNOPTICON ............................................... 27
   A. Journalists .................................................................................... 28
   B. Government Insider and Outsider Watchdogs .................................... 31
   C. Warrior Lawyers ........................................................................... 36
   D. The Guantanamo Bar .................................................................... 37

III. AN UNSTABLE THEORY OF LEGITIMACY ............................................. 42
   A. The Obama Administration ............................................................ 43

* Legal Director of the Center for Constitutional Rights. Professor of Law, Seton Hall Law School (on leave). I would like to thank Aziz Huq, Avidan Cover, Marc Falkoff, Jonathan Hafetz, Michael Ratner and Jules Lobel for their helpful comments on earlier drafts. Any mistakes are my own.
I. INTRODUCTION

Case Western Reserve University School of Law has understandably chosen to recognize Jack Goldsmith’s latest book, *Power and Constraint: The Accountable Presidency After 9/11*,¹ as part of this year’s Frederick K. Cox International Law Center War Crimes Symposium. It is a thoughtful and very readable account of the dynamic political, legal, and military forces that shaped and ultimately limited executive-branch policy making around a host of asserted war-making activities such as targeting, detention, and surveillance in the tumultuous decade following 9/11.

Goldsmith’s project and his perspective are optimistic, some would even say Panglossian.² He seeks to demonstrate that, despite depictions of lawlessness, secrecy, and cruelty associated with counterterrorism policies of the past decade—and primarily occurring in George W. Bush’s first term—the executive branch has in fact come to be meaningfully constrained by a complex, inter-related, and decidedly modern set of mechanisms. Those mechanisms have made the commander-in-chief democratically accountable and subject to a system of checks and balances that, while different from the structural ones contemplated by James Madison, are equally effective in limiting executive branch transgressions throughout what may well be an


endless war. Goldsmith’s provocative thesis—supported as it is, by first-person interviews from a variety of participants on all sides of the decade’s legal drama and benefitting from some temporal distance from key events—will surely populate syllabi addressing the post-9/11 legal landscape for years to come, alongside other important and decidedly less sanguine works that have excoriated the Yoo-Addington-Cheney legal paradigm that operated in the early-to-middle years of the Bush Administration.3

As readable as Goldsmith’s account is, however, it suffers from notable methodological flaws and ultimately comes to a highly contestable substantive judgment about the virtue of the present state of affairs. These facets of his analysis appear to be driven by a significant bias that preferences American exceptionalism and might over the substantial human suffering caused by those same forces. On the methodological side, Goldsmith’s analysis falls into a basic philosophical trap, the “is-ought problem” (also known as “Hume’s Law”).4 That is, Goldsmith appears to make normative judgments about how the world of accountability ought to be, from largely positivist premises about the way the world is; he labels, it seems, this determinist account of the current state of affairs as “legitimate.” His normative conclusion—that, in effect, this is the best of all possible worlds—does not follow from his positivist (and too rosy, in my view) depiction of the status quo. Indeed, it is undermined by some striking


4. See David Hume, Treatise on Human Nature (1776).
statements that bespeak a failure to fairly evaluate the competing interests at stake. For example, he regards the ethics investigation into John Yoo’s instrumentalist memos authorizing torture as “brutal,” saying nothing about the actual brutality of the interrogations and violence Yoo ratified. To take another, he credulously asserts that all of the remaining Guantanamo detainees are the “worst of the worst” “terrorist soldiers,” a claim that is so sloppy and manifestly false, it would appear to call into question the balance of his entire legitimacy analysis.

However, having identified what I believe is a perceptible bias in his perspective, I must make a full disclosure of my own. I am a long-standing member of the Guantanamo Bay Bar Association, the collection of thousands pro bono attorneys described in Goldsmith’s book, who have represented hundreds of Guantanamo detainees in habeas proceedings following the Supreme Court’s decision in Rasul v. Bush. And I have recently assumed the role of Legal Director of the Center for Constitutional Rights (CCR), a human rights litigation and advocacy organization Goldsmith places at the center of the legal battles seeking access to justice for Guantanamo detainees and accountability for torture and human rights abuses committed by U.S. officials in connection with the Bush Administration’s “war on terror.” Goldsmith credits CCR president and leading human rights lawyer, Michael Ratner, for filing the first habeas cases in 2002 challenging the legality of the Guantanamo detentions, when few

5. See Goldsmith, supra note 1, at 110.

6. See, e.g., id. at 231.


others dared take on such an unpopular cause. But Goldsmith also contends that the litigation not only failed to achieve its initial aims—i.e., ending indefinite, preventive detention—the litigation actually set in motion a series of judicial decisions and executive actions that ultimately legitimated these policies under the law and popular perception.

Of the many facets of Goldsmith’s account, this is the one I am most interested in, and not just because it surely has a sting to it. After all, no human rights lawyer wants to hear that she has solidified or validated the very system she finds immoral and dedicated her life to changing. Still, putting aside the literary allure of the “be-careful-what-you-wish-for” trope, Goldsmith’s characterization of the state of the world today is neither entirely accurate nor fair. In what follows, I first intend to demonstrate that this facet of his book’s conclusion—that various aspects of U.S. counterterrorism policy (especially around detention, targeting and surveillance) now have legal legitimacy—suffers from some significant methodological flaws: the empirical foundation for his claim of “legitimacy” is uncertain, at best. After spending a little more time questioning Goldsmith’s perspective, I then seek to show that the system of “accountability” that Goldsmith endorses remains fundamentally unjust and will be judged so by important criteria that Goldsmith undervalues. Finally, I suggest Goldsmith’s policy recommendation for a robust executive national security paradigm may produce a paradox that would sting far more harshly than the one Goldsmith attributes to CCR’s work.

II. A Rosy Presidential Synopticon

Goldsmith posits that we have developed a healthy system of presidential accountability—a push and pull equilibrium in which various actors inside and outside of the government (e.g., journalists, whistleblowers, government agency Inspectors General, military lawyers, human rights NGOs), responded to the extra-legal actions of the first-term Bush Administration and exposed, litigated, publicized, and ultimately forced a change in the worst executive-branch practices related to things such as incommunicado detention, extraordinary rendition, secret CIA prisons, and torture. He catalogs the ways in which these actors played a meaningful part in supplementing and energizing the role of traditional institutions—the courts and Congress—in checking extra-legal Bush Administration activities, even as he gives some of these actors more credit than

9. See GOLDSMITH, supra note 1, at 161–201 (detailing the efforts of the Guantanamo Bar Association, spearheaded by CCR and Michael Ratner).

10. Id. at xi.

11. See, e.g., id. at 209.
they probably themselves believe they deserve. He regards their modest successes as particularly novel and noteworthy in light of the traditional deference given to the president during times of crisis.

What seems most important to Goldsmith is that the cumulative response of these actors to emergency actions of the Bush Administration—the “ecology of transparency” they created—is actually durable and sustainable. These actors can, and should, in his view, remain in place to scrutinize and constrain future executive wartime practices. Goldsmith believes that these forces have inverted the traditional assumptions regarding the awesome and intimidating power of the state, including its consistent capacity to surveil and control its citizens. Instead of (or at least in addition to) a Benthamite, state-created panopticon, a device in which one can monitor many, Goldsmith believes we live in a synopticon, in which these many actors can consistently monitor and control one: the presidency. For Goldsmith, this dynamic produces a happy stasis of presidential power checked by presidential accountability, where the president can do just enough to robustly pursue national security policy, bolstered by a legitimacy that comes from persistent legal scrutiny.

In subsequent sections of this essay, I offer some normative critiques of what I believe to be Goldsmith’s overly optimistic model. In the meantime, it is worth briefly considering the role he ascribes to some of the key actors, both to understand the substance of his argument and to notice the often rosy shading of his perspective.

A. Journalists

Goldsmith observes that “accountability journalism” played a prominent role in the “ecology of transparency” by exposing deep secrets about illegal or extra-legal activity of the Bush Administration. For example, Dana Priest of the Washington Post (and later Barton Gellman of the same) defied the pleading of national security officials in the Bush Administration and published bombshell reports about an archipelago of secret prisons being run by the CIA in foreign countries. Jane Mayer’s remarkable reporting in


13. See GOLDSMITH, supra note 1, at 212 (noting the increased ability of journalists and others to access government information and documents)

14. See id. at 51–82.

the New Yorker also highlighted the dubious legality of the Bush Administration’s “extraordinary rendition” program and torture and interrogation regimes in Guantanamo and other U.S. prisons, reporting which culminated in her comprehensive take-down of the extra-legal paradigm inspired by Dick Cheney’s reference to working on the “Dark Side.” Likewise, Eric Lichtblau and James Risen published explosive reports in the New York Times regarding a massive, secret, warrantless wiretapping program (the “Terrorist Surveillance Program”) in the United States run by the National Security Agency.

Goldsmith rightly credits Priest’s (and presumably Mayer’s) reporting with influencing the part of the Supreme Court’s 2006 decision in Hamdan v. Rumsfeld, ruling that Common Article 3 of the Geneva Conventions applied to al-Qaeda suspects and thus banned “cruel, inhuman, and degrading treatment” of individuals presumably held in these secret prisons. (Much like, as Goldsmith emphasizes, CBS’s reporting of torture in Abu Ghraib must have informed the Supreme Court’s decisions in Rasul v. Bush and Hamdi v. Rumsfeld to ensure some judicial oversight of executive detention operations.) This, in turn, likely contributed to the Bush Administration’s decision in 2006 to modify interrogation practices and move detainees from the CIA prisons into the comparative light of day at Guantanamo. Goldsmith observes that journalistic exposés must have depended upon leakers within the government, who were uncomfortable with executive practices and eager to impose some constraints themselves. Overall, this reporting contributed eventually to public disapprobation of the worst of Bush Administration practices and when combined with the distance from the smoke of Interrogations, WASH. POST, Dec. 26, 2002, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.

