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## BOOK REVIEW

### STOCHASTIC CONSTRAINT

POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11. By Jack Goldsmith. New York, N.Y.: W.W. Norton & Co. 2012. Pp. xvi, 311. \$26.95.

*Reviewed by Neal Kumar Katyal\**

One hot summer day, following a week-long marathon of grading 130 Constitutional Law exams, I received a visit from a student who appeared in my office to protest her grade vociferously. She arrived clutching the marked-up exam that she had written during the allocated three hours. Her exam was four pages long. And she pointed to the last lines of the exam, and then pulled out a copy of the exam I had designated as the best in the class, and contended that she should have received the same grade. Her reasoning was simple: "I got the same answer, so I should get the same grade." I pointed out, however, that the model exam was a twenty-page-long exegesis of the same problem, and reached the same answer that she did by a completely different (and more accurate) path. In the end, I told her, a grade is not simply a function of the bottom-line answer, but rather of the process used to reach the result.

With *The Terror Presidency*,<sup>1</sup> Professor Jack Goldsmith wrote, hands down, the very best analysis of the national security issues surrounding President George W. Bush's tenure. In *Power and Constraint: The Accountable Presidency After 9/11*, Goldsmith returns to the same set of problems, but adopts a different tack. He argues that the modern wartime Executive is constrained in new ways beyond the traditional system of checks and balances, and that these new constraints combine to create an effective system that checks executive power. Though the modern wartime Executive may disregard traditional limits on presidential power and attempt to act unilaterally, new checks from an aggressive press, a watchful and technologically enabled public, and the legalization of warfare combine to constrain the executive branch. Goldsmith argues that this system is the type of reciprocal restraint of which our Founders would have approved (p. 243).

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<sup>1</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007).

Goldsmith's claim ultimately boils down to one about how presidential constraint arises from a stochastic mélange produced by these newly empowered actors. But in his analysis of the constraint imposed on the modern Executive by this new system of checks and balances, Goldsmith fails to account for the values served by good process. Just as with a student's four-page exam (which might reach a correct result but probably will not), the path by which the Executive is constrained matters, because it will significantly affect the substantive quality and sustainability of that end result. Goldsmith's new system of accountability relies on a combination of government leaks and self-checking out of fear of reprisal, whereas the traditional system trusts "[a]mbition . . . to counteract ambition."<sup>2</sup> The latter system — the one envisioned by the Founders — has significantly fewer side effects attached to the process of checking the Executive.

In this Review, I argue that the particular process employed to constrain the Executive has consequences beyond the mere fact of achieving some level of constraint, and the "new" system of checks and balances has more costs associated with it than the traditional, constitutionally envisioned system, which primarily relies on government officials. In the end, many different methods might be used to achieve "constraint," broadly conceived, but the process chosen to reach that constraint has substantive implications. Part I discusses the relationship between the process used to check the Executive and the substance of the constraints imposed. It contends that, just as the Coase Theorem predicts, the initial set of entitlements will strongly influence the eventual result, and that Coasean analysis provides a helpful frame through which to assess Goldsmith's claim that the new constraints he identifies can substitute for Madisonian checks and balances. Part II analyzes Goldsmith's speculation that the modern cycle of permission and constraint is likely to continue, and suggests that future inquiry should examine whether particular policy solutions could be developed, in advance of the next crisis, that might break this cycle.

## I. HOW PROCESS INFLUENCES SUBSTANCE

The standard separation of powers story is simple: our Founders divided government power, both horizontally and vertically, to prevent any one institution from becoming too powerful. Madison, in *The Federalist No. 51*, described the government as one in which:

[I]ts several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . . [T]he great security against a gradual concentration of the several powers in the same depart-

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<sup>2</sup> THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

ment consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.<sup>3</sup>

Faced with undoubted evidence that Presidents have sought to maximize their powers in the national security realm at the expense of Congress, Goldsmith says not to worry. His book argues that the modern system of aggressive journalism, leaks, and information-sharing technology (pp. xiv–xv) as accountability mechanisms is a “harmonious system of mutual frustration” of the sort Madison envisioned (p. 243). Goldsmith here is partially correct: the ex post scrutiny he celebrates truly is a check on executive power, but it is not at all the type of ex ante constraint the Founders envisioned. Acting first, and then calibrating policy to adjust ex post to the reaction of courts as well as the media and other extragovernmental entities is a far cry from Madison’s constraints — particularly in a world in which Presidents possess massive powers (such as the ability to deploy overwhelming military might at a moment’s notice and to manipulate diplomatic and economic levers) that are unlike any tools possessed by any leader in the history of the world.

#### A. *The Obama Continuation of Bush-Era Policies*

Goldsmith chronicles the narrative of counterterrorism policy through the transition from the Bush Administration to the Obama Administration. He notes that, contrary to what many might have expected before President Obama took office, the Obama Administration has largely embraced the Bush Administration’s counterterrorism policies (p. x). He acknowledges that there were significant changes in interrogation policy and minor changes to rendition policy and detention criteria, but by and large, he contends, the policies remained in place (pp. 5–20).

Goldsmith’s explanation for this continuation mentions several factors, including the tendency of Presidents to adopt institutional viewpoints after inauguration (pp. 28–29) and the public’s increased willingness to accept aggressive policies from a seemingly pacifist President (p. 40). But the factor with the most explanatory power — and one that Goldsmith does not quite acknowledge — is the fact that by the time the Obama Administration took office, both Congress and the judicial branch had already rigorously vetted the Bush Administration’s policies and reined in many of its extravagant excesses. By January 2009, many of the existing policies reflected something closer to a consensus than the discord that had characterized the middle of the Bush presidency. Accordingly, the Obama Administration contin-

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<sup>3</sup> *Id.* at 318–19.

ued to perpetuate Bush-era policies, but they were policies that had been approved by Congress, the courts, and the press.

