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Conscience of a Conservative

By JEFFREY ROSEN SEPT. 9, 2007

In the fall of 2003, Jack L. Goldsmith was widely considered one of the brightest stars in the conservative legal firmament. A 40-year-old law professor at the University of Chicago, Goldsmith had established himself, with his friend and fellow law professor John Yoo, as a leading proponent of the view that international standards of human rights should not apply in cases before U.S. courts. In recognition of their prominence, Goldsmith and Yoo had been anointed the "NewSovereigntists" by the journal Foreign Affairs.

Goldsmith had been hired the year before as a legal adviser to the general counsel of the Defense Department, William J. Haynes II. While at the Pentagon, Goldsmith wrote a memo for Defense Secretary Donald Rumsfeld warning that prosecutors from the International Criminal Court might indict American officials for their actions in the war on terror. Goldsmith described this threat as "the judicialization of international politics." No one was surprised when he was hired in October 2003 to head the Office of Legal Counsel, the division of the Justice Department that advises the president on the limits of executive power. Immediately, the job put him at the center of critical debates within the Bush administration about its continuing response to 9/11 — debates about coercive interrogation, secret surveillance and the detention and trialof enemy combatants.

Nine months later, in June 2004, Goldsmith resigned. Although he refused to discuss his resignation at the time, he had led a small group of administration lawyers in a behind-the-scenes revolt against what he considered the constitutional excesses of the legal policies embraced by his White House superiors in the war on terror. During his first weeks on the job,

Goldsmith had discovered that the Office of Legal Counsel had written two legal opinions — both drafted by Goldsmith's friend Yoo, who served as a deputy in the office — about the authority of the executive branch to conduct coercive interrogations. Goldsmith considered these opinions, now known as the "torture memos," to be tendentious, overly broad and legally flawed, and he fought to change them. He also found himself challenging the White House on a variety of other issues, ranging from surveillance to the trial of suspected terrorists. His efforts succeeded in bringing the Bush administration somewhat closer to what Goldsmith considered the rule of law — although at considerable cost to Goldsmith himself. By the end of his tenure, he was worn out. "I was disgustedwith the whole process and fed up and exhausted," he told me recently.

After leaving the Office of Legal Counsel, Goldsmith was uncertain about what, if anything, he should say publicly about his resignation. His silence came to be widely misinterpreted. After leaving the Justice Department, he accepted a tenured professorship at Harvard Law School, where he currently teaches. During his first weeks in Cambridge, in the fall of 2004, some of his colleagues denounced him for what they mistakenly assumed was his role in drafting the torture memos. One colleague, Elizabeth Bartholet, complained to a Boston Globe reporter that the faculty was remiss in not investigating any role Goldsmith might have played in "justifying torture." "It was a nightmare," Goldsmith told me. "I didn't say anything to defend myself, except that I didn't do the things I wasaccused of."

Now Goldsmith is speaking out. In a new book, "The Terror Presidency," which will be published later this month, and in a series of conversations I had with him this summer, Goldsmith has recounted how, from his first weeks on the job, he fought vigorously against an expansive view of executive power championed by officials in the White House, including Alberto Gonzales, who was then the White House counsel and who recently resigned as attorney general, and David Addington, who was then Vice President Cheney's legal adviser and is now his chief of staff. Goldsmith says he is not speaking out for the money; though he received a low six-figure advance for the book, he is, after deducting some minor expenses, donating the advance and any profits to charity. Nor is he speaking out because he disagrees with the basic goals of the Bush administration in the war on terror. "I shared, and I still share, a lot of

their concerns about what we have to do to meet the terrorist threat," he told me. When I asked whether he thought Gonzales should have resigned and whether Addington should follow, he demurred. "I was friends with Gonzales and feel very sorry for him," he said. "We got along really well. I admired and respected Addington, even when I thoughthis judgment was crazy. They thought they were doing the right thing."

Goldsmith told me that he has decided to speak publicly about his battles at the Justice Department because he hopes that "future presidents and people inside the executive branch can learn from our mistakes." In his view, American presidents for the foreseeable future will, like George W. Bush, face enormous pressure to be aggressive and pre-emptive in taking measures to prevent another terrorist attack in the United States. At the same time, Goldsmith notes, everywhere the president looks, critics — as well as his own lawyers — are telling him that pre-emptive actions may violate international law as well as U.S. criminal law. What, exactly, are the legal limits of executive power in the post-9/11 world? How should administration lawyers negotiate the conflict between the fear of attacks and the fear oflawsuits?