23. See Goldsmith, supra note 1, at 56.
9/11, contributed to the diminishment in the public and the courts of Cheney’s “Dark Side” paradigm.24

Goldsmith also finds that the massive disclosure and publication of government documents by Bradley Manning and Wikileaks is notable because of the significant technological capacity to copy and distribute enormous amounts of data: it can happen at the click of a button, without the laborious page-by-page Xeroxing that Daniel Ellsberg undertook forty years ago.25 This, in turn, makes it harder for the government to conceal secrets. A dynamic Goldsmith appears to endorse without acknowledging that recent, aggressive crackdowns on whistleblowers and other Espionage Act prosecutions by the Obama Administration26 (not to mention the brutal treatment of Bradley Manning27) make this accountability system less sustainable and less effective than several years earlier. Indeed, in this context, the hypocritical failure of facets of accountability Goldsmith describes is evidenced by the government’s prosecution of former CIA official John Kiriakou for leaking the names of CIA officials involved in the CIA interrogation program while demurring from any meaningful investigation or punishment of CIA officials for the creation or implementation of torture.28

To be sure, the work of these and other path-breaking journalists is emblematic of the highest ethical standards and consistent with the Fourth Estate’s role in our democracy. Still, there are important reasons to hesitate before crediting modern journalism with providing as robust a check to executive branch power as Goldsmith suggests. As Goldsmith concedes in passing, journalists (some from the very same major papers lauded above) failed in questioning, let alone preventing, the catastrophic and falsely premised build up to the war

24. See id. at 57. See also SAVAGE, supra note 3, 154.
25. See GOLDSMITH, supra note 1, at 73–79.
in Iraq.29 In light of the subsequent mayhem, destruction, and official incompetence, this was no small oversight. Why this dramatic failure? In part because, as history teaches us, journalists, like citizens and court, often get caught up and manipulated by the patriotic push for war, with its attendant invocations of the American virtue and exaggerated assertions of harm that would follow absent invasion. This lasts, as in Vietnam and Iraq, until this narrative is overwhelmed by facts on the ground. The Bush Administration’s manipulation of the media in the run-up to the Iraq war should make us less certain of the ability of journalism to consistently and durably meet the challenge of checking executive branch misconduct.

Equally important, is the problem Donald Rumsfeld famously identified as “unknown-unknowns.”30 Journalists can only publish what has been leaked to them, and not even the most aggressive journalist can do anything to expose abuse the government manages to keep secret. That obvious and overwhelming asymmetry of information and power necessarily precludes an efficient system of accountability. This power dynamic also renders Goldsmith’s assessment about an emerging public consensus or “legitimacy” around national security policy dubious.31

B. Government Insider and Outsider Watchdogs

Goldsmith also identifies the development of lawyers inside the government who serve as Inspectors General within government agencies or who are appointed by the Justice Department to undertake special investigations as a piece of his synopticon. Goldsmith explains that Congress created these offices for the express purpose of monitoring executive branch activities and then reporting back to Congress in a speedier and more thorough manner than Congress could accomplish itself.32 To Goldsmith, the force of these internal government watchdogs comes as much from the novelty of such agency oversight as from the consequences of their actions. For

29. See Goldsmith, supra note 1, at 56–57 (“The press stumbled badly in its coverage of the weapons of mass destruction (WMD) rationale for the 2003 Iraq war.”).


31. Naturally, journalistic pressure also tends toward publication of stories that are dramatic and sensational, such as secret CIA detention and torture centers, as less accolade or reward is lavished on reporters who develop stories that are less graphic or visceral, such as concerns about data mining, the PATRIOT Act, or the Foreign Intelligence Surveillance Court. The results of that incentive structure also produce significant accountability gaps.

32. See Goldsmith, supra note 1, at 105.
example, Goldsmith marvels that CIA Inspector General John Helgerson was seeking documents and information from CIA officials actually contemporaneous with their involvement in detention and interrogation operations and policy making; this kind of intervention was unprecedented and burdensome. Yet, any surprise over the assertedly unprecedented scope or force of these investigations should be moderated when one acknowledges that the CIA’s broad control of U.S. detention and interrogation operations was itself unprecedented in the agency’s history. In any event, it is unclear that, other than forcing CIA officials to bear the pestering inquiries the Inspector General, the Inspector General or his reporting was responsible for meaningfully constraining CIA behavior.

Goldsmith similarly praises Attorney General Michael Mukasey’s decision in 2008 to appoint a special Department of Justice prosecutor, John Durham, to look into the quite narrow question of whether former CIA Official Jose Rodriguez unlawfully ordered the destruction of ninety-two videotapes depicting interrogation (and likely torture) of CIA-detainee Abu Zubaydah. Note, the investigation was not for purposes of deciding whether Zubaydah (or others) were tortured in violation of our basic commitments to human rights law, but to examine whether the CIA destroyed evidence in violation of a more parochial legal duty. In any case, Durham chose not to bring any criminal charges even related to this narrow inquiry. Attorney General Eric Holder then commissioned Durham to investigate whether any CIA officials should be held criminally responsible for torture or deaths of detainees in U.S. custody. Again, he declined to prosecute any CIA officials for violation of the criminal

33. Id. at 109–10.

34. See Weiner, supra note 3, at 482 (“[T]he CIA [after 9/11] began to function as a global military police, throwing hundreds of suspects into secret jails in Afghanistan, Thailand, Poland, and inside the American military prison in Guantanamo, Cuba. It handed hundreds more prisoners off to the intelligence services in Egypt, Pakistan, Jordan, and Syria for interrogations.”).

35. Goldsmith notes that Helgerson was principled and respected, and that his work culminated in a comprehensive report in 2004 about the CIA’s “Counterterrorism Detention and Interrogation Activities.” Goldsmith, supra note 1, at 103. He notes that much of the report was actually laudatory of the CIA, and for criticism, the report merely “documented some ill-considered or illegal actions that had taken place prior to the establishment of the CIA’s formal detention and interrogation program, and explained that many aspects of the program, especially in the early days, were poorly organized and managed.” Id. at 104. This critique of CIA behavior does not seem commensurate with CIA wrongdoing and thus does not appear to me to be a useful example of accountability.

36. Id. at 111.
torture statute, or for the deaths of detainees in CIA custody, even though it is clear that CIA officials engaged in waterboarding, stress positions, mock executions, threatening with handguns and power drills, vowing to kill or rape members of a detainee’s family, and inducing vomiting, among other horrible things.

Goldsmith sees no problem with such a conclusion, which to many inside and outside the United States appears bewildering and leads to some considerable cynicism regarding the authenticity, rigor, and scope of the investigation. Indeed, Goldsmith argues that what makes the result just and the CIA legitimately “accountable,” is that CIA officials felt hampered by the investigation and its requirement

37. Press Release, Dep’t of Just., Eric Holder, Att’y Gen., Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012), available at http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html (“Based on the fully developed factual record concerning the two deaths, the Department has declined prosecution because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt.”).


39. Human Rights advocate and long-time proponent of accountability for criminal actors in the Bush Administration, Scott Horton wrote in response to Attorney General Holder’s announcement that Durham had exercised prosecutorial discretion in declining to bring charges:

These outcomes should once again focus international attention on the Justice Department’s conduct. Mandatory provisions of the Convention Against Torture should have compelled the department to open criminal inquiries into cases in which concrete and credible allegations of torture exist. It failed even to open inquiries in almost all such cases, and in the tiny handful of cases in which inquiries were opened, Justice Department figures were busy murmuring assurances from the outset that these investigations were a mere formality, and that actual prosecutions were unlikely. So did Durham conduct a bona fide investigation? We can never know the answer to that question because everything that Durham did was cloaked—as proper process in fact requires—in secrecy.

Scott Harper, Holder Announces Impunity for Torture-Homicides, HARPER'S MAG. ONLINE (Aug. 31, 2012), http://harpers.org/blog/2012/08/holder-announces-impunity-for-torture-homicides/. Similarly, Elisa Massimino, the president of Human Rights First, a group that includes prosecutors, attorneys, and former judges, and which has published a comprehensive accounting of the CIA torture-murder cases, responded, “It is hugely disappointing that with ample evidence of torture, and documented cases of some people actually being tortured to death, that the Justice Department has not been able to mount a successful prosecution and hold people responsible for their crimes.” Scott Shane, No Charges Filed in Two Deaths Involving C.I.A., N.Y. TIMES, Aug. 31, 2012, at A1.
that they spend hours on the “distracting and psychologically draining process” of refreshing their memories and digging through thousands of documents.\textsuperscript{40} Administrative burden should not be a valid metric for government accountability. Indeed, Goldsmith misses a bigger, more problematic point. Presumably, Durham declined to prosecute any CIA officials who relied on advice of government lawyers, such as John Yoo and Jay Bybee, the authors of the shameful Torture Memos. But a system in which government lawyers create objectively implausible legal interpretations to immunize ex ante, otherwise illegal activity—\textit{i.e.}, to create the proverbial Golden Shield—is hardly a system that one can plausibly hold up as accountable.

And, what about Yoo and Bybee, the paradigmatic wrongdoers in the Bush Administration? A finding by a Justice Department Ethics Investigator (a kind of Inspector General, which is a mechanism of accountability lauded by Goldsmith) that Yoo and Bybee committed legal malpractice in authoring the Torture Memos was overturned by a Senior Justice Department official on the grounds that the investigators “themselves had done shoddy work.”\textsuperscript{41} Goldsmith is again comfortable with this seemingly neutered outcome from an Inspector General, because, “[n]o Justice Department lawyer has ever been subject to this kind of scrutiny.”\textsuperscript{42} The complaint about unprecedented administrative burden again elides an obvious response about the unprecedented breach by a Justice Department lawyer. More importantly, as argued in more detail below, this burden theory of accountability is a distressingly thin theory of accountability.