This last factor is where substance and process enter the equation. The policies the Obama Administration inherited were significantly different from the ones President Bush first proposed, both substantively and procedurally. For example, the Detainee Treatment Act of 2005<sup>4</sup> provided unprecedented protections to detainees in response to scandals at Abu Ghraib and other problems. In addition, the Military Commissions Act of 2006<sup>5</sup> provided a series of statutory protections and legislative specifications of crimes that were completely absent from President Bush's unilateral military order to set up the Guantanamo tribunals. And, as the titles of both of these examples reveal, they were *Acts* of Congress, not executive decrees. Before these Acts, the Bush Administration had contended that it was the stroke of one man's pen that could change the legal status quo — even sometimes when Congress had directly spoken to the issue. The Bush Administration had begun its defense of some of its most significant post-9/11 policies by claiming that the Commander in Chief Clause of the Constitution permitted unilateral presidential action, and in some cases (such as electronic surveillance and torture) even going so far as to suggest that the President's Article II powers would trump duly enacted statutes of Congress that forbade presidential action in the area.<sup>6</sup> This assertion under the third category of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>7</sup> however, lost force over time. Goldsmith acknowledges the change in constitutional law (pp. 187–88), but does not give it its due. This omission is one example of a larger concern with Goldsmith's thesis: his slighting of the role process plays in checking the Executive.

<sup>4</sup> 42 U.S.C. §§ 2000dd–2000dd–1 (2006).

<sup>5</sup> Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

<sup>6</sup> For a discussion of electronic surveillance, see U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 33–44 (2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>. For a discussion of defenses of executive use of torture in violation of the relevant statute, see Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS* 172, 207–13 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

<sup>7</sup> 343 U.S. 579 (1952). Justice Jackson's famous concurrence grouped presidential actions into three categories — when the President acts with explicit congressional backing, when the President acts in the absence of congressional expression, and when the President acts contrary to “the expressed or implied will of Congress,” *id.* at 637 (Jackson, J., concurring) — concluding that in the third category the President's “power is at its lowest ebb,” *id.* See *id.* at 635–38.

*B. Ex Post Versus Ex Ante Checks and Balances*

The early Bush-era policies were formulated unilaterally, in a manner that cut out the other two branches of government; yet by the time the Obama Administration inherited the policies, they had been scrubbed by the courts and by Congress. A hard question is whether the way in which those policies were formulated matters. Are we living in the world of Justice White's *INS v. Chadha*<sup>8</sup> dissent, where so long as a functional constraint on the Executive exists, the legal niceties do not matter — so much so that the President can exercise his “veto” power before legislation is even taken up by Congress?<sup>9</sup> Or does formalism serve important values that cannot truly be replaced by Goldsmith's newfangled checks and balances? Goldsmith argues that even as Congress passed the Military Commissions Act of 2006 and as the Supreme Court issued the *Boumediene v. Bush*<sup>10</sup> opinion, the other branches were confirming the Executive's exercise of power while they were amending it around the edges (pp. 197–99). By offering moderate changes, the other branches confirmed generally the Executive's power to act. Are these actions not checks and balances in substance, if not in form?

Perhaps. Goldsmith is right to say that Congress and the judiciary may place limits on executive power through these mechanisms. But the ex post nature of these powers gives the Executive a huge first-mover advantage: the potential scope of executive power as asserted by the President is limited only by his boldness. With little initial check on what power can be asserted, the range of acceptable exercises of power may shift past what would have otherwise been acceptable. “Go ahead, I dare you” is not a stable edifice for constitutional law in general. And this point has particular resonance in the realm of national security. Presidents have to act quickly, and Congress, by its nature, has little choice but to trust the Executive more than it does in

<sup>8</sup> 462 U.S. 919 (1983).

<sup>9</sup> In his *Chadha* dissent, Justice White argued that the “central concern” of the Founders was that “departure[s] from the legal status quo” require the approval of the President and the majority of both houses, or two-thirds of both houses in the case of a presidential veto. *Id.* at 994 (White, J., dissenting). The precise manner in which this approval was granted was of less concern. Regarding the deportation matter at issue, Justice White argued:

The President's approval is found in the Attorney General's action in recommending to Congress that the deportation order for a given alien be suspended. The House and the Senate indicate their approval of the Executive's action by not passing a resolution of disapproval within the statutory period. Thus, a change in the legal status quo — the deportability of the alien — is consummated only with the approval of each of the three relevant actors.

*Id.* at 994–95.

<sup>10</sup> 128 S. Ct. 2229 (2008).

the domestic sphere.<sup>11</sup> There are many reasons to think that Congress will not be able to complain — whether due to time constraints, politics, lack of access to real-time intelligence, or other factors.

What is true for Congress is even more so for the courts. Courts lack daily intelligence briefings, trained foreign policy staff, experts who can detect the nuances in diplomacy, and the like. Due to their limited institutional competence in the national security realm, it is very hard to imagine them exercising much of a checking function. The post-9/11 cases are, in this sense, a historical anomaly — for almost all of American history it was extremely hard for the government to lose a war powers case in the Supreme Court during a time of armed conflict.<sup>12</sup> (It was kind of like failing a class at Yale — you really had to try.) But it is very difficult to envision courts in the future playing quite the same role as they have over the last decade. Indeed, the government-friendly post-*Boumediene* decisions by the D.C. Circuit, none of which has been taken up by the Supreme Court, are powerful indicia of that fact.<sup>13</sup>

Goldsmith's description of public perception as a check on executive power suffers from the same problem. He observes that the manner in which the public accepts the President's actions depends a great deal upon the public's opinion of the President himself (pp. 47–48). A President perceived as eager for battle will be more severely questioned when he sends troops into harm's way than a President perceived as a pacifist. But this point undoes some of Goldsmith's own argument, for it means that public receptiveness to particular policies will turn on which President is proposing them. Popular perception of a President's agenda is not a stable edifice on which to build a serious check. Indeed, because public perception and congressional constraints are both muted by presidential popularity, there is a deep risk that a particularly popular President may work grave changes in the

<sup>11</sup> See THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 2, at 422–23 (“[P]oliticians and statesman . . . have, with great propriety, considered energy as the most necessary qualification of [the Executive], and have regarded this as most applicable to power in a single hand . . . . Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number . . . .”).

<sup>12</sup> See JOHN HART ELY, WAR AND RESPONSIBILITY 67, 192 (1993) (providing examples).

