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The Man Behind the Torture

David Cole
Georgetown University Law Center

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David Cole
Professor of Law
Georgetown University Law Center
cole@law.georgetown.edu

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The Man Behind the Torture

By David Cole

The Terror Presidency: Law and Judgment Inside the Bush Administration
by Jack Goldsmith
Norton, 256 pp., $25.95

Perhaps the most powerful lawyer in the Bush administration is also the most reclusive. David Addington, who was Vice President Dick Cheney's counsel from 2001 to 2005, and since then his chief of staff, does not talk to the press. His voice, however, has been enormously influential behind closed doors, where, with Cheney's backing, he has helped shape the administration's strategy in the war on terror, and in particular its aggressively expansive conception of executive power. Sometimes called "Cheney's Cheney," Addington has twenty years of experience in national security matters—he has been a lawyer for the CIA, the secretary of defense, and two congressional committees concerned with intelligence and foreign affairs. He is a prodigious worker, and by all accounts a brilliant inside political player. Richard Shiffrin, deputy general counsel for intelligence at the Defense Department until 2003, called him "an unopposable force."[1] Yet most of the American public has never heard him speak.

Addington's combination of public silence and private power makes him an apt symbol for the Bush administration's general approach to national security. Many of the administration's most controversial policies have been adopted in secret, under Addington's direction, often without much input from other parts of the executive branch, much less other branches of government, and without public accountability. Among the measures we know about are disappearances of detainees into secret CIA prisons, the use of torture to gather evidence, rendition of suspects to countries known for torture, and warrantless wiretapping of Americans.

When the public learns of such practices, usually because someone—presumably not David Addington—has leaked information about them to the press, the administration continues to invoke secrecy to block efforts to hold it to account. After *The New York Times* revealed that President Bush had authorized the National Security Agency (NSA) to monitor Americans' phone calls without judicial approval, in violation of a criminal statute, the administration labeled the program a "state secret" and argued that lawsuits challenging its legality must be dismissed in deference to executive claims of confidentiality.[2] On the same grounds, the Supreme Court in October declined without comment to hear a lawsuit challenging the administration's abduction of an innocent German citizen who was taken to Afghanistan to be tortured, and then dumped on a remote Albanian roadside when US officials realized they had kidnapped the wrong man. The administration argued that the litigation would reveal classified information, and the Supreme Court was unwilling even to consider whether it is consistent with our democratic system to elevate secrecy over all other constitutional and human rights values—including the right not to be tortured.

Because of this secrecy, what little the public knows about Addington and the policies he has advocated necessarily comes from others. No one has provided more credible detail on that subject than Jack Goldsmith, himself a former Bush administration insider, now a Harvard law professor, who has written *The Terror Presidency: Law and Judgment Inside the Bush Administration*, a captivating memoir of his brief time as head of the Justice Department's Office of Legal Counsel (OLC) under

Attorney General John Ashcroft. Goldsmith's repeated run-ins with Addington ultimately drove Goldsmith from office only nine months after he took the post in October 2003.

Goldsmith's confrontations with Addington are central to the story he tells. They began in his first weeks on the job, when Goldsmith informed Addington that according to his analysis of the law, the Geneva Conventions protect all Iraqis in Iraq, even those we suspect are terrorists. "The President," Addington objected, "has already decided that terrorists do not receive Geneva Convention protections. You cannot question his decision." When Goldsmith told Addington that he did not believe that a surveillance program being conducted by the NSA was legal, Addington replied, "If you rule that way, the blood of the hundred thousand people who die in the next attack will be on *your* hands."

In a discussion about whether surveillance of communications had to be approved by a court, as required by the Foreign Intelligence Surveillance Act (FISA), Addington boasted, "We're one bomb away from getting rid of that obnoxious [FISA] court." And when Goldsmith and other high-level Justice and State Department officials recommended going to Congress to obtain legislative authority for the detention program at Guantánamo Bay, Addington asked dismissively, "Why are you trying to give away the President's power?" As Addington articulated the administration's general strategy, "We're going to push and push and push until some larger force makes us stop."

Goldsmith writes that Addington and Cheney viewed executive power reductively as the "absence of constraint," and rejected all efforts to exercise authority through persuasion, consultation, and consensus-building. Such initiatives, they felt, would only show weakness. They bristled at any law that tied the executive's hands. As Goldsmith tells it, Addington and Cheney

> dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.