Goldsmith adds some strange company to this cast of government watchdogs: the ACLU. He focuses in particular on Jameel Jaffer’s genuinely impressive efforts (along with other unmentioned and talented ACLU lawyers such as Amrit Singh and the lawyers at the Gibbons PC law firm in New Jersey) to obtain documents related to Bush Administration torture and interrogation practices, as part of a massive Freedom of Information Act (FOIA) litigation. As Goldsmith observes, the litigation forced the government to release, against its strong will, thousands of embarrassing documents that shed troubling light on administration torture programs and which, in Goldsmith’s eyes, “propelled Jameel Jaffer from an unknown and inexperienced lawyer to a hero of progressive litigation, a man at the vanguard of the national security bar who used the courts and the FOIA in new ways to extract the government’s darkest national security secrets.”\textsuperscript{43}

\textsuperscript{40} See Goldsmith, \textit{supra} note 1, at 111.

\textsuperscript{41} \textit{Id.} at 110.

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{Id.} at 117.
But Jaffer himself does not share Goldsmith’s enthusiastic view of FOIA as a meaningful accountability tool in the national security context. Jaffer thinks the ACLU was fortunate to draw Judge Alan Hellerstein of the Southern District of New York on the case. Furthermore, only a small fraction of the documents the ACLU sought were actually disclosed and only after literally thousands and thousands of painstaking hours of effort.\footnote{See id.} Indeed, the Second Circuit in that case, like so many courts in other national security cases, has since adopted a highly limited deferential view of the court’s authority to question executive branch classification decisions.\footnote{See, e.g., ACLU v. U.S. Dep’t of Just., 681 F.3d 61, 75–76 (2d Cir. 2012) (concluding that national security exemption to FOIA justified government from withholding portions of an OLC memorandum that revealed, among other things, a picture of CIA detainee and subject of waterboarding, Abu Zubaydah); see also Wilner v. Nat’l Security Agency, 592 F.3d 60 (2d Cir. 2009) (accepting NSA’s “Glomar” response to FOIA request seeking information about government surveillance of attorneys representing Guantanamo detainees); Amnesty Int’l USA v. CIA, 728 F.Supp.2d 479, 511 (S.D.N.Y. 2010) (crediting nearly all of CIA’s claimed national security exemptions to disclosure of information regarding interrogation, torture and rendition of detainees in CIA custody); Azmy v. U.S. Dep’t of Defense, 592 F.Supp.2d 590 (S.D.N.Y. 2010) (relating to requests regarding information about released Guantanamo detainee, accepting Defense Department’s claims of risk to national security).}

Goldsmith must be well aware of the often Orwellian limitations of the FOIA mechanism. After all, a federal court in the District of Columbia has endorsed the CIA’s refusal to acknowledge even the \textit{existence} of the very targeted killing program that Goldsmith discusses in his book.\footnote{See ACLU v. U.S. Dep’t of Justice, 808 F. Supp. 2d 280, 301 (D.D.C. 2011). Goldsmith criticizes the CIA’s Glomar response in this case, more out of frustration over the selective and strategic leaking by the Obama Administration about details of its targeting killing program, than because of a desire for robust judicial review of executive-branch classification decisions. See Jack Goldsmith, \textit{Thoughts on Today’s Important Drone FOIA Oral Argument in DC Circuit}, LAWFARE (Sept. 20, 2012, 6:34 a.m.), http://www.lawfareblog.com/2012/09/thoughts-todays-important-drone-foia-oral-argument-in-dc-circuit/.} Another district court, in \textit{New York Times v. Department of Justice},\textsuperscript{47}—a case which sought to obtain disclosure of legal memoranda justifying the Obama Administration’s targeted killing program—observed the “Alice-in-Wonderland nature” of the government’s position in the case. In denying the plaintiffs’ request for access for the legal justification for targeted killings, the court explained it felt caught in “a veritable Catch-22,” leaving it “no way
around the thicket of laws and precedents that effectively allow the executive branch of our government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret."48

That Goldsmith is able to look past FOIA’s serious limitations and still sunnily praise the statute as “a more salient and powerful accountability tool”49 that will permit future Jaffers to get at secret government documents or as a meaningful and durable weapon to exact national security secrets from the executive branch suggests Goldsmith maintains a far lower threshold than current and future Jaffers in evaluating government accountability. In the war for executive accountability, FOIA is a slingshot attempting to pierce the tank armor of government secrecy and over-classification.

C. Warrior Lawyers

Goldsmith observes that the military itself (much like every aspect of our society) has incorporated law and lawyers into nearly every aspect of its operations, including killing operations.50 He explains that, after the embarrassments of the Vietnam era—and more solidified norms regarding international humanitarian law and international human rights law, and global public scrutiny of military wrongdoing—lawyers became an increasingly important part of the military decision-making process. Goldsmith in particular highlights the integrated role lawyers have played in military targeting decisions, in Kosovo, Iraq, and Afghanistan, as those decisions unlike in the World War II era, are expressly constrained by laws of war. He notes also that lawyers were involved in developing criteria for individuals subject to “targeted killing” by drones.

Here, too, Goldsmith may be overemphasizing the significance of this set of actors in creating a meaningful accountability system. Indeed, Goldsmith seems to contort a bit to account for the serious failure of certain lawyers to constrain the worst of Bush Administration practices in the area of detention and interrogation. How can this failure be reconciled with his perspective on the positive influence of government lawyers? All Goldsmith offers on this score is that, despite all the resources and training poured into ensuring “lawful action in targeting and in rules of engagement more generally,” the military “allowed itself to be relatively unprepared for detention operations.”51 We know what happened as a result. Put this

48. Id.
49. See GOLDSMITH, supra note 1, at 117.
50. See id. at 125–60 (discussing the historical development of the role of lawyers in military operations).
51. Id. at 147.
way, this seems a significant concession against his argument. Yet, there’s a deeper problem. Lawyers of course *were* involved in detention decisions and, it is the result of that involvement that we got torture, incommunicado detention in Guantanamo, and Abu Ghraib. Office of Legal Counsel lawyers in DOJ wrote memos recommending that detention operations be located outside the jurisdiction of the United States, that the Geneva Conventions would not apply to al-Qaeda, the Taliban, and insurgents in Iraq, and that universally condemned methods of torture were permissible as a matter of statutory construction or constitutional law.52 If the presence of lawyers in making national security policy is, of itself, proof of an accountable presidency, how can we account for the very worst excesses of the Bush Administration, which had the official sanction of law? In World War II, Franklin Roosevelt and his military commanders did not need a team of lawyers to believe that the United States *should* respect the Geneva Conventions in detaining Japanese and German soldiers, despite similar ambiguity claimed by Bush Administration lawyers regarding the Conventions’ applicability.53 The presence of lawyers does not guarantee legal legitimacy.

**D. The Guantanamo Bar**

The most interesting and vexing piece of Goldsmith’s accountability puzzle is his account of the role played by human rights groups, which mounted a sustained and in many ways successful challenge to the Bush Administration’s detention practices and, in Goldsmith’s view remain trigger ready to push back against future executive transgressions. The account has a dramatic arc. It starts with CCR’s president and “left-wing” “radical” lawyer54 Michael Ratner choosing (along with accomplished civil rights lawyer, Joe Margulies, who regrettably goes unmentioned) to do what no other human rights group dared to do in 2002: file a habeas corpus petition on behalf of Shafiq Rasul and other detainees being held

---

52. *See generally The Torture Papers: The Road to Abu Ghraib, supra* note 3 (collecting the Torture Memos and providing general background).

53. *See Margulies, supra* note 3, at 74–75.

54. The classification of Michael Ratner of “far-left” and CCR as “radical” is good for dramatic effect. But fundamentally, there was nothing politically radical about the case, as the years since its initiation have borne out, manifested by, among other things, a number of Supreme Court rulings siding with detainees, and the mass mobilization of thousands of lawyers into the Guantanamo Bay Bar Association. This effort sought the application of the most elementary human rights and constitutional principles in the face of a startling arrogation of executive power.
incommunicado in Guantanamo, at a time when emotions from 9/11 were still raw and strong.\textsuperscript{55} The administration confidently boasted that Guantanamo housed only the “worst of the worst,” or among “the most viscous, best-trained killers on earth.”\textsuperscript{56}

Goldsmith quotes Ratner’s belief that, at the time it was filed, the petition had no chance. But that is likely not because, as Goldsmith himself believes, “[t]he legal precedents, looked at dispassionately, did not permit Ratner’s clients to go to court.”\textsuperscript{57} On the contrary, as the Court ultimately came to view the question in \textit{Rasul} and \textit{Boumediene}, legal principles do support extending the reach of the great writ to territories, such as Guantanamo, over which the jailer exercises control over the prisoner, and where the executive seeks deliberately to evade the reach of the writ.\textsuperscript{58} And, as Ratner believed at time of filing, the precedent Goldsmith thinks is controlling, the enigmatic 1950 case of \textit{Johnson v. Eisentrager},\textsuperscript{59} was easily and correctly distinguished by the Court because the petitioners there were housed in foreign territory and had already received an opportunity to challenge the lawfulness of their detention via lengthy military tribunal.\textsuperscript{60} Thus, Ratner was certain he would lose in 2002 primarily because he is (like Goldsmith is, in this account) a legal realist and knows that courts cannot always review precedent dispassionately or politics with a long-term orientation, particularly in the fever of war.

By the time the first enemy combatant cases reached the Court in 2004, however, the detentions at Guantanamo were temporally and physically removed from the armed conflict in Afghanistan, the Bush Administration’s unilateralism seemed arrogant and overly-aggressive, and the specter of a secret prison outside the law seemed incongruent with a constitutional republic. The fact that, as Goldsmith documents, so many (non-“radical”) groups came to support, via amicus briefs, the detainees’ claim to judicial review of their detention

\begin{itemize}
\item \textsuperscript{55} Tom Wilner and his colleagues at the D.C. law office of Shearman and Sterling also risked their professional reputations in courageously deciding to represent the families of a number of Kuwaiti detainees and in filing habeas corpus petitions in early 2002.
\item \textsuperscript{57} GOLDSMITH, supra note 1, at 164.
\item \textsuperscript{59} 339 U.S. 763 (1950).
\item \textsuperscript{60} See Rasul, 542 U.S. at 476; id. at 487 (Kennedy, J., concurring); see also Baher Azmy, Rasul v. Bush \textit{and the Intraterritorial Constitution}, 62 N.Y.U. ANN. SURV. AM. LAW 369, 381–84 (2007) (discussing the legal status of Guantanamo Bay).
\end{itemize}
in *Rasul*—groups such as retired generals, diplomats and judges, former prisoners-of-war, hundreds of UK Parliamentarians, a collection of JAG officers, an impressive array of domestic and international human rights organizations, and the iconic Fred Korematsu himself—suggests how dramatically lawless the administration’s position seemed to be. The Court’s seemingly minimalist response in *Rasul* to grant detainees statutory habeas rights, packed great symbolic force, by pulling the executive in line with basic, American legal values. As Goldsmith describes, “[t]he presidency was untrustworthy, out of control, and defying the rule of law and military tradition.”