In Goldsmith's view, the Bush administration went about answering these questions in the wrong way. Instead of reaching out to Congress and the courts for support, which would have strengthened its legal hand, the administration asserted what Goldsmith considers an unnecessarily broad, "go-it-alone" view of executive power. As Goldsmith sees it, this strategy has backfired. "They embraced this vision," he says, "because they wanted to leave the presidency stronger than when they assumed office, but the approach they took achieved exactly the opposite effect. The central irony is that peoplewhose explicit goal was to expand presidential power have diminished it."

I have known Goldsmith since we were at law school together. In addition to being intellectually curious and having good judgment, he always struck me as a pragmatic rather than an ideological conservative. Born in 1962 in Memphis, Goldsmith is the son of a former Miss Teenage Arkansas whose parents ran a celebrated nightclub. Growing up, he had two stepfathers, one of whom he describes in the book as "a mob-connected Teamsters executive" who was "Jimmy Hoffa's right-hand man and for decades a leading suspect in Hoffa's disappearance." His upbringing seems to have contributed to his down-

to-earth sensibility. After earning degrees at Washington and Lee University and Oxford, he thrived at Yale Law School, where he developed what he calls "an allergic reaction to Yale's left-wing jurisprudence and political correctness." He later clerked for Justice Anthony Kennedy on the Supreme Court and taught law at the Universities of Virginia and Chicago. He is married, and he and his wife have two sons.

When Goldsmith was asked, four years ago, to head the Office of Legal Counsel at the Justice Department, he jumped at the opportunity. Working for the office is one of the most prestigious jobs in government: former heads and deputies include the Supreme Court Justices William H. Rehnquist, Antonin Scalia and Samuel A. Alito Jr. The Office of Legal Counsel interprets all laws that bear on the powers of the executive branch. The opinions of the head of the office are binding, except on the rare occasions when they are reversed by the attorney general or the president.

In the post-9/11 era, the office has played a crucial role in providing legal cover to jittery bureaucrats fearful that officials in the White House, Defense and State Departments or the C.I.A. might be prosecuted for their actions in the war on terror. The Justice Department, after all, is the branch of government responsible for prosecutions, and its own prosecutors — as well as independent counsels — would be hard pressed to prosecute someone who had relied on the department's own opinions in good faith. For this reason, the office has two important powers: the power to put a brake on aggressive presidential action by saying no and, conversely, the power to dispense what Goldsmith calls "free get-out-of jail cards" by saying yes. Its opinions, he writes in his book, are the equivalent of "an advance pardon" for actions taken at the fuzzy edges of criminal laws.

In the Bush administration, however, the most important legal-policy decisions in the war on terror before Goldsmith's arrival were made not by the Office of Legal Counsel but by a self-styled "war council." This group met periodically in Gonzales's office at the White House or Haynes's office at the Pentagon. The members included Gonzales, Addington, Haynes and Yoo. These men shared a belief that the biggest obstacle to a vigorous response to the 9/11 attacks was the set of domestic and international laws that arose in the 1970s to constrain the president's powers in response to the excesses of Watergate and

the Vietnam War. (The Foreign Intelligence Surveillance Act of 1978, for example, requires that executive officials get a warrant before wiretapping suspected enemies in the United States.) The head of the Office of Legal Counsel in the first years of the Bush administration, Jay Bybee, had little experience with national-security issues, and he delegated responsibility for that subject matter to Yoo, giving him the authority to draft opinions that were binding on the entire executive branch.

Yoo was a "godsend" to a White House nervous about war-crimes prosecutions, Goldsmith writes in his book, because his opinions reassured the White House that no official who relied on them could be prosecuted after the fact. But Yoo's direct access to Gonzales angered his boss, Attorney General John Ashcroft, according to Goldsmith. (Neither Ashcroft nor Gonzales responded to requests for interviews for this article.) Ashcroft, Goldsmith says, felt that Gonzales and the war council were usurping legal-policy decisions that were properly entrusted to the attorney general, such as the creation of military commissions, which Gonzales supported and Ashcroft never liked.