Addington would not even let the National Security Agency's counsel see the opinions purporting to authorize NSA spying. And when other officials objected that a particular policy would hurt the United States' image with its allies, Addington's response was even more dismissive; according to Goldsmith, he invariably replied, "They don't have a vote."

Goldsmith's account is credible not only because he was an insider, but because he shares so many of Addington's views. Like his classmate at Yale Law School and onetime friend John Yoo, another Office of Legal Counsel lawyer who worked closely with Addington to justify the administration's most extreme assertions of unilateral power,[3] Goldsmith made his reputation as a scholar with articles highly skeptical of international law, human rights, and international institutions. While serving in the legal counsel office at the Department of Defense, he wrote a memo for Donald Rumsfeld dismissing international law as a tool of the weak. He accused other nations and nongovernmental organizations of creating a "web of international laws and judicial institutions that today threatens USG interests," and recommended that the United States "confront...the threat." And Goldsmith is equally critical of domestic legal constraints; in *The Terror Presidency* he characterizes post-Watergate legal limits on executive power—the very limits Addington and Cheney so resented—as "one of the Bush administration's biggest obstacles in responding to the 9/11 attacks."

Why, then, did two lawyers with so much in common come to such an impasse? In Goldsmith's retelling, it is because he was more faithful to the law than to the President, and was unwilling to bend the law at every juncture to authorize whatever the administration desired. Apparently, Goldsmith was the first official in the OLC to challenge the administration's claims to unchecked power. While other high officials, including Secretary of State Colin Powell, State Department legal adviser William Taft III, and National Security Council adviser John Bellinger, had objected to various aspects of the war on terror, they could be, and generally were, ignored. It was more difficult to disregard the OLC, because its job is

to interpret federal law within the executive branch. If it takes the view that an administration program is legal, those charged with carrying it out can rest assured that they will not be prosecuted for violating federal law. As Goldsmith puts it, the OLC has the power to issue "get-out-of-jail-free cards." Because the White House was repeatedly pushing the limits of criminal law on torture, wiretapping, and war crimes, it deemed opposition from the OLC unacceptable. And after his appointment on October 6, 2003, Goldsmith soon showed that, unlike his predecessor, Jay S. Bybee, he was willing to say "no."

Goldsmith crossed the administration frequently. As noted above, he ruled that the Geneva Conventions protect all Iraqi civilians, much to Addington's displeasure. In early 2004, he concluded—along with FBI Director Robert Mueller, Deputy Attorney General James Comey, and Attorney General John Ashcroft—that the NSA spying program violated FISA, which requires judicial approval for electronic surveillance of US citizens and permanent residents. And in June 2004, he withdrew the Justice Department's infamous August 2002 memo on torture, drafted by John Yoo at Alberto Gonzales's request. This memo, in effect, allowed the CIA to use harsh interrogation tactics, including waterboarding, head-slapping, sleep deprivation, stress positions, and exposure to extremes of heat and cold, by assuring CIA agents that they would not be prosecuted for violating the federal torture statute. Goldsmith writes:

> The message of the August 1, 2002, OLC opinion was indeed clear: violent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under color of presidential authority. CIA interrogators and their supervisors, under pressure to get information about the next attack, viewed the opinion as a "golden shield," as one CIA official later called it, that provided enormous comfort.

Goldsmith did not come to these positions lightly. In his view, the OLC should approve presidential action so long as there is any reasonable legal argument available to defend it. In these instances, he apparently concluded that no reasonable lawyer could say "yes." Or, in other words, David Addington and John Yoo were not reasonable lawyers.

Goldsmith has received widespread and deserved commendation for his courage in standing up against these assertions of unchecked executive power, at both personal and professional cost.[4] John Yoo, once a close friend, no longer speaks to him. And saying "no" was not a way to get ahead in the Bush administration. Patrick Philbin, who worked with Goldsmith at the OLC and reportedly supported Goldsmith's challenges to the White House, was vetoed for a prestigious post in the solicitor general's office for having done so.

Still, when one probes more deeply, Goldsmith's differences with Addington often turn out to be more about style and prudence than about substance. Goldsmith rarely criticizes any of the administration's policies on their merits, whether the CIA's interrogation tactics or disappearances into secret prisons or detentions at Guantánamo or military tribunals. His complaint is not that these measures were wrong, but simply that it would have been more diplomatic to seek congressional authorization for them. Thus he cites with approval the 2006 Military Commissions Act (MCA), which stripped Guantánamo detainees of habeas corpus review, authorized the admission of coerced testimony in military trials, retroactively immunized CIA interrogators from prosecution for war crimes, barred foreign nationals from invoking the Geneva Conventions in court, and watered down the federal war crimes statute. Goldsmith takes issue with none of these developments, and instead praises the MCA as "an important first step in the right direction of putting counterterrorism policy on a more secure and sensible legal foundation."