<sup>13</sup> See, e.g., *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011) (vacating and remanding district court's decision to grant Guantanamo detainee's habeas petition), *cert. denied*, 132 S. Ct. 2741 (2012); *Almerferdi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011) (reversing district court's decision to grant Guantanamo detainee's habeas petition), *cert. denied*, 132 S. Ct. 2739 (2012); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010) (reversing district court's decision to order release of Guantanamo detainee following detainee's habeas petition), *cert. denied*, 131 S. Ct. 1001 (2011); *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (reversing district court and holding that federal habeas jurisdiction does not extend to detainees held at Bagram Air Force Base in Afghanistan); *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (affirming district court's denial of Guantanamo detainee's habeas petition), *cert. denied*, 131 S. Ct. 1814 (2011).

framework of the law, and that those executive branch precedents will be used by later Presidents (akin to Justice Jackson's famous warning in his *Korematsu v. United States* dissent).<sup>14</sup> Our Founders placed intensive checks and balances in the Constitution to avoid this precise problem.<sup>15</sup> It is not easy to imagine that those checks can be replaced by Goldsmith's newfangled ones without significant damage.

### C. Executive Constraint and Coasean Entitlements

Presidents George W. Bush and Barack Obama are not the first Presidents to claim and exercise extraordinary war powers, as Goldsmith documents. But several of our greatest Presidents took a different path even as they asserted great executive power.

President Lincoln unilaterally suspended habeas corpus in 1861, but convened a special session of Congress to determine whether he was right to do so, and he assured Congress he would abide by its decision.<sup>16</sup> Similarly, in 1952, President Truman seized the nation's steel mills, but even as he did so, he sent a message to Congress asking them whether he was wrong to act.<sup>17</sup> With many of the aforemen-

<sup>14</sup> 323 U.S. 214 (1944). In *Korematsu*, Justice Jackson stated:

A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

*Id.* at 246 (Jackson, J., dissenting).

<sup>15</sup> See THE FEDERALIST NO. 51 (James Madison), *supra* note 2, at 318–19. As James Madison argued:

[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . supplying, by opposite and rival interests, the defect of better motives . . . [T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights.

*Id.*

<sup>16</sup> Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 6 COMPLETE WORKS OF ABRAHAM LINCOLN 297, 310 (John G. Nicolay & John Hay eds., 1905); see also Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1272–73, 1309 & n.186 (2002).

<sup>17</sup> The morning after directing the Secretary of Commerce to seize the steel mills, President Truman sent the following message to Congress:

[I]t was my judgment that Government operation of the steel mills for a temporary period was the least undesirable of the courses of action which lay open. In the circumstances, I believed it to be, and now believe it to be, my duty and within my powers as President to follow that course of action.  
It may be that the Congress will deem some other course to be wiser . . .

tioned Bush Administration policies, such as detainee treatment, military commissions, or electronic surveillance, there was no such overture to Congress in the first several years after 9/11. This is not just a matter of interbranch etiquette — it is about stymieing checks and balances. One of the most endemic features of Congress is its inertia. And given that inertia, it is particularly important that a President jump-start a conversation about the propriety of an action when he acts unilaterally. By signaling that the President welcomes the discussion, the Truman-Lincoln model facilitates the congressional checking function that Goldsmith celebrates. By contrast, presidential actions undertaken in secret cannot, by their nature, create the conditions for such a conversation.

To understand why “act first, ask forgiveness later” yields a different constitutional allocation of powers, insights derived from the Coase Theorem are particularly illuminating. Simply put, the Coase Theorem states that in the absence of transaction costs, parties will bargain to the efficient allocation regardless of the initial distribution of resources.<sup>18</sup> It does not matter who has what resources or rights at the beginning; if bargaining costs nothing, at the end of the day, the parties will reach the optimal result. This theorem has a long academic pedigree and broad applications, from environmental economics to urban planning. But in each real-world application, the crucial question revolves around transaction costs. If it is costly to bargain and transfer resources or rights, then the initial allocation of those resources and rights has enormous consequences.

One of Goldsmith’s central claims is that the Executive will be constrained in wartime, regardless of whether those constraints take effect before or after the Executive has acted. This is, in essence, a Coasean claim — regardless of which actor moves first, we will end up at a place where the Executive is constrained. If Congress has the right to move first by setting policy, the President can veto it and so affect it; by contrast, if the President has the right to move first, Congress, the media, and the judiciary can retroactively pass judgment on his actions. But, just as with any application of the Coase Theorem,

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*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 676 (1952) (Vinson, C.J., dissenting) (quoting 98 CONG. REC. 3912 (1952)) (internal quotation marks omitted).

Twelve days later, the President sent another message: “The Congress can, if it wishes, reject the course of action I have followed in this matter.” *Id.* at 677 (quoting 98 CONG. REC. 4131 (1952)) (internal quotation marks omitted); see also Katyal & Tribe, *supra* note 16, at 1297, 1309 & n.186.

<sup>18</sup> “It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production.” R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

the transaction costs that accompany the bargaining process are what ultimately determine its success.<sup>19</sup>

So, for example, in urban planning, the first settlers often have powerful advantages. The status quo will not easily change for a newcomer no matter what he offers; there is value in continuity beyond the mere costs of moving and construction.<sup>20</sup> A similar problem infects environmental economics: there are few rights granted to communities against polluters, and the obstacles to collective action prevent communities from organizing effectively to offer a sum that incentivizes a polluting corporation to reduce its emissions.

War powers are no different. There is a tremendous advantage to the first mover, and the transaction costs involved with checking an actor may be too great. If the President acts too boldly, Congress and the judiciary may not be able to constrain the President *ex post*.<sup>21</sup> It may take years for Congress even to learn of the action, and by that point, the policy may be entrenched, making alteration bureaucratically complicated. Furthermore, there may be significant costs in the interim before Goldsmith's *ex post* checks begin to rein in executive power. That is particularly true today, when Presidents possess unprecedented powers, both military and diplomatic.