The matter came to a head in the fall of 2003, when Bybee left the Office of Legal Counsel and Gonzales suggested Yoo as a candidate to lead it. Ashcroft rejected the suggestion. Yoo then recommended his friend Goldsmith to the White House as a suitable alternative. Goldsmith interviewed with Ashcroft at the Justice Department and with Gonzales and Addington at the White House. In his interview with Addington and Gonzales, Goldsmith recalls talking about the dangers of international law and the importance of military commissions. He got the job.

Several hours after Goldsmith was sworn in, on Oct. 6, 2003, he recalls that he received a phone call from Gonzales: the White House needed to know as soon as possible whether the Fourth Geneva Convention, which describes protections that explicitly cover civilians in war zones like Iraq, also covered insurgents and terrorists. After several days of study, Goldsmith agreed with lawyers in several other federal agencies, who had concluded that the convention applied to all Iraqi civilians, including terrorists and insurgents. In a meeting with Ashcroft, Goldsmith explained his analysis, which Ashcroft accepted. Later, Goldsmith drove from the Justice Department to the White House for a meeting with Gonzales and Addington. Goldsmith remembers his

deputy Patrick Philbin turning to him in the car and saying: “They’re going to be really mad. They’re not going to understand our decision. They’ve never been told no.” (Philbin declined to discuss the conversation.)

In his book, Goldsmith describes Addington as the “biggest presence in the room — a large man with large glasses and an imposing salt-and-pepper beard” who was “known throughout the bureaucracy as the best-informed, savviest and most conservative lawyer in the administration, someone who spoke for and acted with the full backing of the powerful vice president, and someone who crushed bureaucratic opponents.” When Goldsmith presented his analysis of the Geneva Conventions at the White House, Addington, according to Goldsmith, became livid. “The president has already decided that terrorists do not receive Geneva Convention protections,” Addington replied angrily, according to Goldsmith. “You cannot question his decision.” (Addington declined to comment on this and other details concerning him in this article.)

Goldsmith then explained that he agreed with the president’s determination that detainees from Al Qaeda and the Taliban weren’t protected under the Third Geneva Convention, which concerns the treatment of prisoners of war, but that different protections were at issue with the Fourth Geneva Convention, which concerns civilians. Addington, Goldsmith says, was not persuaded. (Goldsmith told me that he has checked his recollections of this and other meetings with at least one other participant or with someone to whom he described the meetings soon after.)

Months later, when Goldsmith tried to question another presidential decision, Addington expressed his views even more pointedly. “If you rule that way,” Addington exclaimed in disgust, Goldsmith recalls, “the blood of the hundred thousand people who die in the next attack will be on *your* hands.”

The conflict over the Geneva Conventions was just the beginning. About six weeks after he started work, Goldsmith became aware that there might be what he calls “potentially problematic” opinions drafted by the Office of Legal Counsel. These were the “torture memos,” one of which was written in August 2002 and the other in March 2003. The August opinion defined torture as pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death.” Goldsmith

concluded that this opinion defined torture far too narrowly. He also had concerns about the March 2003 opinion, the contents of which remain classified but which dealt with the military interrogation of aliens held outside the United States.

Goldsmith told me that he objected to what he calls the "extremely broad and unnecessary analysis of the president's commander in chief power" in the memos. The August opinion, for example, boldly concluded that "any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander in Chief authority in the President." Goldsmith says he believed at the time, and still does, that "this extreme conclusion" would call into question the constitutionality of federal laws that limit interrogation, like the War Crimes Act of 1996, which prohibits grave breaches of the Geneva Conventions, and the Uniform Code of Military Justice, which prohibits cruelty and maltreatment. He also found the tone of both opinions "tendentious" rather than cautious and feared that they might be interpreted as an attempt to immunize government officials for genuinely bad acts.

Yoo has acknowledged drafting the August 2002 memo, which he says was the basis for the interrogation of Abu Zubaydah, a top Al Qaeda operative. Yoo also wrote and signed the March 2003 opinion. His friendship with Goldsmith made it especially awkward for Goldsmith to criticize the memos. "I was basically taking steps to fix the mistakes of a close friend, who I knew would be mad about it," Goldsmith told me. "We don't talk anymore, and that's one of the many sad things about my time in government."