But this is just a pit stop in the course of the legal drama Goldsmith narrates. In short, the victories in *Rasul*, *Hamdi*, and later *Hamdan*, were supported by and further energized a massive network of coordinated human rights activists (foreign and domestic), journalists, military lawyers, and the private bar, to press for meaningful rights for detainees. Of particular note is the so-called Guantanamo Bar Association, made up of thousands of pro bono attorneys from the biggest and smallest law firms, the legal academy, public interest organizations, and federal public defender offices, which took on individual representation of hundreds of detainees and transformed Ratner’s “radical” litigation into a decidedly mainstream one, at the heart of the rule of law. Their coordinated efforts were enough to expose monumental human suffering, unfairness, and bureaucratic incompetence, wrestle freedom for hundreds of detainees (through pressure and advocacy, not through any court order), to overcome congressional efforts to restrict habeas rights via the Detainee Treatment Act of 2005 and the Military Commissions Act.

---

61. See Goldsmith, supra note 1, at 170–75 (discussing Fred Korematsu and the other amici who filed briefs in the enemy combatant cases).

62. Id. at 177.


Act of 2006, and to ultimately secure a constitutional right to habeas corpus grounded in the Suspension Clause in 2008 in *Boumediene v. Bush*.

The year 2008 was a heady one for the Guantanamo Bar Association. Following the *Boumediene* decision, lawyers were having considerable success in litigating their habeas petitions in the district courts: district courts were imposing some substantive law-of-war-based limitations on a previously unconstrained executive detention authority; they were carefully identifying and dismissing evidence procured by torture; and they were rejecting evidence based on hearsay or other attenuated evidentiary principles advanced by the Bush Administration. President Obama’s election promised the eventual closure of the facility. These seemed to represent a twin victory for the rule of law and a dramatic vindication of CCR’s decision to bring these challenges six years earlier.

Instead, in Goldsmith’s telling, this decision produced unintended and paradoxical consequences. Obama abandoned his promise, made on the first day in office, to close Guantanamo within one year and to try 9/11 conspirators in an Article III court, and his administration aggressively defended a broad detention authority and the validity of every single detention decision made by the prior administration in the habeas cases percolating in the D.C. federal courts. At the same time, the highly conservative D.C. Circuit Court of Appeals, which had been thrice reversed by the Supreme Court for ratifying the executive branch’s position in detainee cases (*Rasul*, *Hamdan*, *Boumediene*), kicked into action, steadily reversing every single habeas grant by a district court (at the same time it affirmed nearly every habeas denial). Far from a model of accountability, the D.C. Circuit is acting in fairly open defiance of the Supreme Court’s *Boumediene* decision, mocking *Boumediene*’s “airy suppositions,” reversing factual findings traditionally reserved for district courts, offering the executive branch enormously expansive detention authority under the Authorization for the Use of Military Force (AUMF) and the laws of war (even hinting at the inapplicability of

67. *See* Denebeaux & Hafetz, supra note 63, at 3 (noting congressional attempts to eliminate the writ).


70. *See* Denbeaux & Hafetz, supra note 63, at 4.

71. *See* Goldsmith, supra note 1, at 190–94.

72. *See* Azmy, supra note 69, at 512.
any international law constraints on executive conduct) and simply ratifying every executive detention decision, no matter how attenuated or contemptible.73 Despite Boumediene’s judgment, we find ourselves still in a pre-Boumediene world where, as Judge Tatel described, “the court calls the game in the government’s favor.”74

CCR President Michael Ratner believes the campaign that started in 2002 led to many victorious battles, including “getting six or seven hundred men out of Guantanamo” and “take[ing] on . . . the most egregious aspects of . . . the national security state since 9/11, and mak[ing] them public debating issues.”75 But Ratner regrets that he “lost” on some basic questions like “the enemy combatant issue . . . the preventive detention issue . . . and the military commission issue, more or less.”76

Goldsmith does not find this aspect of the litigation disappointing as I do and as Ratner does, just ironic (and in a good way);77 what started as a “radical” challenge to military paradigm of indefinite preventive detention ended up actually “legitimating” this system, via “consensus legal infrastructure.” All three branches of government (and the public) have accepted, ten years hence, the language and logic of a wartime approach to counterterrorism. Indeed, the detention cases themselves have broad reaching effects: they provided a corpus of law regarding who is detainable under the AUMF78 that grounded the administration’s targeting decisions in some semblance of law. Goldsmith concludes his deterministic historical analysis as follows:

[F]or those who believe that the terrorist threat remains real and scary, and that the nation needs a Commander in Chief empowered to meet the threat in unusual ways—embedding the presidential prerogatives in the rule of law is an enormous

73. See id. at 512–14.
75. GOLDSMITH, supra note 1, at 195.
76. Id.
77. Which is nothing to say of the dramatic successes of the litigation—reuniting hundreds of detainees with their families, organizing the bar and the public to recognize the unlawful arrogation of power by the president and his military officials, changing the dishonest narrative about the supposed dangerousness of these detainees, and exposing torture and incompetence in the basic administration of U.S. detention policy.
blessing. It is a blessing, ironically, for which the nation has Michael Ratner and his colleagues to thank.79

This observation, though somewhat true and somewhat tart, does not to my mind fully capture the complexity, instability, or fairness of the post-9/11 legal landscape. Having attempted to suggest the ways in which the component parts of Goldsmith’s synopticon (journalists, watchdogs, lawyers, and courts) may not be as piercing as he believes, I now offer a slightly deeper critique.

III. An Unstable Theory of Legitimacy

Goldsmith’s normative analysis—that the current national security landscape is objectively “legitimate”—is built on a shaky foundation. His methodological basis for arriving at this judgment leads to premature or ill-founded conclusions. While Goldsmith and I can agree that the presidency has been made accountable in some ways, we should recognize the numerous other ways in which it remains deeply unaccountable. I fear it is not just Goldsmith’s admirable optimism about American institutions, but perhaps also his investiture and defense of our now sprawling national security apparatus, which causes him to unfairly privilege one form of accountability over other, more consequential forms.

Goldsmith believes the work of human rights NGOs and other pieces of his accountability synopticon have left “no doubt that [current detention and targeting] practices are lawful and legitimate within the American constitutional system.”80 He believes we have reached an equilibrium of power and constraint whose “legitimacy” should make us pleased with the present state of affairs. Much of this is unexplained, though he does state in the penultimate chapter:

[A]mong politicians, judges, and most of the American people, there is agreement on the legitimacy of and basic constraints on these [detention, targeting and military commission] powers, especially compared to the 2001–2004 baseline. This equilibrium—and the legal and political settlement that undergirds it—is the main reason Obama continued so many Bush counterterrorism policies as they stood in 2009. The same legal and political pressures that influenced the evolution of Bush’s policies continued to influence the development of Obama’s policies, though in different ways.81

79. Goldsmith, supra note 1, at 196.
80. Id. at 194 (emphasis added).
81. Id. at 210.
Thus, it appears the legitimation of the current legal landscape has three primary sources: (1) the Obama Administration’s continued use of Bush Administration policies; (2) public support; and (3) judicial ratification.

Before proceeding to contest each component of his legitimacy matrix, I pause to note a deep conceptual flaw shared by all of them: an “is-ought” conflation appears particularly prominently in this part of Goldsmith’s analysis. Goldsmith’s theory of legitimacy has a law and economics feel to it; it operates as a variation of an efficient market hypothesis. Under his view, it appears, we have reached a present and optimal state of social-political-legal affairs because a set of efficient (yet invisible) inputs, information, and dynamic relationships pushed us inevitably to this point. The price is right. But this sort of self-fulfilling determinism cannot be taken at face value—one must always identify a credible dynamic that could produce an efficient or legitimate outcome. In a fully competitive market, it is the price mechanism which produces efficiency and legitimacy, by transparently matching buyers and sellers at an optimal intersection of supply and demand. Where is the parallel mechanism driving the U.S. national security policy to a legitimate place? That is left largely unexplored.

I have already tried to identify how a number of the inputs (checks) are likely not as robust as Goldsmith believes and that, therefore, may not be pushing us to the efficient (legitimate) equilibrium of power versus constraint. I now briefly address each of the three principle bases upon which Goldsmith believes the current landscape is based in order to demonstrate they cannot plausibly support a normative claim of legitimacy.

A. The Obama Administration

Goldsmith is right, of course, that the Obama Administration, while affirming the rejection of some of the grossest excesses of first Bush Administration policy (torture, secret CIA prisons, extraordinary rendition to torture, most of which were actually abandoned prior to 2009) has maintained central features of the Bush Administration’s detention, trial, and targeting practices as well as its analytical foundation. Goldsmith posits that one reason these controversial policies have continued—despite Obama’s withering criticism of them as a candidate—is that they have been repeatedly vetted, analyzed, and ultimately accepted by lawyers within the administration. This may be true; but, there is just no way to be

82. We cannot actually confirm that none of these practices have continued in any form. If it turns out not to be true, we would have to conclude the synopticon is not working according to plan.

83. Goldsmith, supra note 1, at 38.
sure. In this political environment it seems risky to ascribe some underlying correctness to Obama’s policies; that is, to assume he is following them because he genuinely believes they are the right or legal thing to do. This account does not sufficiently account for politics or contingencies.