The use of force has consistently been an unofficial presidential power, despite the Constitution's delegation of the declaration of war to Congress.<sup>22</sup> Presidents as early as Jefferson eschewed congressional approval in troop deployment,<sup>23</sup> and despite the War Powers Resolution of 1973,<sup>24</sup> which attempted to limit the time troops may be deployed without congressional approval to ninety days,<sup>25</sup> Presidents have continued to act unilaterally. President Reagan was sued twice

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<sup>19</sup> "Once the costs of carrying out market transactions are taken into account . . . the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates." *Id.* at 15–16. Thus, "we have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department)." *Id.* at 44.

<sup>20</sup> See, e.g., Herbert Hovenkamp, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, 27 J. CORP. L. 519, 529 (2002) (explaining that Coasean land controls make change extremely difficult because any change must be approved by unanimous consent of all landowners).

<sup>21</sup> Some of the new checks Goldsmith identifies, such as executive branch lawyering and inspectors general, function *ex ante*. But, as I discuss in Part II, Goldsmith himself acknowledges that these peacetime checks will be weak or suspended in times of crisis. See *infra* p. 1005. And today, without significant reforms within the executive branch, these checks are unlikely to do the work the Founders envisioned. For an analysis of the reforms necessary to make these internal checks work, see Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

<sup>22</sup> "The Congress shall have Power . . . [t]o declare War . . ." U.S. CONST. art. I, § 8, cl. 11.

<sup>23</sup> See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1818 (1996).

<sup>24</sup> 50 U.S.C. §§ 1541–1548 (2006).

<sup>25</sup> *Id.* § 1544(b).

for violating the War Powers Resolution by supporting the government of El Salvador and the Nicaraguan Contras,<sup>26</sup> fifty-four members of Congress sought an injunction against President George H.W. Bush to prevent Operation Desert Storm from commencing without congressional approval,<sup>27</sup> and President Clinton faced a lawsuit claiming the airstrikes during the Kosovo crisis violated the War Powers Resolution.<sup>28</sup> Courts have routinely let such military operations stand, either by applying the political question doctrine or by dismissing the litigation for lack of standing.<sup>29</sup> The Executive therefore has been largely unconstrained by either the legislative or judicial branch when it comes to the use of force.<sup>30</sup> What makes things somewhat different today is the massive power that Presidents wield at a moment's notice. With over 1500 nuclear weapons at their disposal, not to mention literally millions of soldiers, Presidents can inflict massive, planet-level damage at the push of a button or through a short order to the military. As Vice President Cheney put it most vividly:

The president of the United States now for 50 years is followed at all times, 24 hours a day, by a military aide carrying a football that contains the nuclear codes that he would use and be authorized to use in the event of a nuclear attack on the United States.

He could launch a kind of devastating attack the world's never seen. He doesn't have to check with anybody. He doesn't have to call the Congress. He doesn't have to check with the courts. He has that authority because of the nature of the world we live in.<sup>31</sup>

Presidents also wield considerable diplomatic tools,<sup>32</sup> despite the academic debate concerning which branch is properly responsible for

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<sup>26</sup> See J. Richard Broughton, *What Is It Good For? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 705–06 (2001).

<sup>27</sup> *Id.* at 706.

<sup>28</sup> *Id.* at 708.

<sup>29</sup> See *id.* at 705–10.

<sup>30</sup> The legality of the Bush Administration's exercise of war powers under the Authorization for Use of Military Force (AUMF) is rigorously analyzed and defended in Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

<sup>31</sup> *Transcript: Vice President Cheney on "FOX News Sunday,"* FOX NEWS (Dec. 22, 2008), <http://www.foxnews.com/story/0,2933,470706,00.html> (quoting Vice President Cheney). The Vice President continued: "No president has ever signed off on the proposition that the War Powers Act is constitutional. I would argue that it is, in fact, a violation of the Constitution, that it's an infringement on the president's authority as the commander in chief." *Id.*

<sup>32</sup> See Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1592–93 (2005) (arguing that the Vesting Clause properly places diplomatic authority in the executive branch); Phillip R. Trimble, *The President's Foreign Affairs Power*, 83 AM. J. INT'L L. 750, 755 (1989) ("[T]he President has the exclusive power of official communication with foreign governments.").

foreign affairs.<sup>33</sup> The modern President often acts alone in forging international agreements,<sup>34</sup> either through “sole executive agreements,” which the President negotiates without approval of Congress,<sup>35</sup> or through “congressional-executive agreements,” which the President enters into only after Congress has passed a statute granting him authority to do so.<sup>36</sup> These statutory authorizations, however, are often vague, both in the particular terms of the agreement and in the parties with whom the President is authorized to make the agreement. Such a broad grant of power vests the President with significant unilateral authority even under the moniker of a “congressional-executive agreement.”<sup>37</sup> Again, because the stakes of diplomatic alliances are extremely high in today’s multipolar world, this diplomatic authority can amount to a massive amount of presidential power.

Given these expanded powers, there is a deep risk that Presidents may, in the interim between the exercise of power and the ex post check, work grave harm — to peace, to civil liberties, and to the image of the United States abroad. Goldsmith argues that the existence of ex post checks places all modern Presidents in a “synopticon” that produces a deterrent effect (p. 207). “[O]fficials are much more careful merely by virtue of being watched,” Goldsmith notes (p. 207). However, a crucial check on presidential adventurism — reelection — has been nonexistent for second-term Presidents since 1951.<sup>38</sup> This structural change may hide the Executive from the synopticon’s watchful eyes, making presidential decisionmaking freer of checks and balances than it otherwise might be in a system that properly relies on Madisonian power sharing. And, as Goldsmith himself acknowledges, presidential popularity can often blunt the power of the synopticon — particularly when national security is pitted against civil liberties (p. 47). The popular willingness to err on the side of national security, and the consequent weakness of the synopticon, will be at its apex when the issue involves the rights of foreigners — who altogether lack

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<sup>33</sup> See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 237 (2001).

<sup>34</sup> Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 144 (2009).

<sup>35</sup> These agreements become binding upon signatures of the representatives of both countries, and Congress may not become aware of these agreements until well after they become binding. *Id.* at 150.

<sup>36</sup> *Id.* at 156.

<sup>37</sup> Even if Congress did seek to invalidate a congressional-executive agreement by statute, such an attempt would be unlikely to survive the President’s veto. *Id.* at 167.