In December 2003, Goldsmith decided that he had to withdraw the March opinion — that is, he had to tell administration officials that they could no longer rely on it. "But figuring out how to withdraw it was very tricky," he told me, "since withdrawal would frighten everyone who relied on the opinions in a very sensitive area." In the past, the Office of Legal Counsel had occasionally changed its legal positions between presidential administrations to reflect different legal philosophies, but Goldsmith could find no precedent for the office withdrawing an opinion drafted earlier by the same administration — especially on a matter of such importance. Goldsmith concluded that he could immediately tell the Defense Department to stop relying on the March opinion,

since he was confident that it was not needed to justify the 24 interrogation techniques the department was actually using, including two called “Fear Up Harsh” and “Pride and Ego Down,” which were designed to make subjects nervous without crossing the line into coercion. But the withdrawal of the August opinion was a much harder call. The August opinion provided the legal foundation for the C.I.A.’s interrogation program, Goldsmith says, which he considered much closer to the legal line. (He refused to discuss the details of the program.)

Goldsmith, however, says he didn’t have the time or resources to create a replacement opinion immediately. In his initial months on the job, his attention was focused on the more pressing matter of addressing legal issues surrounding the terrorist-surveillance program. In April 2004, however, Goldsmith’s priorities were reversed when the Abu Ghraib scandal broke. Then, in June of that year, Yoo’s August 2002 opinion was leaked to the media. “After the leak, there was a lot of pressure on me within the administration to stand by the opinion,” Goldsmith told me, “and the problem was that I had decided six months earlier that I couldn’t stand by the opinion.”

A week after the leak of Yoo’s August 2002 memo, Goldsmith withdrew the opinion. Goldsmith made the decision himself, in consultation with Philbin and Deputy Attorney General James B. Comey, both of whom, Goldsmith says, agreed it was the right thing to do. He then told Ashcroft, who was, Goldsmith writes, “unbelievably magnanimous: it had happened on his watch, and he could have overruled me, and he didn’t.” Goldsmith was concerned, however, that the White House might overrule him. So he made a strategic decision: on the same day that he withdrew the opinion, he submitted his resignation, effectively forcing the administration to choose between accepting his decision and letting him leave quietly, or rejecting it and turning his resignation into a big news story. “If the story had come out that the U.S. government decided to stick by the controversial opinions that led the head of the Office of Legal Counsel to resign, that would have looked bad,” Goldsmith told me. “The timing was designed to ensure that the decision stuck.”

Again, according to Goldsmith, Addington was furious. During his brief time in office, Goldsmith had withdrawn not only the two torture opinions but also others. (He refused to discuss the other opinions with me.) In the end, he

says, he had withdrawn more opinions than any of his predecessors. Shortly before he resigned, Goldsmith says, Addington confronted him in Gonzales's office, pulling out of his jacket pocket a 3-by-5 card that listed the withdrawn opinions. "Since you've withdrawn so many legal opinions that the president and others have been relying on," Addington said, according to Goldsmith, "we need you to ... let us know which [of the remaining] ones you still stand by." Goldsmith recalls that Gonzales, in his own farewell chat with him, said, "I guess those opinions really were as bad as you said."

Looking back, Goldsmith says, he criticizes but does not vilify Yoo, whom he believes wrote and defended the opinions in good faith. Praising Yoo's "knowledge, intelligence and energy," he writes in his book that "the poor quality of a handful of very important opinions is probably attributable to some combination of the fear that pervaded the executive branch, pressure from the White House and Yoo's unusually expansive and self-confident conception of presidential power."

I have known Yoo since we were in law school together as well, and I called him for a response. "I think Jack and I had a good-faith disagreement, but I think at some level this was elevating form over substance," he said. Yoo said that in writing the torture memo, he experienced no pressure from the White House, which he described as "hands off." Instead, he said, "there was an urgency to decide so that valuable intelligence could be acquired from Abu Zubaydah, before further attacks could occur." Yoo says it is his understanding that no policies or interrogation techniques changed as a result of the withdrawal of the torture memo, noting that all policies that were legal under the withdrawn opinions are also acknowledged as legal under the opinion that eventually replaced the withdrawn ones. (That opinion was issued in December 2004, six months after Goldsmith's resignation, and was signed by Daniel Levin, his acting successor as head of the Office of Legal Counsel.)

Yoo also rejects the criticism that his reasoning was unnecessarily broad, describing the criticism of his opinion as something that could have been made only with the benefit of hindsight. "You can claim it's too broad after the policy has been decided on, but I didn't have that luxury in the spring of 2002," he told me. "If you're providing the legal advice before they choose the policy, how could you know?"

