points were in discarding the same critical Marxist approach when writing about Soviet policies in light of international law.

Some would take such a reading of Tunkin as belittling the role of the patriarch of the Soviet doctrine of international law, while others may see it as putting him on par with the greatest international lawyers of the twentieth century. As I noted, Tunkin's achievements were due to his talent, hard work, self-discipline, and luck. Yet, in his career, he also faced and had to struggle with significant disadvantages and constraints, many dictated by the environment—a closed totalitarian society—within which he was brought up, lived, and worked. In a way, he certainly understood his situation, and, thanks to the positive features of his character, he was even able to loosen some of these constraints. He traveled abroad more than most Soviet academics, combined his academic interests with the practice of international law and diplomacy, and intensively communicated with the brightest and the best in his field. Had he not felt the constraints imposed by the Soviet realities, he would not have so enthusiastically welcomed Gorbachev's policies of openness. But Tunkin, like all of us, was formed by the time and space in which he lived and worked. He triumphed as one of the best, and as the best in his own field, within the confines of the system. His tragedy, in my opinion, was that he could not break free. But that is why he survived; many did not.

Butler and Tunkin's son Vladimir have put immense effort into the book. Vladimir's recollections of his father add much to the understanding of the man and his time, and Butler's knowledge of international law and of most of those persons with whom Tunkin worked and with whom he met during his many trips abroad helps complete the picture. In his translation of Tunkin's diary, Butler has used a more or less word-for-word translation from Russian to English. That style may feel a bit strange for those who do not read Russian. At the same time, this approach more authentically conveys the spirit of the Russian language as well as the peculiarities of the time and space. Ultimately, the publication of Tunkin's diary, together with his Hague lectures, is an important contribution to the history of international law during the Cold War period.

REIN MÜLLERSON
Tallinn University (Estonia)

Power and Constraint: The Accountable Presidency After 9/11. By Jack Goldsmith. New York, London: W.W. Norton & Company, 2012. Pp. xvi, 311. Index. $26.95.

In the wake of 9/11, some see the executive branch as out of control—spying on U.S. citizens, detaining suspected terrorists indefinitely, subjecting detainees to harsh interrogation techniques, even on occasion killing suspected terrorists through the use of drones—all behind a wall of secrecy that precludes scrutiny by the public or the courts.[1] As is his wont, Jack Goldsmith, the Henry L. Shattuck Professor at Harvard Law School and a former Bush administration official, provides a revisionist rebuttal to the commonly held view that "we are living in an era of unrestrained presidential power" (p. 252). In its place, Goldsmith presents a "relatively sanguine story" (p. 248), arguing that the last decade has produced a presidential "synopticon" (p. 207) of unprecedented transparency, in which the president is "deeply constrained by law and politics" (p. 48).

Like all of Goldsmith's work, *Power and Constraint* is a powerful challenge to conventional thinking. It is brilliantly argued and often persuasive. But just as the conventional critique of the terror presidency goes too far in sounding "the death knell for the separation of powers" (p. x), *Power and Constraint* swings too far the other way in its claims about presidential accountability. As usual, the truth lies somewhere in between.

The story that Goldsmith tells is one of action and reaction, thesis and antithesis, producing a new equilibrium or synthesis. Rather than acquiescing in the Bush administration's "aggressive executive unilateralism" (p. 37), Congress and the

[1] The view that the president is unconstrained is widely shared by critics and supporters of presidential power alike. *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010); ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011).

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courts—aided by inspectors general, military and national security lawyers, the press, and human rights attorneys representing detainees at Guantanamo (GTMO)—"pushed back against the Commander in Chief like never before in our nation's history" (p. 38). The result was a rethinking, recalibration, and, in some cases, revision of the Bush administration's counterterrorism policies. For example:

- An investigation by the CIA's Office of Inspector General led to a discontinuation after 2003 of the much-criticized interrogation technique known as waterboarding.
- GTMO detainees were allowed to file habeas petitions in U.S. courts as a result of the Supreme Court's 2004 decision in *Rasul*,[2] and 2008 decision in *Boumediene*.[3]
- Interrogation techniques were limited first by Congress's adoption of the Detainee Treatment Act of 2005, which banned cruel, inhuman, and degrading treatment;[4] and later by the Supreme Court's decision in *Hamdan*,[5] which ruled that Common Article 3 of the Geneva Conventions applies to the conflict with Al Qaeda.
- Congress "prescribed in detail" the procedures for military commissions (which were "much more protective to defendants than the President's commission scheme"), through the Military Commissions Act of 2006 (p. 187).[6]

Power and Constraint analyzes the system of "distributed checks and balances" (p. 49) that led to these constraints and suggests a new way of thinking about who is doing the checks and balances. Goldsmith goes beyond the traditional focus on interactions among the three branches of the federal government, arguing that many of the checks on presidential power in the aftermath of 9/11 did not come from Congress or the courts. Instead, executive power was constrained by "giant distributed networks of lawyers, investigators, and auditors, both inside and outside the executive branch" (pp. xi–xii): from within the executive branch, by military and national security lawyers and inspectors general; from without, by the press and the human rights bar.