As for closing Guantanamo, trying detainees in Article III courts, and releasing many others, principle seems to have little to do with it. Grandstanding NIMBY politicians (in both Democratic and Republican administrations) rejected and sensationalized Obama’s attempt to relocate concededly innocent Uigher detainees in northern Virginia.84 Had Americans seen these men, living among them in peace, holding down jobs (and criticizing the Chinese Communist government85), we could have recast the entire debate about the supposed lethality of detainees in Guantanamo. Instead, some have been disbursed to Bermuda, Palau, El Salvador, and others, equally innocent, sit out their eleventh year there.86 The same holds true for the bizarre, fright-filled reaction to Attorney General Eric Holder’s proposal to try 9/11 conspirators in the Southern District of New York, the safest courthouse in the country.87 As with the failure to relocate and humanize numerous harmless detainees, the decision to try 9/11 conspirators in military commissions instead of real courts is attributable to politics, not law.

Why didn’t Obama do more to press his earlier principles? Goldsmith presumably believes the University of Chicago constitutional law professor was persuaded on the merits to abandon them. But likely he simply had other priorities, including mustering political attention and support for massive health care legislation and a sustained response to financial catastrophe. If one believes Daniel Klaidman’s account in Kill or Capture, the politicos in the Obama


87. See Carrie Johnson, For Holder, Much Wrestling Over Decision, WASH. POST, Nov. 14, 2009, at A01 (noting the U.S. Marshals Service’s determination that the Southern District of New York is the safest courthouse in the country).
Administration such as Rahm Emmanuel and David Axelrod, believed it would be political suicide to press ahead with plans to persuade the public to close Guantanamo, screamed down the voices of conscience in the administration, including White House Counsel Greg Craig who left in defeat, and ultimately prevailed on a deeply ambivalent president. All of this suggests that the merits of legal principle were not necessarily at play in these judgments; if this much is true, then it would seem possible that Obama could shift course in his second term to secure a legacy consistent with his original human rights and constitutional law instincts and thus destabilize the regime Goldsmith believes currently to be legitimate.

Or, take another example: Why did Obama choose not to prosecute CIA officials responsible for torture and homicide? Perhaps he felt they had sufficient legal authority to act, or that the public would not support selling out his predecessors. Jane Mayer suggests a far less principled reason. According to one of her high-level administration sources, Obama was told in no uncertain terms that the worst thing an inexperienced (and especially Democratic) president could ever do in the beginning of his term is turn against the CIA; the agency would, in turn, undermine him thoroughly. The fear of losing the CIA must also explain the Obama Administration’s decision to re-assert a full-throated state secrets defense in the Mohamed v. Jeppeson torture and extraordinary rendition case in the Ninth Circuit, one month into office, despite the clearest indications that he would abandon this beloved CIA defense. Again, fear, not principled study of the law, appears to be driving much of the power-constraint equilibrium.

Alternatively (or in addition), Obama’s decision to abandon his prior commitments may have to do with the very imperial vortex of the office of the presidency and the echo chamber of national security obsession in which it must operate. Consider Woodrow Wilson. Like Obama, he was a progressive constitutional law scholar before

88. See generally Daniel Klaidman, Kill or Capture (2012).
90. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).
91. Id. at 1083–84
92. A fear that the CIA will go rogue has permeated virtually every presidential administration since Eisenhower. See Weiner, supra note 3. The nearly sovereign status of this secret agency, destabilizing as it can be to any president’s foreign policy, surely demands more scrutiny and accountability than currently exists.
assuming the office of the president. As president and professor at Princeton University, Wilson wrote eloquently and thoughtfully about the importance of robust First Amendment protections for dissident viewpoints. Yet, when he became president, he presided over the passage of the Espionage Act of 1917 and the Sedition Act of 1918, and the criminal prosecution of dozens of peaceful war objectors and dissidents who he blithely considered destabilizing enemies of the state, producing one of the most repressive periods in American history. His dramatic change of course was likely not due to a principled or legitimate change of legal heart, and his policies were ratified by his Attorney General, Congress, and the courts (including, until it changed course, the Supreme Court). Under Goldsmith’s analysis, therefore, this multi-year and repressive stasis, even though ultimately discredited, would have maintained legal legitimacy.

B. Public Opinion

It is always fraught to consider public opinion as a measure of the normative legitimacy of a complex legal or policy question. What do Americans make of Planned Parenthood v. Casey? Or our jurisprudential compromises around the death penalty? Public opinion is notoriously fickle and often based on vague impressions or the framing of polling questions rather than on objective evidence. Consistent polling actually suggests a majority of Americans are uncomfortable with the more far-reaching provisions of the Bill of Rights. Much of the backlash against transferring individuals to the United States or trying individuals here (or even transferring cleared detainees to their home countries) is ultimately based on the most fatuous and cynical political posturing by Congress that it is difficult for polling to reflect. Still, Goldsmith is surely right in his gestalt judgment that there is no widespread disapproval of Obama’s detention and targeting policies, and none approaching the disapprobation of Bush Administration practices, tied up as they were with impressions of venality (Cheney-Rumsfeld-Yoo) and incompetence (Iraq, Katrina).

95. See id. at 135–60.
But where does this gestalt judgment get us? It does not follow that people have consciously accepted the legality of Obama’s practices. Apathy and disinterest seem the norm. The economy is a mess, and people have already been talking about Guantanamo for ten years. The managing attorney of CCR’s Guantanamo docket recounts being asked, in 2010, by an otherwise educated and well-informed individual, “But, I thought Obama already closed Guantanamo?” Apathy, more than acceptance, is the norm.

Goldsmith identifies another dynamic at work: a reverse Nixon-goes-to-China. If Obama, burdened with the expectations that Democrats are soft on national security, plays against this type and keeps open the prison and assassinates multiple people he says are part of enemy forces, people will more likely trust this decision as deliberative and based on legitimate concerns. This suggests public approval is just a vague, impressionistic presumption, and not an informed or meaningful reflection of what the state of the law ought to be.98

More importantly, even if there were widespread approval, what would that mean for our system of legitimacy? Presumably there was widespread approval for the FDR’s decision to intern Japanese and the Court’s ratification of that decision under the Constitution—a then-legitimate state of affairs that we shudder to think about today.

C. The Courts

1. Detention

Goldsmith emphasizes the Supreme Court’s interventions in Rasul, Hamdi, Hamdan, and ultimately Boumediene, both cabined the excesses of early Bush Administration policies (torture, secret prisons, incommunicado detention, deliberate evasion of the courts) and solidified the current legal equilibrium: the same decisions, by ratifying policies regarding preventive detention and targeting, contributed to their current legitimacy. Goldsmith is particularly fond of the legitimacy paradox as articulated by Justice Kennedy’s opinion in Boumediene, that judicial review does not weaken the presidency,

98. Probably very few of the public know that nearly half of the current detainees in Guantanamo have been “cleared for release” by a comprehensive Inter-Agency Task Force, and that therefore, all relevant national security agencies have concluded that they aren’t dangerous and should no longer be detained. I should think if the public did know this troubling state of affairs, they would be far less likely to think our current detention practices are legitimate. And, if the public still did think accept this as fair, public opinion should not be given much weight in an analysis of a policy’s legitimacy.
it strengthens it: According to Kennedy, “the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch.”

As a general matter, it is hard to see how Goldsmith can so easily accept the idea that judicial intervention provides a legitimating role in light of the public disapproval of judicial decisions such as *Brown v. Board of Education*\(^{100}\) (in the South), *Roe v. Wade*,\(^{101}\) or *Kelo v. New London*.\(^{102}\) More specifically, Goldsmith’s account suffers here from the is-ought conflation: an assumption that the level of judicial intervention as it is today, constitutes proof that it should be this way. There are strong reasons to question whether we have arrived at an equilibrium and that the present state of judicial review of detention and interrogation operations is insufficiently robust and legitimate.

As an initial matter, Goldsmith’s deterministic view of the present state of judicial review, and its attendant legitimacy, appears insufficiently appreciative of pure fortuity. For example, the account proceeds largely as if the Supreme Court’s intervention in *Boumediene* (and Kennedy’s statement about the judicial ratification of executive power) was inevitable. Far from it. Recall that the Supreme Court actually denied the *Boumediene* and *Al-Odah* cert petitions in 2007,\(^{103}\) leaving Guantanamo detainees and the executive branch under the Detainee Treatment Act (DTA)-Military Commissions Act regime ratified by the D.C. Circuit, without any habeas review of the legality of their detentions. Under that DTA-based judicial-review regime, the Suspension Clause did not apply to Guantanamo, and the only inquiry left for the judiciary was the preposterously narrow one of whether the military in fact followed its own procedures in implementing the administrative Combatant Status Review Tribunal (CSRT) proceedings. There would be no opportunity to offer independent evidence of innocence, to challenge scope of detention authority, or to even demand release in the unlikely event a detainee prevailed under this DTA construct. Presumably, had the Supreme Court not granted the petitioners’ motion to reconsider its earlier cert denial—a contingency so remote we easily forget it happened—Goldsmith would still endorse the D.C. Circuit’s limited DTA-based judicial review scheme, as a fair and legitimate balance of executive power and (limited) judicial constraint on that power.

---


100. 349 U.S. 294 (1955).


Instead, petitioners’ counsel, through a series of high-wire coincidences, located Stephen Abraham, a California lawyer and former Naval Intelligence officer who had been involved in a number of CSRT panels, and who was willing to blow the whistle at that moment in time, via declaration to the Court and congressional testimony about how laughably one-sided and outcome-determinative the CSRT process was. It was proof that the kind of broad deference to the CSRT process endorsed by the D.C. Circuit could not operate as an adequate substitute to even the most elementary requirements of habeas corpus and must have convinced the Supreme Court that it need not wait to see how the D.C. Circuit regime shook out. The system Goldsmith imagines generally works rationally and predictably to produce democratically accountable and legitimate outcomes. So, what if the Boumediene and Al-Odah petitioners’ counsel had never been able to find Stephen Abraham’s silver bullet in time to file a motion to reconsider with the Court? Presumably, Goldsmith would still consider the alternate, weaker system to represent the best of all possible worlds.