<sup>38</sup> See U.S. CONST. amend. XXII, § 1.

the ability to vote.<sup>39</sup> Yet the rights of foreigners are a crucial part of the post-9/11 debate.

Goldsmith continues on to argue, however, that some of these new checks can ultimately constrain a President. But these checks are unpredictable by their nature and risk being overreactive. It matters tremendously who does the checking — the public due to a leak to the media, a congressional committee, or a court. If it is a court, the constraint may last for decades, even when it is wrong, due to stare decisis. If it is a leak, then it relies on a government official to break her oath of confidentiality, which can have pernicious consequences for government functioning. Ultimately, there is no way to know if, how, or when Goldsmith's different, newfangled checks will operate. Goldsmith's thesis is reminiscent of chemistry and stochastic diffusion — the general rule that particles will move from areas of high concentration to areas of low concentration, eventually arriving at a random but uniform distribution. The path each individual particle takes can only be predicted in probabilistic terms. And so even though each individual particle's movement cannot be definitively determined, the net flow of all particles can be.<sup>40</sup>

In Goldsmith's formulation of the new checks and balances, the end result — some level of executive constraint — can be determined, but the manner in which all the individual pieces will move cannot be predicted. Too much movement in one sector of the new checks and balances can be compensated for with too little movement in another — but some predictable end point can be achieved from this uneven process. However, unlike in chemistry, when dealing in the high-stakes game of executive power, the end point — executive constraint — is by no means the only measure by which to evaluate success. The process of how the check takes place matters tremendously. That is particularly so in the drama of wartime, when the process employed may alter the end result. Goldsmith rightly notes that in the immediate wake of a crisis, the nation will be anxious for action and forgiving of — even eager for — broad executive power. But this zeal for action in the heat of crisis will give way to speculation and skepticism as the broad policies become further and further removed from the crisis. Good reporting and media investigation do create an ex post check, but it is a zigzag one that is ad hoc, reactive, and necessari-

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<sup>39</sup> See generally Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007) (explaining why accountability mechanisms do not work as well when government singles out noncitizens in counterterrorism policy).

<sup>40</sup> The description of stochastic diffusion in this paragraph is drawn from the description of diffusive motion in Elmer M. Tory, *Stochastic Sedimentation and Hydrodynamic Diffusion*, 80 CHEMICAL ENGINEERING J. 81, 81 (2000).

ly less comprehensive than lacing constraints into the system from the start.

In this way, the ex post action that characterizes the media's ability to constrain the executive branch exemplifies the larger problem of relying on extragovernmental actors in Goldsmith's new system of checks and balances. Few can doubt Goldsmith's contention that "human rights activists and . . . global media outlets" among other extragovernmental groups have seen their influence grow in recent decades (p. xv). And few can doubt the very real impact these extragovernmental actors have had on post-9/11 executive power (p. xv). But like the courts and the general public, these groups are not national security experts privy to daily intelligence briefings and internal government deliberations. Instead, their access to information is driven by officials from within the government itself — rendering extragovernmental actors almost entirely reactive, checking presidential authority only after the President has chosen to move (and sometimes perhaps only after some collusion between a journalist and the government has transpired).<sup>41</sup> For this reason, Goldsmith's reliance on these extragovernmental actors in his checks and balances system might be considered a "third-best" option for constraining executive power when other, better options exist.<sup>42</sup>

The same thing is true, to some extent, for courts. Because of their aforementioned competence limitations, they will often stay on the sidelines of national security disputes. But when they do get involved, they may overreact in ways that could last for generations due to stare decisis. Here, the atmosphere of litigation can itself be part of the problem. Government lawyers come to court armed with the broadest arguments possible, and the Court's tendency is to push back against extreme claims. In this sense, the Guantanamo cases from 2004 through 2008 may be seen as a reaction, indeed an overreaction, to the broad claims the Bush Administration put forth in the name of executive power. The Administration argued that the courts had no role whatsoever in reviewing the cases of the detainees<sup>43</sup> and missed oppor-

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<sup>41</sup> See Arthur S. Brisbane, *Pre-Publication Disclosure of Dowd Column: A Breach of Two Boundaries*, N.Y. TIMES (Aug. 29, 2012, 1:01 PM), <http://publiceditor.blogs.nytimes.com/2012/08/29/pre-publication-disclosure-of-dowd-column-a-breach-of-two-boundaries> (describing one possible example of such collusion).

<sup>42</sup> See Katyal, *supra* note 21, at 2316 ("The first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' divisions.").

<sup>43</sup> See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833, 57,835–36 (Nov. 16, 2001) ("[Sec. 7(b)] With respect to any individual subject to this order — (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the indi-

tunities to craft more modest arguments.<sup>44</sup> By asserting that it had the ability to build an offshore facility to evade judicial review, to do what it wanted at that facility to detainees under the auspices of the commander-in-chief power, and to keep the entire process (including its legal opinions) secret, the executive branch provoked a judicial backlash. And while much of the Obama Administration's litigation strategy has been devoted to trying to restore credibility with the courts in the national security realm in the wake of *Boumediene* and *Rasul v. Bush*,<sup>45</sup> that process has been extremely resource intensive and laborious — and there is no guarantee of a return to the pre-*Boumediene/Rasul* era.<sup>46</sup> The result may be to shackle Presidents in ways that can prove dangerous for national security.

Goldsmith praises another form of check somewhat indigenous to Washington, D.C.: the well-placed source who leaks government secrets. That check, too, has tremendously pernicious consequences. Leaking weakens the Executive's ability to function even as it empowers the press, and it sows distrust not only between the people and the government but also within the government itself, further reducing efficiency. Indeed, leaking as a check relies on disgruntled individuals who decide to disobey rules that they swore to uphold, and the leaks themselves may be incomplete or inconsistent.<sup>47</sup> One virtue served by the original, Madisonian conception of checks and balances is that it reduces the tendency to leak. Government servants may be substantively opposed to particular policies, but so long as they have an opportunity to be heard and process is respected, they are unlikely to leak. Moreover, leaking as a check suffers from the same problem as the judicial check — it is far too haphazard a practice around which to build a constitutional system.

