A Conversation on National Security Law: The Future of Enemy Combatants, Guantánamo Bay, and Nuclear Terrorism

An Interview with Jack Goldsmith

Jack Goldsmith is a Harvard Law School professor and an expert in international law. He previously served as United States Assistant Attorney General for the Office of Legal Counsel in the Department of Justice. He is the author of *The Terror Presidency: Law and Judgment Inside the Bush administration.*

Fletcher Forum editors interviewed Jack Goldsmith on his experience working on national security law in a post-9/11 setting, how policies have changed in recent years, and other hot-button political issues, such as the closing of the Guantánamo Bay detention facilities.

FLETCHER FORUM: *The Office of Legal Counsel (OLC) in the Justice Department has been described as "the most important government office you've never heard of." While many people have now in fact learned about the OLC, in part because of the notoriety it gained during the Bush administration, could you start off by describing briefly why the office is so important?*

JACK GOLDSMITH: The Office of Legal Counsel, located in the Department of Justice, sits atop a hierarchy of government lawyers who work to make sure the executive branch conforms its actions to the law. Since a lot of governmental action takes place outside of courts—sometimes in secret—lawyers in the government are tasked with ensuring that the executive branch as a whole complies with the law. The OLC is especially important in advising the White House on the legality of presidential action.

FORUM: *Do aspects of the OLC need to be reformed, or were the mistakes that were made there a function of the specific people and heightened fear that existed at the time?*

GOLDSMITH: As I said in my book, in my opinion many Bush administration mistakes happened because people were acting under serious time pressure in a severe crisis environment. They were very confident that something bad was going to happen to the country and this influenced their judgment. This is nothing new for the Justice Department or even for judges. There is no doubt that it contributed to what happened. It is also true that some of the procedures that OLC normally uses to minimize certain types of mistakes were not always followed to the letter. I am not sure that OLC needs to be reformed, but it is important that OLC go back to those important procedural checks on its power. And there is every indication that this has happened in the past four or five years.

FORUM: *You have written extensively about your role at the OLC in withdrawing many of the so-called "torture memos" that were written by some of your predecessors. Nevertheless, some have suggested that your differences with the administration were more a matter of style than of substance, and that you don't fundamentally disagree with many of the actual positions on policies and attitudes toward executive power that were taken. Instead, it has been said that you found their way of justifying those policies as being unnecessarily undiplomatic toward Congress. Is this an accurate description of your position, or was your decision to withdraw the memos based on other grounds?*

GOLDSMITH: It's true that I share many of the Bush administration's counterterrorism goals, and that a lot of my objections were based, not just on diplomacy toward Congress, but on how they went about implementing their policies. For example, on military commissions, it would have been much more prudent to get Congress on board upfront, given that they eventually did get on board in 2006. This is also the case with surveillance, which Congress did not get on board with until 2008; it would have been more prudent to get their approval earlier rather than later. So it is true that many of my objections on the issues were not about the substance of what they were doing, but about how the administration justified them. This is not a trivial distinction; one of the things I think we have learned in the last eight years is how important it is to follow proper procedures and proper constitutional channels in order to adhere to constitutional values. It is especially important when you are trying to accomplish something in a war and you are bumping up against the law to cross your procedural "t's" and dot your procedural "i's."

The best evidence of this is that the Obama administration has adopted the vast majority of the Bush administration's policies, but it has put a much nicer face on them. They came out with a recent brief justifying a non-criminal, long-term detention program that looked very much like the Bush detention program. They have defended the state secrets doctrine and they haven't walked away from the surveillance program. They are closing Guantánamo but they have embraced the Bush policies on habeas corpus and the domestic effect of the Geneva Conventions. More than anything, the Obama administration is demonstrating that most of the objections to what Bush was doing were about how he went about doing it, and how he went about justifying it in unnecessarily broad terms with unnecessarily broad assertions of presidential power.

FORUM: *Based on news reports it appears that President Obama has, up until now, left in place much of the legal architecture that he inherited from President Bush. Is it your impression that this will be a permanent situation, and that he agrees with the policies, or is it that his lawyers have not yet found safe ways to dismantle the policies?*

GOLDSMITH: I think the first thing to understand, and this is really important, is that he hasn't changed a lot of Bush's policies as they stood in 2008. Yet by 2008, a lot of the original Bush policies from 2002, 2003, and 2004 had changed enormously, so there is a sense that everyone complaining about the Bush administration policies was complaining about the policies as they were shortly after 9/11. The fact is that we had six or seven years in which the courts and Congress pushed back, and we had a lot of consensus between political parties for things like surveillance, military commissions, limitation on habeas corpus, and the like. By the election in 2008, a lot of the things that people were upset with had already been rejected and replaced with something else. So in truth, Obama was really reacting to a baseline that had changed a lot since 2002 or 2003.