But, we did get Boumediene and an order from the High Court that each detainee be provided a “meaningful” opportunity to challenge the legal and factual basis of their detention, without any of the presumptive deference Congress and the D.C. Circuit sought to give the military’s CSRT determinations regarding detainability. It was a result the Guantanamo Bar Association cheered at the time, as a capstone of a long, hard struggle for genuine accountability in Guantanamo. As I’ve written elsewhere, Boumediene in fact produced accountability in the district courts, as those habeas courts were finally empowered to, among other things, including limit the president’s otherwise utterly unconstrained AUMF and law-of-war detention authority, throw out government evidence that was procured by torture and coercion, and carefully scrutinize the plausibility of otherwise highly attenuated guilt-by-association theories proposed by the government. In the early months following Boumediene, and consistent with what the Guantanamo Bar had long argued was the unfairness of so many of the Guantanamo detentions, detainees were successful in a significant majority of their habeas petitions in the district courts.


106. See, e.g., Azmy, supra note 69.

107. See Linda Greenhouse, Goodbye to Gitmo, N.Y. TIMES (May 16, 2012), http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo (stating that during the first two years after Boumediene, district courts granted habeas corpus in nineteen out of thirty-four cases)
Goldsmith’s is one version of a legitimate and accountable separation-of-powers regime, which preserves a meaningful role for the courts in a manner consistent with Boumediene’s instructions and the historic scope of the great writ. But, importantly it is decidedly not the one we have now. Sitting in open defiance of the Supreme Court’s Boumediene decision, the D.C. Circuit has eviscerated the prospect of meaningful judicial scrutiny by the district courts of the president’s detention decisions. The D.C. Circuit has reversed every district court decision granting the writ and affirmed nearly every decision denying the writ. The D.C. Circuit has purposefully ensured that the president has complete discretion to detain, via decisions that: (1) reverse careful fact-finding of the district courts, in favor of its own assessments of credibility and plausibility of evidence;\(^{108}\) (2) accept the facial validity of government evidence, no matter how dated, raw, or contestable;\(^{109}\) (3) reject the relevance of international law to interpret detention authority, in a manner contravening the Supreme Court’s plurality opinion in Hamdi;\(^{110}\) and (4) prohibit district courts from entering orders requiring the executive to release non-detainable petitioners, preferring supine orders that merely encourage the executive to undertake its best efforts to find a detainee a home.\(^{111}\) As Judge Tatel observed in his dissent in Latif, the D.C. Circuit’s jurisprudence comes perilously close to accepting what the government says as true.\(^{112}\) Indeed, the D.C. Circuit has effectively reinstated its 2007 Boumediene/Al-Odah jurisprudence of categorical deference; now in 2012, it is as if Boumediene had never been decided. And, if the Court’s decision in Boumediene was necessary to preserve legitimacy of our system, what does Goldsmith make of the fact that the D.C. Circuit has since effectively overruled it?

In sum, for Guantanamo detentions, the writ no longer exists as a mechanism of accountability. It is impossible then, to agree with Goldsmith’s belief that the current state of judicial constraint on executive detention power is optimal.

2. Targeting

Lessons about the judiciary’s role in reviewing targeting decisions are equally inconclusive. In 2010, CCR and the ACLU sought an injunction to prevent the extrajudicial killing of Anwar al-Aulaqi, a

---

108. See generally Al-Adahi v. Obama, 613 F.3d 1102 (2010) (overturning a district court’s factual finding that detainee was not a member of al-Qaeda).


111. See Kiyemba v. Obama, 555 F.3d 1022, 1026 (2009).

112. See Latif, 666 F.3d at 779 (Tatel, J., dissenting).
U.S. citizen residing in Yemen (i.e., far from a zone of actual armed conflict), after it was reported that al-Aulaqi had been placed on an executive “kill list.”\textsuperscript{113} District Court Judge John Bates took the questions raised by the suit seriously, but ultimately dismissed the case on the grounds that the plaintiff, Anwar al-Aulaqi’s father, lacked standing to proceed on behalf of his son and that, in any event, the decision to target an individual for killing whom the president himself believes is an enemy is constitutionally committed to the executive branch under the political question doctrine.\textsuperscript{114} CCR and the ACLU have since filed another suit, challenging the legality of the eventual killing of Anwar al-Aulaqi, plus the killings of U.S. citizen Samir Khan (whose killing was “collateral” to the targeted killing of al-Aulaqi) and Abdul-Rahman al-Aulaqi, the sixteen-year-old U.S. citizen-son of Anwar al-Aulaqi, who was killed in a massive drone strike two weeks later, without legitimate lawful or factual basis.\textsuperscript{115}

Goldsmith no doubt predicts that this latest suit will be dismissed on the political question doctrine, or \textit{Bivens} special factors,\textsuperscript{116} or perhaps qualified immunity. He may be right, especially considering the overly-deferential state of D.C. Circuit law in the national security context. Dismissal on any one of these technical doctrines of judicial restraint, however, would not legitimate the legality of the decision to kill individuals without due process, any more than a court’s dismissal of murder charges under a statute of limitations would legitimate the underlying crime. The process of legitimation is dynamic and cannot be fixed with any one judicial determination. And, as Goldsmith rightly appreciates, this lawsuit is but one piece of advocacy and pressure by the “international legal-media-academic-NGO-international organization-global opinion complex,” to “stigmatize drones and those who support and operate them.”\textsuperscript{117}

\textbf{D. A Revealing Bias}

I have already suggested that Goldsmith tends toward the optimistic in his assessment of the legitimacy of the present legal-political landscape and that it is hard to otherwise credit his confidence that the current state of the world is an optimal one. My skepticism of Goldsmith’s position is compounded considerably by a

\begin{itemize}
\item \textsuperscript{113} See CCR and the ACLU v. OFAC & Al-Aulaqi v. Obama, CTR. FOR CONST. RTS., http://www.ccrjustice.org/Al-Aulaqi-v-Obama+ (last visited Feb. 16, 2013).
\item \textsuperscript{114} See \textit{id}.
\item \textsuperscript{117} \textit{GOLDSMITH, supra} note 1, at 200 (quoting Professor Kenneth Anderson).
\end{itemize}
persistent and serious factual error in his analysis that reveals an unjustified bias in favor of the status quo.

Goldsmith credulously labels the detainees remaining in Guantanamo (numbering 166 by this writing) as “terrorist soldiers,” when the overwhelming majority are neither terrorists nor soldiers.\textsuperscript{118} He also speculates without citation to authority that the remaining detainees are by now truly the “worst of the worst” that Rumsfeld falsely assured us were housed in Guantanamo in 2002. This is flatly incorrect. For example, at the time of the book’s publication, four remaining detainees were Uighers, who the Bush Administration and the courts concluded were not terrorists or soldiers or otherwise detainable.\textsuperscript{119} Indeed, by this writing 86 of the 166 detainees—\textit{i.e.}, over half of the remaining population—have been “cleared for transfer” by a rigorous inter-agency task force set up by the Obama Administration in his first year in office; this designation means that the relevant agencies (State Department, DHS, CIA, DOD, NSA, and NIA) have \textit{unanimously} concluded that a detainee is not a threat to the United States or its allies and thus should be transferred to their home countries or resettled in a third country.\textsuperscript{120} These 86 men are decidedly not the worst of the worst; they remain in Guantanamo, despite the jailers’ determination that they should go free, only because of political timidity by the Obama Administration and substantively unjust restrictions on transferring detainees out of Guantanamo imposed by a craven Congress—restrictions that keep Guantanamo open and unaccountable, and we should hasten to add, Congress never saw fit to impose on the Bush Administration.

This is more than a small oversight. It is revealing of Goldsmith’s predispositions. It is much easier to defend the status quo if one ignores its unambiguous injustices. By simply guessing that those who remain must be the really dangerous, Goldsmith reveals that he believes the system (including the process that has sorted who could go home and who must remain) works rationally and moves linearly toward progress. In fact, the system governing the Guantanamo

\textsuperscript{118.} \textit{See Guantánamo by the Numbers}, supra note 7 (showing that a majority of the detainees remaining in Guantanamo have been cleared for release).


\textsuperscript{120.} \textit{Obama Releases Names of Cleared Guantánamo Prisoners; Now It’s Time to Set Them Free}, ANDY WORTHINGTON (Sept. 9, 2012), http://www.andyworthington.co.uk/2012/09/29/obama-releases-names-of-cleared-guantanamo-prisoners-now-its-time-to-set-them-free/ (stating that eighty-six Guantanamo prisoners have been cleared for release by Obama’s Guantanamo Review Task Force); \textit{Guantánamo by the Numbers}, supra note 7.
detentions, ten years into its creation, is astonishingly arbitrary, cruel and, ultimately, substantively illegitimate.

IV. A THIN THEORY OF ACCOUNTABILITY

So far, I have addressed the claim that each component of Goldsmith’s synopticon can keep meaningful watch on the executive’s national security practices and the corollary that the surveillance and pressure of these inputs have produced a set of policies (e.g., detention, military commissions, and targeting) that are stable and endorsed as legitimate by the public and constitutional agents (the president, Congress, the courts). I now wish to briefly address Goldsmith’s ultimate claim that the president is and will remain sufficiently accountable to the American people, courts, and Congress, even as we proceed through an era of indefinite war. Goldsmith concedes that the mechanisms of accountability he identifies are quite different than those contemplated by James Madison to do the checking and balancing in our constitutional system, especially since Madison would no doubt be quite alarmed by the size and adventurousness of our modern, military presidency. Still, Goldsmith concludes:

[A]fter adjusting to the modern world and studying the vitriolic clashes of the last decade between the presidency and its synopticon, Madison would discover a harmonious system of mutual frustration undergirding a surprising national consensus—a consensus always fruitfully under pressure from various quarters—about the proper scope of the President’s counter-terrorism authorities. And, then the father of the Constitution would smile.121

That James Madison would, or anyone else should, accept the system of accountability Goldsmith describes, seems overly optimistic. Or, more to the point, enthusiasm for it depends on adopting in the first instance, a standard of accountability insufficiently rigorous for a healthy constitutional republic.