Similarly, while Goldsmith differed with the White House over the NSA spying program during the spring of 2004, he ultimately approved a program that appears to have violated criminal law. Goldsmith initially sided with Comey, Mueller, and Ashcroft in concluding that some aspects of the program as it existed in

2004 were illegal. This is what led to the now-famous March 2004 hospital room confrontation, in which White House Counsel Alberto Gonzales sought to get an ailing and sedated Ashcroft to reverse his own prior decision and approve the NSA program.[5] Thanks to candid congressional testimony from Comey, it will not be difficult to stage the scene for the inevitable made-for-television movie. In an interview with Jeffrey Rosen for a *New York Times Magazine* article, Goldsmith added the detail that Mrs. Ashcroft stuck her tongue out at Gonzales and White House Chief of Staff Andrew Card as they left the room, having been rebuffed by Ashcroft from his sick bed.

But we still do not know what aspect of the program prompted the disagreement—and Goldsmith does not tell us. What we do know is that once the White House agreed to change the program, Goldsmith and others fell into line and approved it, despite its apparent continuing illegality. The Justice Department's legal opinion defending that altered program, which Goldsmith presumably approved and which has now been made public, authorizes warrantless wiretapping of Americans' international calls to or from persons suspected of ties to al-Qaeda, and does so by relying heavily on the Addington-Cheney view that the President has uncheckable constitutional authority to ignore criminal statutes when engaging the enemy in wartime.[6]

While Goldsmith reserves his harshest criticism for the August 2002 torture memo, that is an easy target, and he appears to have taken no steps to halt any of the interrogation tactics it authorized. The memo infamously maintained that torture was limited to the infliction of physical pain at a level associated with organ failure or death, thus permitting all lesser forms of physical abuse. Goldsmith writes that no one in the administration other than Addington was willing to defend the memo once it became public. In his recent confirmation hearing for the post of attorney general, Judge Michael Mukasey called the August 2002 memo "worse than a sin." To Goldsmith's credit, he recognized that it was deeply flawed before the photographs from Abu Ghraib were released, and before the memo was leaked to the press. But it is telling that he did not actually withdraw it until after the memo was leaked.

More disturbing, while Goldsmith ultimately withdrew the memo, he did not succeed in issuing a replacement: the new memo was drafted in December 2004 by his successor, Daniel Levin, after Goldsmith had resigned. Most disturbing of all, even after Goldsmith withdrew the August 2002 memo, he never requested that a single interrogation tactic previously approved on the basis of the retracted memo be prohibited. In his book, he says only that he "just didn't yet know" whether any of the CIA methods were illegal, an evasion remarkably similar to Judge Mukasey's recent statements that he is unable to say whether waterboarding is torture. Goldsmith's failure to reach a decision meant that the CIA continued to engage in waterboarding, head slapping, stress positions, sleep deprivation, and the like, even after the August 2002 memo was withdrawn. And while Goldsmith harshly criticizes the Yoo memo, his objections are that it was "wildly broader than was necessary," "tendentious [in] tone," and lacked "care and sobriety." In other words, to Goldsmith the memo's sin was that it was poorly drafted, not that the tactics it authorized were illegal and immoral and had to be stopped.

In fact, in discussing the December 2004 memo drafted by Levin, Goldsmith cites with approval a footnote stating that "we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum." Goldsmith cites this footnote as evidence that the August 2002 memo was unnecessarily broad, which it certainly was. But he expresses no concern that even after the initial memo was replaced, waterboarding and other forms of torture continued to be used and approved.

For all its strengths as a descriptive account of an administration run amok, the prescriptive elements of *The Terror Presidency* are at best conventional and at worst perverse. Holding up Franklin Delano Roosevelt as a model, Goldsmith recommends that the executive branch should take a more diplomatic approach to the other branches of government. As a matter of realpolitik, he suggests, the executive might well consolidate and exercise its power more effectively by working with Congress and

the courts than by aggressively asserting immunity from legislative and judicial oversight on national security matters. What is striking is not the content of this prescription, which in itself is neither novel nor controversial, but the fact that Addington and other members of the Bush administration so vehemently rejected it.