Regarding whether I think this is a permanent situation, I do think that we are going to be living with an aggressive counterterrorism policy that does not look like the traditional peacetime presidential authorities' for a very long time. I do think the Obama administration will push back a little, along some margins, but not very much. It will mostly be packaging and not substance.

FORUM: *Presidents in periods of national crisis have always assumed more power. Do you think the circumstances surrounding the war on terror have fundamentally changed since the first few years of the Bush administration, to the extent that we can no longer be considered to be in a national security crisis from a legal perspective?*

GOLDSMITH: This is a hard and important question: "are we out of the crisis?" We are certainly out of the crisis as it was in September and October of 2001 when the government was distraught, didn't understand the issue, didn't have control of the issue, and so on. I do think we have—as a result of input from the Congress and Courts over the last six or seven years—a situation that has normalized in that sense.

All three branches of the government have contributed to this. I agree that we are not in a crisis in which the executive has to act on his own. On the other hand, has the problem of terrorism gone away, and can we expect to eliminate all of our aggressive counterterrorism policies in the near future? I don't think so at all. There have been two major reports completed by bipartisan panels in the last year which have gotten very little attention. The 9/11 Commission Report was released in July, and the other, which I think was released in January, was an adjunct to the 9/11 Commission Report. These were bi-partisan commissions saying that the threat of WMD has grown, not abated. The public perception is that it has abated because the public does not see the threat, and the public does not believe that there is a threat it cannot see. That is why concern about terrorism has diminished since 9/11.

The government, however, is every bit as worried, and in that sense, the threat hasn't abated at all. This is one of the other reasons that the Obama administration is not giving away these important wartime powers. Most of President Obama's changes have been at the level of rhetoric and packaging, and I want to emphasize that these are important. He hasn't renounced war powers, he hasn't renounced surveillance powers, he hasn't renounced non-criminal detention powers, he hasn't renounced the state secrets doctrine, he hasn't renounced military commissions, he hasn't renounced rendition, he hasn't even renounced interrogation methods that go beyond what the military does. If you think that normalizing the situation means renouncing those things and going back to a pre-9/11 mentality, I don't think we are anywhere close to that.

FORUM: *You're describing a situation in which we have a new security paradigm. The WMD Commission talked about the nexus of nuclear terrorism being in Pakistan, and it doesn't seem like we will have our problems solved there any time soon. So, if the security situation seems to be, if not permanently altered, altered for the foreseeable future, where are we going to be dealing with this sort of terrorism paradigm as a threat to our national security interests? What elements of the legal framework that we have now do you see as not matching the sustainability of the architecture?*

GOLDSMITH: What I think you're getting at is the following: based on what I just said, we are in a war that has gone on for eight years, and it doesn't seem to be abating at all. So how can we have a constitutional system with a permanent emergency or a permanent crisis when a lot of our legal powers are premised on the idea that in wartime the President has temporarily enhanced powers? How can we maintain our constitutional principles in a war that's going to go on indefinitely?

This is both a really hard and great question. I think the answer is that we are going to have to develop new methods of accountability for the President. There is no doubt that in a crisis the unitary hierarchical executive branch is the branch that we all look to in order to keep us safe. What we need to develop are methods of making sure the President can have the enhanced powers needed to keep us safe from the bad guys, while at the same time ensuring that he doesn't have too much power and that he's not doing things that should be impermissible under our Constitution.

There are lots of small and medium-sized strategies to do that. Some are simple things like rigorous oversight and scrutiny of the executive by Congress. Another strategy is having sunset laws where an authorization to the President to do something ends in two years, and he has to go back to Congress and have a debate in light of new information to make sure he still has the right level of powers. These are ways of developing new methods of accountability to check new powers granted to the President.

However, the Constitution has never been stable in the sense of just having one definition of the separation of powers, and, in fact, the trend of the Constitution over approximately the last 225 years has been toward an ever more powerful executive branch. This includes trying to find ways in which executive power is checked so that he can have those powers while still being accountable to the people and to the Congress and to the law. This is not something new. Rather, it's a trend that may have begun in World War II or under Lincoln in the Civil War or, arguably, even way back at the founding of the country. This trend lies in an unambiguous expansion of executive power and an attempt to find more and more clever ways to keep the executive accountable.