A. Defining Accountability Down

Toward the end of his book, Goldsmith offers his definition of accountability: “to be subject to an account, which in turn means to disclose one’s activities, explain and answer for them, and subject oneself to the consequences of the institution to which one is accounting.”122 As Goldsmith concedes, his definition need not include other traditional forms of accountability for wrongdoing such as

121. GOLDSMITH, supra note 1, at 243.
122. Id. at 234–35.
criminal liability or, as I will discuss later, civil liability. This is accountability as process, rather than as substance. It credits a government entity’s disclosure of information for assessment by political actors (especially where the disclosure imposes administrative oversight burdens), even if no negative consequences attend to those who undertook unlawful activity. It is hard to see how mere investigations will ever provide adequate deterrence. I believe a legitimate system of separation of powers must insist on a higher standard of accountability.

Recall that Goldsmith was satisfied that two of the architects of the CIA’s torture practices, former DOJ Office of Legal Counsel officials John Yoo and Jay Bybee, were subject to an intensive ethics investigation by the Department of Justice into their outcome-determinative, executive-take-all legal opinions, even though higher-level DOJ officials nixed the prospect of any legal sanction against the lawyers.\(^{123}\) The mere fact of an ethics investigation did not add much to the existing consensus in the legal and political establishment about Yoo and Bybee’s unethical lawyering. In light of that, the decision to overturn the DOJ’s recommendation of sanction looks little like accountability and more like the kind of impunity for high-level officials one sees in a system that is not seriously committed to the rule of law. Goldsmith surmises that future national security lawyers will be more cautious in their work because of the “brutal recriminations that Jay Bybee, John Yoo, and other lawyers suffered as a result of legal opinions written at a time of scary threats.”\(^{124}\) Note Goldsmith’s allegiances: recriminations are “brutal,” but he says nothing of brutality of the interrogation techniques Yoo and Bybee authored. In any event, perhaps they take from this episode a very different lesson. After all, Yoo and Bybee, even after enduring this investigation, still now sit in the most elite positions of authority: tenured professor at University of California—Berkeley and judge on the U.S. Court of Appeals for the Ninth Circuit.

Goldsmith also credits the Durham investigation of CIA’s destruction of videotapes and of detainee homicides that occurred at the hands of the CIA, even though it resulted in no criminal prosecution or other public reprimand, because his investigation required the agency to turn over thousands of documents, churn through their memories, and explain their conduct;\(^{125}\) this was both unprecedented in the annals of this secrecy-obsessed entity and a pain in their neck. This may have been better than nothing, or maybe it was not. The absence of punitive measures will potentially signal, over time, that these investigations are merely prophylactic and non-

---

123. See supra Section II.
124. GOLDSMITH, supra note 1, at 238.
125. See id. at 236–39.
consequential. More problematic, endorsing this kind of paper review risks fundamentally corrupting judicial processes—it becomes a sort of show trial designed ultimately to justify policies under question, rather than a serious attempt to judge potential crimes on the merits.

B. High-Level Impunity

Goldsmith’s transparency-based system of political accountability should make it more difficult for executive-branch officials to repeat many of the same unlawful or extra-legal activities of the past. His metric of accountability is admirably forward looking. This perspective, however, overlooks another important component of a meaningful system of accountability: legal liability for unlawful conduct. One would think this kind of accountability, i.e., forcing actors to internalize the costs of their serious misconduct, would be a part of any “ecology of transparency,” but it is not for Goldsmith. Accordingly, while Goldsmith largely endorses Supreme Court cases such as Rasul, Hamdi, Hamdan, and Boumediene because they pushed the executive to be more transparent and responsive to coordinate branches of government, he pays no attention to a very troubling set of cases that have ensured impunity to numerous (mostly high-level) government officials for the most egregious of the Bush Administration practices—torture, extraordinary rendition, and religious discrimination. Given a widespread perception that Bush Administration policies were fundamentally lawless, the judiciary’s response to serious legal challenges seeking accountability (i.e., an acknowledgement of wrongdoing) against some of the administration’s most controversial practices represents a serious failure in our system.

The architecture of impunity constructed by the courts for the benefit of government officials engaged in illegal conduct is especially concerning for several reasons:

- The Supreme Court repeatedly rejected, the theoretical premise upon which many of these damages-accountability detention cases were dismissed—that the judiciary is not competent to second guess executive decisions in wartime, or that executive officials should have near complete discretion to act in matters related to national security—and did so in a manner that itself marked a conscious departure from the Court’s regrettable World War II-era deference to the military.126

---

126. See id. at 168–170 (discussing the “longlasting shame” of the Supreme Court’s decision in Korematsu v. United States, 324 U.S. 885 (1945)).
Under this country’s *Marbury* paradigm, and even in the ever-diminishing *Bivens* context, the remedy of damages for government misconduct is (and should be) still considered an important attribute of our commitment to the rule of law and separation of powers.127

Sister nations such as Canada and the United Kingdom have provided substantial damages awards (aided by, if not directly compelled by, judicial decree) for their role in abuses of some of the very same people denied relief in U.S. courts.128

Consider just a few examples of the judiciary’s failure to hold the executive branch accountable.

1. Extraordinary Rendition

In the extraordinary rendition context, the Second Circuit sitting en banc dismissed the infamous case of Maher Arar, a Canadian citizen who sued a variety of federal government officials under *Bivens* for their role in apprehending and abusing him in JFK Airport and in rendering him to Syria through a deliberate evasion of judicial process, where he was tortured as part of an allegedly joint Syrian-U.S. interrogation plan.129 The Canadian government acknowledged Arar’s innocence, accepted responsibility for their role in his torture, apologized to him, and paid him $10 million—an act of meaningful accountability. The Second Circuit, however, concluded that a number of “special factors,” most general among them, the national security context in which the case arose, counseled hesitation in the

127. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) (“The [government’s] arguments for a more stringent test to govern the grant of damages in constitutional cases [than that governing a grant of equitable relief] seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests. . . .”).

128. See, e.g., Philip Bentley, QC & David Henry, *UK Competition Court Awards Punitive Damages for the First Time*, McDERMOTT, WILL & EMERY (July 9, 2012), http://www.mwe.com/UK-Competition-Court-Awards-Punitive-Damages-For-the-First-Time-07-09-2012/?PublicationTypes=d9093adb-e95d-4f19-819a-f0bb5170ab6d (noting that UK law provides “exemplary damages” for instances of “oppressive, arbitrary or unconstitutional conduct by ‘servants of the government’”).

creation of a \textit{Bivens} damage remedy for Arar.\textsuperscript{130} Most significant, the majority ultimately viewed Arar’s suit, though styled as an individual-damages action against high-level government officials, as a challenge to a long-standing executive \textit{policy} of extraordinary rendition.\textsuperscript{131} This is a curious but revealing objection because these concerns would apply to any civil rights action—almost all of which use the damage remedy to affect “government interests” and, if moderately successful, “elicit government funds for settlement.”\textsuperscript{132} And, that a civil rights action might influence the unlawful implementation of a government policy can hardly be a reason to “counsel hesitation” in its creation because, as Judge Sack understated, “that is their point.”\textsuperscript{133} Civil rights actions, as in any healthy tort system, are designed to “make it more costly for executive officers to violate the Constitution.”\textsuperscript{134} That a court is unwilling to constrain the executive’s ability to violate the constitution should be seen as a serious defect in a system of accountability.

In \textit{El-Masri v. Tenet}\textsuperscript{135} and \textit{Mohamed v. Jeppesen Data Plan},\textsuperscript{136} the Fourth Circuit and en banc Ninth Circuit ruled that the state secrets doctrine required dismissal of rendition and torture claims on the pleadings, even after assuming that the plaintiffs could prove all facts necessary to prevail based on already-public information.\textsuperscript{137} Yet, each court’s concern about an unacceptable risk of disclosure of classified information appears at tension with the judiciary’s notable success in the detention context, of meeting and managing that same concern. In notable contrast, the European Court of Human Rights found the Macedonian government acted unlawfully in conspiring with U.S. officials to effectuate El-Masri’s rendition, and ordered payment of damages to El-Masri,\textsuperscript{138} while the British government paid Mohamed and other British citizens millions of dollars in compensation for the British government’s role in the rendition,

\begin{thebibliography}{138}
\bibitem{Footnote130} See \textit{id.} at 573.
\bibitem{Footnote131} See \textit{id.} at 574 (“Such a suit unavoidably influences government policy, probes government secrets, invades government interests, enmeshes government lawyers, and thereby elicits government funds for settlement.”).
\bibitem{Footnote132} \textit{Id.}
\bibitem{Footnote133} \textit{Id.} at 602–03 (Sack, J., dissenting).
\bibitem{Footnote134} \textit{Id.} (citing Wyatt \textit{v. Cole}, 504 U.S. 158, 161 (1992)).
\bibitem{Footnote135} 479 F.3d 296 (4th Cir. 2005).
\bibitem{Footnote136} 614 F.3d 1070 (9th Cir. 2010) (en banc).
\bibitem{Footnote137} \textit{El-Masri}, 479 F.3d at 299–300; \textit{Mohamed}, 614 F.3d at 1073.
\end{thebibliography}
unlawful detention and torture at the hands of the Americans.\footnote{See Patrick Wintour, Guantanamo Bay Detainees to be Paid Compensation by UK Government, THE GUARDIAN (UK), Nov. 15, 2010, http://www.guardian.co.uk/world/2010/nov/16/guantanamo-bay-compensation-claim.} And, more problematic for Goldsmith’s theory, the decisions demonstrate that the judiciary is not particularly interested in forcing transparency among coordinate branches of government and thus is not advancing the limited theory of accountability Goldsmith proposes.