Goldsmith puts the bulk of the responsibility for the excesses of the Office of Legal Counsel on the White House. “I probably had a hundred meetings with Gonzales, and there was only one time I was talking about a national-security issue when Addington wasn’t there,” Goldsmith told me. “My conflicts were all with Addington, who was a proxy for the vice president. They were very, very stressful.”

During his tenure at the Office of Legal Counsel, Goldsmith also clashed with Addington over the detention and trial of suspected terrorists. In January 2004, the Supreme Court agreed to review a lower-court decision approving the detention of Yaser Hamdi, an American citizen then being held as an enemy combatant. A group of administration lawyers including Goldsmith met with Gonzales and Addington in Gonzales’s office to discuss the implications of the case. “Why don’t we just go to Congress and get it to sign off on the whole detention program?” Goldsmith recalls asking, reasoning that the Supreme Court would be less likely to strike down a detention program in wartime if Congress had explicitly supported it. According to Goldsmith, Addington shot down the idea.

Not long before Goldsmith left, the Supreme Court approved in June 2004, in the Hamdi case, the detention power itself but put some modest restrictions on the administration’s ability to detain citizens without trial. Afterward, Gonzales, Addington, Goldsmith and others, including the deputy solicitor general, Paul Clement, met again, Goldsmith recalls, and he and Clement again proposed going to Congress to put the administration’s legal strategy on a more sound footing. Once again, Goldsmith told me, the advice was ignored, and the White House continued to operate as if it assumed it could avoid a strong rebuke from the Supreme Court.

That rebuke finally arrived, however, last year in the Hamdan case, when the Supreme Court rejected the administration’s claim that it could try suspected terrorists in military commissions created without Congressional approval. In a further blow to the administration, the court held that the legal protections of “common article 3” of the Geneva Conventions, which contains minimal protections for detainees in wartime, also applied in the war against Al Qaeda. Goldsmith says he believes this ruling was “legally erroneous” but “hugely consequential.” It provided detainees at Guantánamo with more rights

than the administration had ever acknowledged, and it implied that the War Crimes Act might be used to prosecute administration officials for their treatment of detainees.

In debates over the detention of suspected terrorists, Goldsmith says he was struck by how Addington's efforts to expand presidential power ultimately weakened it. In September 2006, two months before the midterm elections, Bush eventually did ask Congress to approve his military commissions, and Congress promptly passed a law that gave him everything he asked for, authorizing many aspects of the military commissions that the Supreme Court had struck down. Although Bush had won the battle, Goldsmith sees the refusal to go to Congress earlier as the cause of an unnecessary Supreme Court defeat. "I'm not a civil libertarian, and what I did wasn't driven by concerns about civil liberties per se," he told me. "It was a disagreement about means, not ends, driven by a desire to make sure that the administration's counterterrorism policies had a firm legal foundation."

In Goldsmith's estimation, the unnecessary unilateralism of the Bush administration reached its apex in the controversy over wiretapping and secret surveillance. Goldsmith says he did not originally intend to mention the surveillance controversy in his book. But he says he was infuriated, soon before finishing his manuscript, to be handed a subpoena in Cambridge by F.B.I. agents ordering him to testify in a criminal investigation into the leaks that resulted in stories by James Risen and Eric Lichtblau in The New York Times about the National Security Agency's warrentless wiretapping. After having a public conversation with the F.B.I. in the middle of Harvard Square about aspects of the terrorist-surveillance program, Goldsmith concluded he could discuss the same topics in his book.

Goldsmith emphasizes that he was not opposed to investigating the leak, which he agreed with President Bush did "great harm to the nation." In addition, he shared the White House's concern that the Foreign Intelligence Surveillance Act might prevent wiretaps on international calls involving terrorists. But Goldsmith deplored the way the White House tried to fix the problem, which was highly contemptuous of Congress and the courts. "We're one bomb away from getting rid of that obnoxious [FISA] court," Goldsmith recalls Addington telling him in February 2004.

In his book, Goldsmith claims that Addington and other top officials treated the Foreign Intelligence Surveillance Act the same way they handled other laws they objected to: “They blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations,” he writes. Goldsmith’s first experienced this extraordinary concealment, or “strict compartmentalization,” in late 2003 when, he recalls, Addington angrily denied a request by the N.S.A.’s inspector general to see a copy of the Office of Legal Counsel’s legal analysis supporting the secret surveillance program. “Before I arrived in O.L.C., not even N.S.A. lawyers were allowed to see the Justice Department’s legal analysis of what N.S.A. was doing,” Goldsmith writes.