In the end, there is a deep risk that Goldsmith's new constraints will not leave the presidency in quite the same place as would Madisonian checks and balances. Sometimes, as with a popular President, the Executive may be constrained far less than in a Madisonian system. And sometimes, the President may be constrained too much, for

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vidual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”).

<sup>44</sup> See Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2003–2004 CATO SUP. CT. REV. 49, 68.

<sup>45</sup> 542 U.S. 466 (2004).

<sup>46</sup> See *supra* p. 995.

<sup>47</sup> Consider the remarks by Justice Scalia, in response to a question from CNN host Piers Morgan, on leaks from the Supreme Court: “You should not believe what you read about the court in the newspapers. It’s either been made up or been given to the newspapers by somebody who’s violating a confidence, which means that person is not reliable.” Adam Liptak, *Scalia Says He Had No ‘Falling Out’ with Chief Justice*, N.Y. TIMES, July 19, 2012, at A21 (quoting Justice Scalia) (internal quotation marks omitted).

when Presidents overreach, there is always the risk of a corresponding overreaction by the other branches and the public. What is more, the multiple different actors that might engage in Goldsmith's checking function (and the many possible permutations of actors that might work together) make the ultimate result — and the process used to get there (which will often impact that result) — unpredictable. Such an overreaction may push policy further back, to a place more constrained than what is optimal. By acting too hastily or too independently and by relying on Goldsmith's new mechanisms of constraint, the Executive may end up with less power than it truly needs.

## II. THE CYCLE OF PERMISSION AND CONSTRAINT

Goldsmith's account of the post-9/11 era identifies what amounts to a three-stage cycle. The first is obvious: the attacks on the Pentagon and the World Trade Center. In the second stage, between 2001 and 2003, the Executive took unilateral action on torture, surveillance, military commissions, and the like. In the third stage, between 2003 and 2009, judicial, congressional, and media counterreaction took place. In his afterword, Goldsmith argues that the cycle of crisis, unilateral executive action, and governmental and extragovernmental reaction is likely to repeat following the next attack (pp. 244–52).

At one level of abstraction, like many a Hegelian dialectic (or fortune cookie), this claim is undoubtedly true. In the wake of Lincoln's exercise of executive powers during the Civil War, "Congress reasserted itself with a vengeance and ran roughshod over" Andrew Johnson and his successors (p. 31). In the wake of Wilson's exercise of executive power, the Senate rejected the Treaty of Versailles (p. 31). After Franklin D. Roosevelt's four terms, Congress supported the Twenty-Second Amendment (pp. 31–32). And after Congress ceded power to the Executive to fight the Cold War, the disasters of Vietnam and Watergate reduced trust in the presidency to perhaps a record low (p. 34). But the hard question is whether this cycle is not just likely to, but must inexorably, repeat itself next time. In perhaps the book's only serious shortcoming, Goldsmith does not tell us what to do to try to stop it.

And yet there are strong reasons to try. The harm from unilateral action in the interim will be great — harm to individuals, civil liberties, and the global reputation of the United States. Goldsmith tells us a lot about the reforms undertaken during moments of relative calm. He identifies several mechanisms Congress has established and the Executive has self-imposed to check military wartime activities. Covert actions must be approved via formal findings, congressional intelligence committees must be informed of all intelligence activities, detention now involves extensive paperwork and legalistic standards, and inspectors general conduct reviews of CIA activities (pp. 87–88, 99,

155). Goldsmith describes the exponential increase in the number of lawyers employed by the executive and military departments as a significant check on executive discretion (pp. 125–35). These mechanisms not only lead to increased reporting but also provide a deterrent effect — the presidential synopticon described by Goldsmith and mentioned earlier in this Review — inducing executive branch officials to second-guess themselves before undertaking decisions that they will soon have to explain to Congress and other bodies.

These existing mechanisms work well now, in a time of relative calm. But if another grave threat to national security emerges, as it undoubtedly will, there is no guarantee that these accountability programs will be left in place and will work. Indeed, Goldsmith himself suggests that they will not.<sup>48</sup> The suspension of these checks and the resulting increase in executive power would mean the cycle will repeat itself, for to reinstate those same checks we would have to relitigate, repass, or rescind legislation, and rely once again on the press and courts to uncover abuse of this broad power. Given Goldsmith's prognosis, it is worth thinking now about ways to try to lace an understanding of Goldsmith's cycle into legislative and judicial decisionmaking in times of crisis, in order to catalyze the start of stage three and allow a quick exit from stage two's unilateral regime.

There are a number of different strategies that could break the cycle. Professor Bruce Ackerman has suggested a fairly detailed one.<sup>49</sup>

<sup>48</sup> In his afterword, Goldsmith outlines a likely unfolding of events after the next attack: First, recriminations will be made against the President for failing to stop the attack, regardless of what steps his Administration took. Second, accountability mechanisms will be blamed for the attack, and intelligence officials will be accused of placing a thumb on the scale for civil liberties in the trade-off between liberty and security. Third, officials will recommend granting the President increased legal authority to combat terrorism. Then, there will be a reawakening of, and increased vigor within, those much-criticized accountability mechanisms (pp. 248–51).

<sup>49</sup> Ackerman proposes a set of emergency procedures in which the Executive is granted broad powers to provide relief from the immediate attack and pursue prevention for the next one. Ackerman presents these procedures as a “tragic compromise”: civil liberties are relinquished for the promise of supermajorities, compensation, and decency. Bruce Ackerman, Essay, *The Emergency Constitution*, 113 YALE L.J. 1029, 1077 (2004). The Executive is granted emergency powers for a limited amount of time; to extend these powers, an increasing percentage of Congress must approve the extension. The longer the emergency, the greater the supermajority necessary to maintain emergency status. *Id.* at 1047–48. Compensation would be awarded to victims of the attack as well as persons wrongly detained as terror suspects. *Id.* at 1062–66. And though the Executive has plenary powers in detention, decency in treatment should be the standard for judicial review of detention procedures. *Id.* at 1071–72. There are any number of criticisms of Ackerman's proposal. See, e.g., Martha Minow, *The Constitution as Black Box During National Emergencies: Comment on Bruce Ackerman's Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, 75 FORDHAM L. REV. 593, 597–601 (2006); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1823–30 (2004); David Cole, *In Case of Emergency*, N.Y. REV. BOOKS (July 13, 2006), <http://www.nybooks.com/articles/archives/2006/jul>