Finally, the biggest problem is with secrecy, in my opinion, because the main form of accountability for the executive is that if things happen in public, then the political process works to keep the executive in check. The main danger is excessive secrecy because when the executive acts in secret it's very hard to check his actions, and the problem is that the executive determines what stays secret and what doesn't. That is the real fundamental flaw in our constitutional system, in my opinion. I'm much less worried

about the President having lots of power if everything he does is in the open and the people can criticize and check him, or throw him out of office in four years. The problem is when things happen in secret—and we do not yet have a great solution to that.

FORUM: *Would the solution have to be some sort of fundamental altering? Would it have to be an amendment? What are the strategies to combat that?*

GOLDSMITH: It's very hard, and I'm pretty pessimistic about this. The secrecy system is under the lock and key of the executive. Congress has basically ratified that system, and no president is going to allow it to go back. In fact, all the pressures are toward making things more and more secret. The Obama administration came in promising to be more transparent as every administration does, but it hasn't been exactly transparent. The only way out is to have a very courageous president who fundamentally changes things and opens the doors to let policies be viewed. And maybe the Obama administration is doing it—they changed the Freedom of Information Act (FOIA) and they've promised to be more transparent, but it really hasn't happened yet. I don't have a great solution to this.

FORUM: *One of the policies that you and Professor Neal Katyal suggested as a solution for checking the aforementioned detention policies was a special terrorism court that would allow suspected terrorists some recourse in the proceedings without giving them the full panoply of rights that are given to traditional criminal subjects. This was well received, and was talked about, and a number of other people put forth similar suggestions. Have you had any traction with it in the new administration? Are people talking about it again?*

GOLDSMITH: This very issue is being debated right now in the administration, but I wouldn't be the one to get traction on it because I just put an idea out there. Neal Katyal and I wrote about a national security court, but in a way that was kind of misleading and detracted from the main issue.

The main issue is whether or not we're going to have a system of detention that doesn't involve trials, a system of non-criminal detention of enemy combatants, or whatever you want to call them, in the war on terrorism. A traditional power that every military in the history of the world has exercised is the power to detain members of the enemy without giving them a trial. That is a big issue that is being debated right now.

If there is going to be some residual non-criminal detention power like that, then we'll necessarily have a national security court. While we already have national security courts in the form of the courts in the District of Columbia, which have special jurisdiction and expertise, and which scrutinize these detention policies, the important issue is whether

or not we are going to have detention. The secondary issue is what the courts supervising it would look like and do. The hard issue is the one we're addressing now, of whether we're going to have a detention system or whether everyone will either be tried or released.

FORUM: *What are the domestic and international legal implications of the decision to drop the term "enemy combatant"?*

GOLDSMITH: I don't think that there are any legal implications. I think it's pure rhetoric and packaging. It was a term that very few people liked from the beginning and it's all part of the Obama administration's attempts—and again, I'm not criticizing this—to make the rhetoric and diplomacy of our counterterrorism policies more acceptable. It's what the Bush administration didn't do enough of, frankly. I don't think it has any legal implications whatsoever because the brief they filed when they announced they were dropping that term asserted, through a different rationale, all the same authorities that President Bush asserted. Nothing of substance changed.

FORUM: *Is it similar with the closing of Guantánamo? Was that merely symbolic or are there legal implications behind that?*

GOLDSMITH: There are no legal implications at all because the Supreme Court in 2008 held that the Constitution extends to Guantánamo, so the issue is what they do with the people there. To the extent that they bring people back to this country, there are no legal implications. If they bring them back and detain them in the United States there are no legal implications because the same exact Constitutional protections apply in Guantánamo as apply here.

So again, we don't know how many they are going to release, how much risk they are going to assume, whether they are going to let people go free in the United States, whether they are going to be able to convince some Europeans to let them in, how many they are going to try, in what form they are going to try them—all those questions need to be answered and many things of substance may change there, but closing Guantánamo by itself is not a change of legal substance.

FORUM: *Is there a constitutional system in which changing the rhetoric and packaging does not make something more acceptable or unacceptable? Is that just something we have to accept about the system? That changing rhetoric and packaging, even if you're not substantively changing the policy, makes a difference?*

GOLDSMITH: It's not just about changing rhetoric. When I say rhetoric and packaging, I actually believe and have learned that this is hugely important to the substance of what's going on. The Bush administration

so many times led with their chins by asserting these unilateral wartime authorities and saying, "One of our goals is to expand presidential power." When you say that, people believe you and they worry about it. When you say, instead, "We're grounding these authorities in the power of Congress and in the laws of war," people are much less worried about that. Courts are much less worried—they give the President much more leeway.