The most provocative aspect of Goldsmith's argument, however, is also the least persuasive. He contends that the problem was not that Addington and the administration did not care sufficiently about the law, but that they cared too intensely, so much so that they were "strangled by law." He claims that "this war has been lawyered to death," and describes government officials as overly chilled by the prospect that they might be held criminally accountable for actions taken in the name of the country's security. Goldsmith prefers the good old days when matters of national security and war were, for the most part, not regulated by federal legislation, and presidents, such as FDR, were free to shape their judgments without regard for law, and could concentrate instead on "political legitimation." In the post-Watergate era, he laments, Congress passed "many of the laws that so infuriatingly tied the President's hands in the post-9/11 world." This view, of course, is fully consonant with that of Cheney and Addington. Cheney, for example, told reporters on board Air Force One in 2005 that "a lot of the things around Watergate and Vietnam both, in the seventies, served to erode the authority I think the President needs."

What exactly are the laws that Goldsmith thinks "so infuriatingly tied the President's hands?" The only ones that he discusses are the War Crimes Act, which makes some Geneva Convention violations a federal crime; the federal torture statute, which makes torture inflicted abroad a felony; and the Foreign Intelligence Surveillance Act, which requires judicial approval of wiretapping targeted at US citizens and permanent residents. Which of these laws would Goldsmith do away with? He does not say. And does he really think that Addington, Gonzales, Cheney, and Bush would have acted more prudently if there had been no laws barring torture, warrantless wiretapping, and crimes of war? The only reason these officials had to listen to Goldsmith at all was that there were laws in place that limited their options. And the limits themselves are not especially onerous. FISA does not forbid surveillance, but merely requires judicial oversight. The torture statute does not preclude interrogation, but prohibits only torture. And the War Crimes Act merely enforces the very laws of war that we insisted on enforcing against the Nazis after World War II.

It is true that FDR was not subject to these laws. But Goldsmith never identifies any causal connection between the absence of formal legal restraints and FDR's willingness to collaborate with Congress. It is highly implausible that Bush and Cheney would have been more open to diplomacy had they faced fewer restraints. What restraints they faced they sought to avoid through subterfuge and legal gamesmanship —redefining torture so that it could be used, issuing "signing statements" that asserted the power to ignore the very laws the President was officially approving, and claiming in secret that other laws simply did not apply to actions that they were clearly intended to cover. Those taking the "push, push, push" attitude would have reveled in the absence of legal restraints, because then there would have been no "larger force" to make them stop.

Goldsmith writes convincingly that the pressures on an administration fearful of another terrorist attack are so strong that the executive feels obligated to do everything it can to stop the next attack. He contends that "this is why the question 'What should we do?' so often collapsed into the question 'What can we lawfully do?'" But if his account of this pressure is accurate, it only underscores the need for legal restraints. Indeed, it is because of the abuse of executive power in times of crisis that we now have laws regulating torture, the treatment of enemy detainees, and wiretapping for foreign intelligence.

Ironically, had the laws Goldsmith condemns as "paralyzing" not been on the books, he would have had no standing to resist Addington's relentless drive to expand executive power. The laws governing warfare, interrogation, and surveillance were written to rein in such people as Addington, and their ultimate effectiveness turns on having people like Goldsmith and Comey in office willing to enforce

them. If Goldsmith's perverse proposal to erase the very lines he drew were accepted, the result would be disastrous for future efforts to restrain rampant executive power.

—November 7, 2007

Notes

[1] See Jane Mayer, "The Hidden Power," *The New Yorker*, July 3, 2006.

[2] I am co-counsel in one such case, *Center for Constitutional Rights v. Bush*.

[3] For reviews of Yoo's role in shaping the administration's strategy, see David Luban, "The Defense of Torture," *The New York Review*, March 15, 2007; and David Cole, "What Bush Wants to Hear," *The New York Review*, November 17, 2005.

[4] See, for example, Jeffrey Rosen, "Conscience of a Conservative," *The New York Times Magazine*, September 9, 2007.

[5] I recount the story of that confrontation in "The Grand Inquisitors," *The New York Review*, July 19, 2007.

[6] Martin Lederman and I drafted an open letter to Congress on behalf of fourteen prominent constitutional scholars and former executive officials sharply critical of the Justice Department's defense of the program. See "On NSA Spying: A Letter to Congress," *The New York Review*, February 9, 2006. A federal court declared the program unconstitutional, although a court of appeals subsequently vacated that decision, finding that the plaintiffs lacked standing to sue. See *ACLU* v. *NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), vacated 493 F. 3d 644 (6th Cir. 2007).