And there are more modest strategies worth considering as well. One need not go far to find them. As an exemplar, take one of the most significant post-9/11 pieces of legislation, the USA PATRIOT Act.<sup>50</sup> Outside of a brief mention (p. 183), Goldsmith does not analyze the virtues of this Act in his book. We all know that the USA PATRIOT Act revamped national security law in realms such as electronic intelligence collection. But less appreciated is its sunset provision. Instead of leaving the law on the books for all time, the drafters provided that if, in four years, no legislative action were taken to renew the Act, many parts of it would expire. Included in the sunset clause were many of the law's most important provisions, such as those that governed the authority to intercept wire communications relating to terrorism, liberalized the sharing of intelligence information within the U.S. government, authorized roving surveillance, permitted the government to engage in broad third-party searches for records, and authorized the seizure of voice mail.<sup>51</sup>

The USA PATRIOT Act's sunset provision was applauded across the aisle as a way to avoid overreaction. Republican House Majority Leader Dick Armey explained that "[t]hese tools give the government much increased capability to do surveillance on American citizens,"<sup>52</sup> but that "the sunset is a very important matter with a lot of our members"<sup>53</sup> because it affords an opportunity to "see how well [the Act's provisions] work, how effective they've been, and how responsibly these tools have been used. Our rights as citizens are a big part of what we're fighting for."<sup>54</sup> Democratic Senator Patrick Leahy pro-

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/13/in-case-of-emergency/?pagination=false. But the proposal is nonetheless the type of thinking that could help break Goldsmith's cycle and deserves attention.

<sup>50</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code). Goldsmith discusses the sunset provision briefly in supporting his claim that Congress's grant of power to the President was narrower than many recognize: "Even the controversial provisions of the PATRIOT Act, enacted in October 2001, contained an unusual restraint. The original law had a sunset clause that terminated the law's most controversial provisions after a few years, thus requiring the President to remake the case to Congress that the provisions were still justified, and requiring Congress to consider new evidence before authorizing it again if Congress deemed appropriate" (p. 183) (endnote omitted).

<sup>51</sup> See USA PATRIOT Act § 224, 115 Stat. at 295.

<sup>52</sup> Karen Hosler, *Bills Would Give Ashcroft Many Anti-Terrorism Tools*, BALT. SUN, Oct. 10, 2001, at 7A (quoting Rep. Dick Armey) (internal quotation marks omitted).

<sup>53</sup> *Id.* (quoting Rep. Dick Armey) (internal quotation mark omitted) ("[Rep. Armey] estimated that much of the House support for the measure was based on [the] principle [of sunset]."); see also Nat Hentoff, *Terrorizing the Bill of Rights*, VILLAGE VOICE, Nov. 20, 2001, at 32 ("[Senator Paul] Wellstone, while troubled by the bill, felt reassured because of its 'sunset' provision . . . [Senator Wellstone stated]: 'It is critically important that each and every one, every senator and representative, monitor the use of new authorities provided to the law enforcement agents to conduct surveillance. We're going to have to monitor this very closely.'").

<sup>54</sup> Hosler, *supra* note 52 (quoting Rep. Dick Armey) (internal quotation marks omitted).

posed expanding the sunset provisions even further, arguing that they permitted review and reconsideration of these grants of power to law enforcement before they are “etched into stone.”<sup>55</sup>

A sunset provision can help bring the legislature out of Goldsmith’s stage two and toward stage three. The USA PATRIOT Act provision forced a future conversation about the effectiveness and desirability of the powers the Act granted and made legislators evaluate whether they had overreacted in the heat of crisis. A similar provision was put into the statute creating the Independent Counsel,<sup>56</sup> which contained a similar potential for overreaction post-Watergate,<sup>57</sup> and Congress eventually did allow the office of Independent Counsel to lapse.<sup>58</sup> Indeed, when states have adopted sunset provisions, the upshot has been dramatic change and innovation: one in five agencies that are reviewed under sunsets are terminated, one in three are modified, and “less than half” of such agencies are “re-created with little or no change.”<sup>59</sup> Particularly in the national security realm, a sunset helps minimize the cost of a legislative overreaction by ensuring future debate and reconsideration.

<sup>55</sup> 149 CONG. REC. 23,784 (2003) (statement of Sen. Patrick Leahy) (“With the PATRIOT Act, Congress provided government investigators with a virtual smorgasbord of new powers from which to choose. . . . Have we provided too many choices and too much power to a limited few? These are questions that require answers before the more far-reaching provisions of PATRIOT are etched into stone.”). Similar arguments have been voiced in favor of state sunset provisions. *See, e.g.*, MARCY STEPHENS, *THE STATUS OF SUNSET IN THE STATES* 3 (1982) (“The automatic termination provision is an action-forcing mechanism to require state legislators to conduct serious program evaluation.”); DOUG ROEDERER & PATSY PALMER, *SUNSET: EXPECTATION AND EXPERIENCE* 13 (1981) (suggesting a similar point).

<sup>56</sup> Ethics in Government Act of 1978, Pub. L. No. 95-521, tit. VI, § 598, 92 Stat. 1824, 1873 (codified as amended at 28 U.S.C. § 599 (2006)).

<sup>57</sup> *See* S. REP. NO. 95-170, at 76–77 (1978). The Senate Committee on Governmental Affairs noted:

Section 598 is a sunset provision which states that all of the provisions of the new Chapter 39 . . . will cease to have effect five years after the date on which it takes effect. . . . Five years is a reasonable period to permit the provisions of this chapter to operate and then to review those provisions to see if too many or too few special prosecutors have been appointed, to determine whether there is a need for a revision of the standards defining when a conflict of interest exists, or to determine if there is a need to revise the method of appointment, the method of removal, or any other significant portion of this chapter.