So it's a smart strategy to try to ground what's going on in other authorities besides the President's sole authority. It has a substantive impact on the President's ability to get things done. The Bush administration got killed in courts unnecessarily. It established some very bad precedents because it took the go-it-alone strategy rather than getting Congress and other institutions on board. I'm not belittling the rhetorical strategy at all —it's very important.

FORUM: *When the Constitution was drafted, it's reasonable to believe that a main assumption of the drafters was that war was an activity between sovereign nations. The 2001 Authorization for Use of Military Force (AUMF) authorizing the use of United States Armed Forces against those responsible for the attacks on September 11, 2001, however, doesn't make a distinction between states and non-state actors when authorizing the use of force. As Commander-in-Chief operating with this congressional mandate, how far could President Obama go in pursuing al-Qaida and the Taliban in Pakistan without the permission of the Pakistani government? Are there any domestic legal constraints that would hinder him from taking certain actions?*

GOLDSMITH: I'm not sure he doesn't have the support of the Pakistani government.

FORUM: *At the level of public disclosure, a lot of these acts are unauthorized.*

GOLDSMITH: Unauthorized, or we don't know whether they are authorized? Have the Pakistanis complained about them?

FORUM: *At a minimum, elements of Pakistani society have complained about them.*

GOLDSMITH: I'll give you four or five different propositions regarding the law as I understand it. The first one is that this is not the first time the Congress has authorized the President to use military force against non-state actors. We did so with slave-traders, pirates, Indians, and others. This is not the first time by a long shot that the Congress has authorized the President to use military force and military powers in other countries against non-state actors. International law has developed to make clear that

there can be armed conflict—which is the modern name for war—against non-state actors. So in terms of domestic authorities, this is not a problem.

In terms of international authorities, it's not a problem for a nation to be at war with non-state actors and to use force against them legitimately. At least from the perspective of *jus in bello,* by which I mean the laws that govern how war is conducted. But then there is the question of *jus ad bellum.* The UN Charter puts limits on a nation's ability to violate the territorial integrity and political independence of another state. So you could argue that, if the U.S. was going into Pakistan without Pakistan's permission, that even if we are authorized to do so by the AUMF, and it's consistent with the *jus in bello* (because we're allowed to target enemy combatants), that it's illegal to do so in Pakistan without its permission. The main argument and main legal limitation is that it would be in violation of the UN Charter.

The question then becomes whether Pakistan has consented, in which case there's no UN Charter violation. If Pakistan has not consented, the U.S. could argue that we're acting in self-defense because Pakistan is harboring people who we're at war with and not taking steps to stop them from coming after us (the U.S.). That is a somewhat new conception of self-defense—this idea that Pakistan would be harboring belligerents—but since 9/11 there have been lots of legal authorities, including the UN Security Council, that suggest that a nation that harbors terrorists who are attacking another nation can itself be attacked consistent with the principles of self-defense. In this case, it would not be a violation of the UN charter.

So just to summarize, the AUMF authorized this and that's clearly constitutional. It's consistent with *jus in bello* principles for the United States to go after members of the enemy who we're in conflict with even if they're non-state actors. The hard question is in the UN Charter limitations.

FORUM: *Following up, if those actions we take in Pakistan start to create a situation in which you're instigating a conflict with Pakistan itself, at what point would we then have to seek a new authorization?*

GOLDSMITH: If you are referring to a new authorization to declare war against Pakistan, here's an analogy: we declared war against Germany in World War II, but fought the Germans in Northern Africa and in France. There was not a new authorization to go after the Germans in Northern Africa and in France. There are other examples of that in other wars. No one really knows what the principle here is, but if the conflict is logically and conceptually related to the one that Congress authorized, there probably doesn't have to be a new authorization. Having said that, if the conflict

with the Pakistani government reached a certain stage, it would probably be prudent for the new President get a new authorization.

The truth is that you put your finger on a murky area of constitutional law: when does a war with one country morph into a war with another country? WWII is a good example. We also sent troops to Russia in 1919. Many people in Congress were upset about that because they thought it went beyond the authorization contained in the declaration of war. The President also has residual powers to act in self-defense when another nation attacks us in the absence of congressional authorization. So the President can certainly get away with not getting a new authorization but he would be under a lot of political pressure to do so.