Goldsmith also witnessed perhaps the most well-known confrontation over the administration’s aggressive tactics: the scene at Ashcroft’s hospital bed on March 10, 2004, when Gonzales and Andrew Card, the White House chief of staff, visited the hospital to demand that the ailing Ashcroft approve, over Goldsmith and Comey’s objections, a secret program that was about to expire. (Goldsmith refuses to identify the program, but Robert S. Mueller III, the F.B.I. director, has publicly indicated it was the terrorist surveillance program.) As he recalled it to me, Goldsmith received a call in the evening from his deputy, Philbin, telling him to go to the George Washington University Hospital immediately, since Gonzales and Card were on the way there. Goldsmith raced to the hospital, double-parked outside and walked into a dark room. Ashcroft lay with a bright light shining on him and tubes and wires coming out of his body.

Suddenly, Gonzales and Card came in the room and announced that they were there in connection with the classified program. “Ashcroft, who looked like he was near death, sort of puffed up his chest,” Goldsmith recalls. “All of a sudden, energy and color came into his face, and he said that he didn’t appreciate them coming to visit him under those circumstances, that he had concerns about the matter they were asking about and that, in any event, he wasn’t the attorney general at the moment; Jim Comey was. He actually gave a two-minute speech, and I was sure at the end of it he was going to die. It was the most amazing scene I’ve ever witnessed.”

After a bit of silence, Goldsmith told me, Gonzales thanked Ashcroft, and

he and Card walked out of the room. “At that moment,” Goldsmith recalled, “Mrs. Ashcroft, who obviously couldn’t believe what she saw happening to her sick husband, looked at Gonzales and Card as they walked out of the room and stuck her tongue out at them. She had no idea what we were discussing, but this sweet-looking woman sticking out her tongue was the ultimate expression of disapproval. It captured the feeling in the room perfectly.”

Goldsmith, Comey, Mueller and other Justice Department officials were prepared to resign en masse if the White House implemented the program over their objections. Two days later, Comey had a conversation at the White House with Bush in which the president told him to do whatever was necessary to make the program legal. And in the end, the entire controversy was arguably unnecessary since the program was eventually approved by Congress and brought, at least partially, under the supervision of the FISA Court, as it could have been from the beginning. “I was sure the government was going to melt down,” Goldsmith told me. “No one anticipated they were going to reverse themselves.”

The heroes of Goldsmith’s book — his historical models of presidential leadership in wartime — are Presidents Lincoln and Franklin D. Roosevelt. Both of them, as Arthur Schlesinger noted in his essay “War and the Constitution,” “were lawyers who, while duly respecting their profession, regarded law as secondary to political leadership.” In Goldsmith’s view, an indifference to the political process has ultimately made Bush a less effective wartime leader than his greatest predecessors. Surprisingly, Bush, who is not a lawyer, allowed far more legalistic positions in the war on terror to be adopted in his name, without bothering to try to persuade Congress and the public that his positions were correct. “I don’t know if President Bush understood how extreme some of the arguments were about executive power that some people in his administration were making,” Goldsmithtold me. “It’s hard to know how he would know.”

The Bush administration’s legalistic “go-it-alone approach,” Goldsmith suggests, is the antithesis of Lincoln and Roosevelt’s willingness to collaborate with Congress. Bush, he argues, ignored the truism that presidential power is the power to persuade. “The Bush administration has operated on an entirely different concept of power that relies on minimal deliberation, unilateral action

and legalistic defense," Goldsmith concludes in his book. "This approach largely eschews politics: the needto explain, to justify, to convince, to get people on board, to compromise."

Goldsmith says he remains convinced of the seriousness of the terrorist threat and the need to take aggressive action to combat it, but he believes, quoting his conservative Harvard Law colleague Charles Fried, that the Bush administration "badlyoverplayed a winning hand." In retrospect, Goldsmith told me, Bush "couldhave achieved all that he wanted to achieve, and put it on a firmer foundation,if he had been willing to reach out to other institutions of government." Instead,Goldsmith said, he weakened the presidency he was so determined to strengthen. "Idon't think any president in the near future can have the same attitudetoward executive power, because the other institutions of government won'tallow it," he said softly. "The Bush administrationhas borrowed its power against future presidents."

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