2. Torture

In the torture context, in \textit{Rasul v. Myers},\footnote{563 F.3d 527 (D.C. Cir. 2007).} the D.C. Circuit ruled that government officials allegedly responsible for the torture and abuse of Guantanamo detainees were entitled to qualified immunity because an alien’s constitutional right to be free from torture and abuse outside the territorial United States was not “clearly established,” and because military personnel alleged to have engaged in torture were acting “within the scope of their employment.”\footnote{Id. at 660.} The per curium opinion all but stated that prisoner abuse is a routine and sometimes necessary part of warfare. This seems like a form of judicial approbation of extra-legal conduct, and not a form of judicially-imposed accountability.\footnote{The court also ruled in some troubling logic that these foreign-national detainees were not a “person” within the statutory terms of the Religious Freedom and Restoration Act and as such could not pursue religious discrimination claims. See id. at 532–33.} Even Jose Padilla, who unlike Shafiq Rasul, was a U.S. citizen, brutally and systematically tortured for period of months on U.S. soil, would not be entitled to receive even one dollar in nominal damages from government officials, because the existence of “special factors,” such as potentially illegal policy decisions made by government actors, precluded the judiciary from second guessing such decisions. As appellate counsel for Mr. Padilla and a protagonist in Goldsmith’s book, Ben Wizner, wrote in the ACLU’s brief for Mr. Padilla, the Fourth Circuit’s decision takes this country to the bottom of the slippery slope.\footnote{Brief for Appellant, Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012) (No. 11-6480). Because ‘[n]o court had specifically and definitely addressed the rights of enemy combatants,’ the court held that Defendant’s were not on notice that subjecting Padilla to beatings; depriving him of sleep, heat and light; and threatening him with worse torture and death might violate the Constitution. By this} Goldsmith does not attempt to account for this remarkable abdication of the judicial role.
3. Supervisory Liability

In the supervisory liability context, the Supreme Court in *Ashcroft v. Iqbal*\(^\text{144}\) held that Attorney General John Ashcroft and FBI Director Robert Mueller were entitled to qualified immunity from a *Bivens* damages suit.\(^\text{145}\) The Court concluded that the plaintiff’s allegations that the officials acted with the required discriminatory animus in creating a special hold policy for Muslim detainees were “implausible,” particularly in light of an “obvious alternative” explanation of valid law enforcement goals in pursuing suspected terrorists following the calamity of 9/11.\(^\text{146}\) The Court’s conclusion that bias was implausible in light of a neutral wartime explanation creeps suspiciously close to Justice Black’s implausible rejection of charges of racism as partially motivating Japanese internment.\(^\text{147}\) In any event, that kind of plausibility determination would typically be sent to a jury. But, by making the plausibility determination at the motion-to-dismiss threshold, the Supreme Court ensured that no jury in this case and others, exercise any hindsight bias and find, years after-the-fact, that these government officials acted unreasonably. Thus, the Court itself created a significant obstacle, to accountability through the judicial system for official wrongdoing.

Though we cannot know for sure, it is fair to surmise that Goldsmith would view these cases as fitting in nicely in his accountability model, not least because his model appears to exclude the forms of accountability these cases seek. Goldsmith would likely say that these cases achieve the right results because the executive branch should have substantial discretion in creating policies in response to dangerous contingencies, without worrying about future liability at a point when public opinion has shifted. He would then likely suggest that the cases are nevertheless proof of the legitimacy of our accountability system (narrowly defined) because it forced the government to respond to the complaint, on the road to a judicial endorsement of Goldsmith’s normative view of broad executive power.

---

extraordinary logic, Defendants could have beaten Padilla to death and faced no liability, because ‘not court’ had ‘specifically addressed’ the right of ‘enemy combatants’ to be free from extrajudicial murder.

*Id.* at 29. See also *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc) (dismissing a *Bivens* suit brought by a U.S. citizen against the former Defense Secretary for authorizing interrogation techniques that resulted in Vance’s torture while in U.S. custody in Iraq).

144. 556 U.S. 662 (2009).

145. *Id.* at 675–76.

146. *Id.* at 675–76, 682.

147. See *Korematsu v. United States*, 323 U.S. 224, 223 (1944).
Despite what seems to me the manifest unfairness of these cases and this doctrine, Goldsmith would presumably still think we still live in the best of all possible national security worlds.

C. The Tragedy of the American Form of Legitimacy

What can explain the categorical failure of the accountability cases, at least from the perspective of individuals bringing them? Recall that one particular peculiarity of these cases is that the very theory of exclusive executive prerogative over detention and interrogation these cases heartily endorse, was rejected by the Supreme Court repeatedly in the enemy combatant cases. One possible explanation is that these accountability cases, like much of Goldsmith’s perspective, are grounded in a foundation of American exceptionalism. These accountability cases are quite hostile to and dismissive of the claims of the plaintiffs to wrest restitution from representatives of the U.S. government. Thus, for Goldsmith and the Supreme Court, it may be one (positive) thing for the judiciary to make the president accountable to another branch of the U.S. government; it is quite another (unacceptable) thing for the judiciary to make the president accountable to foreigners or, in Goldsmith’s shoddy but revealing parlance, “terrorist soldiers.”

Goldsmith’s primary interest is to shore up the strength and legitimacy of the executive branch so that it will be positioned to deter or respond to a terrorist attack. He presumably is not intensely concerned with reconciling our past practices against international law norms or providing restitution to those brutalized by U.S. official conduct. And, to be fair, he seeks only to measure legitimacy within the U.S. constitutional system. Still, it is worth broadening our perspective of accountability and legitimacy and considering these norms from different vantage points.

1. Victims

A system that carries out two massive wars, a global counterterrorism operation of unprecedented scale and brutality, including brutality even Goldsmith would acknowledge was in fact wrong, has to acknowledge that it will impose immense costs on real human beings, including innocent ones. Aside from the most general lip service, and some court-martials of low-level military officers, the U.S. government has offered no meaningful accounting, apology, or recompense to hundreds of victims of torture, abuse, homicide, and unlawful detention in Abu Ghraib and other Iraqi prisons.148 While the Canadian government offered an apology and restitution of $10

148. See, e.g., Elisabeth Bumiller & Eric Schmitt, President Sorry for Iraq Abuse; Backs Rumsfeld, N.Y. TIMES, May 7, 2004, at A1 (stating that the President failed to make an direct apology on behalf of the country for the abuses at Abu Ghraib).
million to Maher Arar, the United States government sought and received judicial “legitimation” of its conspiracy to render and torture him in Syria and will not utter one word of apology or contrition to him or his family. Human rights groups have counted many hundreds of innocent civilians killed by U.S. drone strikes in Pakistan and Yemen, an accounting that the U.S. simply defines away or mendaciously and arrogantly denies.

In his dissenting opinion in *Arar v. Ashcroft*, Judge Calabresi explained what a genuinely legitimate judicial system should recognize:

> Whether extraordinary rendition is constitutionally permissible is a question that seems to divide our country. It seems to me obvious, however, that regardless of the propriety of such renditions . . . mistakes will be made in its operation. And more obvious still is that a civilized polity, when it errs, admits it and seeks to give redress. . . . In some countries, this occurs through a royal commission. In the United States, for better or worse, courts are, almost universally, involved. This being so, and regardless of whether the Constitution itself requires that there be such redress, the object must be to create and use judicial structures that facilitate the giving of compensation, at least to innocent victims, while protecting from disclosure those facts that cannot be revealed without endangering national security.

This country’s inability to genuinely account for its mistakes represents a deep moral failure. It renders our system—certainly from the perspective of non-government actors—illegitimate.

2. History

I am not as confident that history, an admittedly ineffable standard, will view this current equilibrium that Goldsmith describes as legitimate or desirable. Who wouldn’t have described the interbranch ratification of the internment of Japanese-Americans as legitimate in 1945 and in the immediate years after? Goldsmith consistently argues that this time around, we have done better to avoid the worst mistakes of the World War II era (even as he seems


to endorse a decision, *Ex Parte Quirin*, that Justice Scalia rightly described as representing “not th[e] Court’s finest hour” 153). But I suspect historical judgment will be less forgiving of that kind of temporal relativism and pass a far more critical verdict than Goldsmith registers.

3. The World

Whatever one thinks of the legitimacy of the present legal landscape within the United States, one would be hard-pressed to find many among the other five billion people of the world who view our system as legitimate under any normative standard. Obama was awarded a Nobel Peace Prize on the *expectation* that he would carry through on his promise to close Guantanamo, restore the American system of justice, and end military expansionism. 154 The policies he has carried on are a betrayal of that expectation. Likewise, consider Obama’s first major address to the world. It was delivered in Cairo, the capital of the Muslim world, in his first month of office. In that speech, he promised an end to the extra-legal practices of the Bush Administration—torture, military detention in Guantanamo, and the like. 155 He delivered that message there because Guantanamo had such iconic significance in that part of the world. Since that time, thousands of courageous Arabs in Tunisia, Egypt, Yemen, Bahrain, and Syria risked their lives to throw off regimes that for years relied on torture, military detention, and related authoritarian practices—a thrilling tribute to the irresistible pull of freedom and human rights. Obama’s failure to live up to his promise to end the practices he identified in his Cairo speech has, regrettably but unsurprisingly, made the United States utterly irrelevant to this powerful freedom movement.

V. Conclusion: A More Sinister Paradox

As I noted in the beginning of this paper, Goldsmith identifies a paradox in CCR’s role in the post 9/11 decade: he suggests that by choosing to take on the executive in a hail-mary challenge to indefinite military detention in Guantanamo, CCR set in motion a process that, while checking the worst excesses of executive power, ultimately put core components of military detention on stronger legal footing. In other words, CCR of all places has made the presidency more imperial. Framed this way, the paradox has quite a sting to it.

But I worry about a potentially more tragic irony coming to pass. By contorting our constitutional traditions in order to accommodate broad and permanent military power to detain, bomb, and capture persons (almost exclusively Muslims) all over the world; by rendering these practices normal and “legitimate” under U.S. law, even as they appear universally illegitimate to the rest of the world, and thus heightening antipathy toward the United States; to do so all in the name of preventing another terrorist attack, actually heightens the risk that such an attack will occur. I hope I am wrong about that prospect. But, I also hope Goldsmith and others who wield the levers of national security power will be mindful of the unintended consequences of the current system of accountability they optimistically defend.