FORUM: *The UN Charter's self-defense authorization is in response to an armed attack. Is there a time limit after which you can no longer argue that you're acting in self-defense?*

GOLDSMITH: That's a good question and I don't know the answer to it. Article 51 also says you can respond to an armed attack but the authorization should go back to the UN Security Council – which we did, and we got authorization after 9/11. But your question would make more sense if they weren't still attacking us. We're still responding to an armed attack. We're still in a war with them. I don't know the answer to this question – how long does the Article 51 power last? Does it last 5 years? 10 years? Does it expire without a UN Security Council authorization? I don't know the answer to those questions. They're good questions, and I've thought about them, but I don't know the answer to them.

FORUM: *Shifting gears, how do you think the U.S. should handle the International Criminal Court, in particular in trying to define "aggression"?*

GOLDSMITH: I haven't followed the Court's attempt to define the crime of aggression carefully. I don't really have an informed view on that. I think the U.S. should engage the ICC in the same way they started doing so with the Bush administration in 2004, which is to not ratify the treaty because that would put our troops in jeopardy because we have troops all over the world. We should support the Court to the extent that we think it can support our foreign policy goals. This is what we did in abstaining in the face of the Darfur referral in 2005 and, frankly, we were the ones who pushed the ICC prosecutor to bring the charge against the Sudanese president. It was the ICC members—England and France—who wanted to hold it up. So I think the court is there, it's a force, and we should use it to our advantage.

FORUM: *What do you think of the Court's decision to issue a warrant for Sudanese President Omar Hassan al-Bashir?*

GOLDSMITH: I don't have an informed view. The disturbing thing is, it issued a warrant, and it seems to have increased the violence and hurt people on the ground. Because the warrant was not backed up by any force, and no one's going to go in there and stop him from hurting people, his response was to kick out aid workers and to exacerbate the humanitarian crisis. I'm not suggesting that the ICC was the cause of that, but that was a straightforward reaction to the indictment, and he warned that he would do that. It just shows the dangers of interjecting legal process into a highly inflammatory political situation without having the diplomatic tools, including coercion, to act in combination with the legal process.

FORUM: *Does this speak to the idea of the perverse effects of the ICC that you talked about?*

GOLDSMITH: It's possible. I mean, that article was written a while back—I was saying that I do think it is a perverse effect in that by alienating the U.S. it lost its best military supporter to help it get things accomplished. That was my basic argument there. And that therefore it wouldn't succeed without that kind of force. But the truth is that humanitarian intervention now is a fairly discredited idea because of what happened in Iraq and because of the many costs of Iraq. The Court has a very hard time extracting people from countries who are doing bad things to their people because no one's going to go in and get them. What it's really highlighting is the emptiness of the idea of Responsibility to Protect, which a lot of people have been very excited about, but which I think is being shown to be high-minded rhetoric without much force behind it.

FORUM: *Do you think the 2005 world summit accepting the Responsibility to Protect principle authorizes coercive humanitarian intervention?*

GOLDSMITH: It absolutely does not. A lot of people say that it does, and that we're going to have a new norm of customary international law of humanitarian intervention, but I'm pretty sure that if you read it carefully it says "no intervention without Security Council authorization," and so, even in 2005, with the Responsibility to Protect, they weren't willing to change that rule.

If anything, the fact that the responsibility to protect principle contained that condition pretty much confirms that there is no customary international law rule permitting humanitarian intervention—that's the way I read it. It's tragic what's happening in Sudan—but the "never again" rhetoric is looking empty also.

FORUM: *Given that events tend to get ahead of policy decision-making, and policy sometimes moves too slowly, what do you anticipate as the major legal challenges to U.S. legal architecture in the near future?*

GOLDSMITH: There are two things that I worry about a lot. One is that we still—and we saw this with the Katrina response and after 9/11—haven't perfectly worked out how and if we're going to use the military in the homeland in a real crisis. The lines of authority between military authority and civilian authority are not clear, and the Posse Comitatus Act looms large. These are issues that we still haven't worked out terribly well.

The second thing I worry about a lot is cyber security: on the private side, the government side, and the infrastructure side. This is a topic that people in the government are very worried about. But it's one of those issues that is so hard because we really can't figure out how to deal with the multiple problems. This is in part because the government doesn't own most of the stuff it needs to protect, doesn't have control over it, and doesn't have ways to protect it. I just worry that because we don't have a great solution to the problem that people are putting their heads in the sand about it. I think it's a real vulnerability.

Those are the two areas that aren't front-and-center on the radar screen that I worry most about. But who knows?

FORUM: *Thank you for your time. It has been a pleasure to speak with you.*■