*Id.*; *see also* H.R. REP. NO. 95-1307, at 11 (1978) (“Section 598, ‘Termination of effect of chapter,’ is in essence a sunset provision for the special prosecutor mechanism. . . . The purpose of this provision is to enable the Congress to review how the legislation has operated in order to determine whether the mechanism should be retained or changed.”).

<sup>58</sup> *See, e.g.*, 28 C.F.R. pt. 600 (2011).

<sup>59</sup> MARK R. DANIELS, *TERMINATING PUBLIC PROGRAMS* 34 (1997). For an extensive summary of state sunset provisions, *see* STAFF OF SUBCOMM. ON THE LEGIS. PROCESS, H. COMM. ON RULES, 97TH CONG., *A COMPILATION OF STATE SUNSET STATUTES* (Comm. Print 1981).

What works for the legislature might work for the other two branches as well. If Presidents are particularly prone to unilateralism at the outset of a crisis, a good default rule may be to insist that all major executive and military orders have a three- or five-year sunset provision. Further advantage might be obtained from a congressional reporting requirement, which would require the President to, at some point in the future, justify each decision affirmatively, hopefully after the crisis has abated and more data points from which to evaluate the policy have been accumulated. The result may be to curtail some of the excesses of presidential unilateralism during the reconsideration phase, as well as perhaps to restrict some of that unilateralism in the first place. A President who knows that a successor will have to affirmatively evaluate one of his policies may be somewhat more cautious than one who does not. While this effect is likely to be modest,<sup>60</sup> the point is simply that while Goldsmith takes the harm of his cyclical reaction and counterreaction as a given, there are a variety of institutional mechanisms such as sunset provisions that may minimize those harms.

Even more promising than executive sunsets, though far less intuitive, are sunsets for judicial opinions. They would ensure that the precedents set at the outset of a military conflict would not necessarily be binding in the future. Right now, national security litigation has the odd quirk of being governed by a set of patchwork rules developed in 1942 (*Ex parte Quirin*<sup>61</sup>), 1868 (*Ex parte McCardle*<sup>62</sup>), and at other times during or shortly after national emergencies. It is not at all obvious that those rules should control judicial decisionmaking today. After all, there are serious risks that some of those opinions (such as *Korematsu* and *Quirin*) may have lurched too far toward enlarging presidential power in the midst of a national security emergency (Goldsmith's stage one). And there are also risks that sometimes the Supreme Court has overreacted and has gone too far in the other direction when carrying out Goldsmith's stage three checks (for example, *Boumediene*, which constitutionalized military detention policy<sup>63</sup> in

<sup>60</sup> There are reasons to believe that sometimes such sunsets might embolden, rather than restrain, executives. Presidents could point to the sunset as an illustration of their bona fides and sell their policies (to themselves and their staffs, as well as to the public if the matter is public) as ones born in restraint due to their temporary natures. Statutes with sunset provisions have an experimental character, and so the concern is not an unreasonable one. On the other hand, Presidents are often concerned with protecting their legacies, and adopting positions that they know a successor will have to affirmatively reevaluate is probably more likely to encourage ex ante restraint rather than adventurism.

<sup>61</sup> 317 U.S. 1 (1942).

<sup>62</sup> 74 U.S. (7 Wall.) 506 (1868).

<sup>63</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2271–74 (2008) (holding that statutory review procedures for Guantanamo Bay inmates were constitutionally inadequate).

the wake of particular scandals such as Abu Ghraib). And when the courts overreact, it is difficult for a new test case to develop. Many executives will be poised to follow the law as laid down by the Supreme Court, rather than to challenge it.

Here, one can take a lesson from Justice O'Connor's opinion for the Court in *Grutter v. Bollinger*.<sup>64</sup> In that case, Justice O'Connor stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>65</sup> This statement might be thought of as a judicial sunset: she was worried about a holding by the Court that would prevent affirmative action policies at universities from being contested in perpetuity. It was also a signal to universities and litigants to be on notice that a test case could develop in the future.

The tendency toward judicial under- and overreaction in national security cases can be muted by adopting the *Grutter* approach and fashioning a judicial sunset. The Court could decide a case but affirmatively state that its holding would be binding and entitled to the full power of the stare decisis doctrine for only a set number of years, or announce that the holding would be binding law until the occurrence of a designated event (for example, "Following the cessation of hostilities with Japan and Germany, we will be completely open to reconsideration."). After the elapse of that time period, both lower courts and the Supreme Court would not be bound by the decision, though they could of course follow its reasoning and logic. In effect, the decision would become something akin to an out-of-circuit precedent for a federal court of appeals, in that it would have no formal binding weight as law, but its reasoning could be cited as persuasive authority via an affirmative codification of the old decision.<sup>66</sup> And the President himself could decide to act in defiance of such precedents — but would ultimately have to win the matter in court.

Sunsetting judicial decisions would allow an easier escape from decisions made in a crisis. The judicial sunset allows government to approach new problems unhampered by old decisions yet informed by them. It may often be prudent, as the USA PATRIOT Act authors realized, for legislators to reconsider their premises after the space of a few years; and a similar point goes for courts, too. Institutional mechanisms that take the likelihood of under- and overreaction seriously, and that attempt to minimize the long-term impacts of under- and overreaction, can make the cycles of permission and restraint that Goldsmith identifies less pernicious.

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<sup>64</sup> 539 U.S. 306 (2003).

<sup>65</sup> *Id.* at 343.

<sup>66</sup> For a fuller explication, see Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237 (2004).

## CONCLUSION

Process matters. Jack Goldsmith has constructed a valiant argument for why we should not be quite so worried about presidential unilateralism by pointing to all sorts of new checks, such as the media. But in the end, these are a poor man's substitute for the real thing. Our framers envisioned a far more robust set of active interlocking governmental institutions where Presidents were constrained at the outset instead of down the road, years later, after much harm had already been done. The type of ex post constraints Goldsmith identifies will not work or, perhaps even worse, will work too well. At the same time, Goldsmith is absolutely right to observe that a time of crisis is not the easiest time to assert checks and balances against the President. Armed with that knowledge, it would be wise to start developing mechanisms and crafting policy now to minimize the harms created by presidential unilateralism and the inevitable legislative, judicial, and media under- and overreaction when the next crisis occurs.