The end result of the back and forth between the Bush administration and its critics was a "new normal" (p. 3) that continued many of the Bush administration's policies but with some recalibrations. Goldsmith begins his book by describing the continuities between the Bush and Obama administrations' policies on military detention, military commissions, habeas corpus, targeted killings, rendition, surveillance, and secrecy. These continuities count as Exhibit A for Goldsmith's conclusion about the emergence of a "new normal."

A reader picking up *Power and Constraint* might suppose that "power" and "constraint" are intended as opposites. But one of the most interesting features of the book is that it sees power and constraint as symbiotically related. In Goldsmith's view, constraints enhance power by endowing it with legitimacy. The Supreme Court's decisions on habeas, for example, have not simply constrained the presidency, they "have also empowered [it]" (p. 194). By putting into place procedural safeguards, the Court's decisions institutionalized and legitimated the executive's substantive policy of detaining suspected terrorists without charge. Similarly, "the institution of inspector general has empowered the presidency by constraining it" (p. 108), thus enhancing its legitimacy.

In Goldsmith's observation, "embedding . . . presidential prerogatives in the rule of law is an enormous blessing" (p. 196). Through the activities of Congress, the courts, military lawyers, executive branch lawyers, and other actors, most of the government's counterterrorism policies were "rethought, changed, and largely legitimated" (p. 39). For example, with respect to indefinite detention without trial and the use of military commissions, "there is no doubt now," Goldsmith claims, "that these practices are lawful and legitimate within the American constitutional system" (p. 194), and reflect "public sentiment

[2] Rasul v. Bush, 542 U.S. 466 (2004).

[3] Boumediene v. Bush, 553 U.S. 723 (2008).

[4] Public Law 109-148, Title X (Dec. 30, 2005), codified at 42 U.S.C. §2000dd (2012).

[5] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[6] Public Law 109-366 (Oct. 17, 2006), codified at 10 U.S.C. §948a *et seq.* (2012).

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about the right balance between safety and security" (p. 48).

In reaching this conclusion, Goldsmith assumes that the rule of law is much more consequential, and has much more constraining force, than he posited in his earlier book, *The Limits of International Law*, coauthored with Eric A. Posner. The earlier work argued that international legal scholars "exaggerate [the] power and significance" of international law; and that, to the extent that law has any role to play in international relations, it operates not as a constraint on states or as a source of legitimacy, but rather as a means for states to pursue their self-interest by solving cooperation and coordination games.[7] In *Power and Constraint*, by contrast, Goldsmith sees law as playing a central role in constraining executive power and thereby legitimating it.

Ultimately, the president's counterterrorism policies are on a stronger footing now than at the beginning of the Bush administration, Goldsmith argues, because of the legal limits on presidential authority:

> [The new normal reflects] a general consensus . . . about what tools the President [can] use in fighting the threat [of terrorism], including military detention. . . , refined military commissions, aggressive surveillance with accountability strings attached, habeas corpus for GTMO but not beyond, narrowed interrogation policies, aggressive targeted killing, and the like. . . . [A]mong politicians, judges, and most of the American people, there is agreement on the legitimacy of and basic constraints on these powers. (P. 210)

The final chapter of *Power and Constraint* provides a brief but very interesting assessment of the new normal. On the whole, the assessment is positive, emphasizing the system's "ability to self-correct" (p. xv). Although increased transparency, legalization, and accountability can have a detrimental effect on national security, Goldsmith concludes that "press coverage of secret executive branch action serves a vital function in American democracy" (p. 222), that human rights lawsuits are "healthy for the presidency and for national security" (p. 241), and that "the strategic use of law during wartime resulted in better planning, better policies, [and] self-corrections" (p. 232). Indeed, Goldsmith maintains, if the father of the Constitution, James Madison, were to survey this "harmonious system of mutual frustration," he "would smile" (p. 243).

I found myself in agreement with much of Goldsmith's assessment, subject to two significant caveats. First, his conclusion about the accountable presidency is not fully convincing, because he evaluates accountability almost exclusively in prospective rather than retrospective terms. For him, "the continuing debates about the past are less important than . . . correcting systemic shortfalls" for the future so that "abuses don't recur" (p. 149). Thus, when Goldsmith speaks of accountability, what he means is not an executive branch that can be held responsible for past misconduct, but rather an executive branch that is subject to "democratic (and judicial) control" and to "strong legal and constitutional constraints" (p. xvi). He argues that "accountability includes much more than criminal punishment and does not turn only on individual mistakes or wrongdoing" (p. 237). Yes, of course. But the fact that "criminal trials are but one form of accountability" does not imply that "an insistence on criminal trials is misplaced" (p. 235). The fact that nobody has been prosecuted for torture, despite the acknowledged use of waterboarding as an interrogation tool, suggests very significant limits to the executive branch's accountability.

In keeping with Goldsmith's focus on the future rather than the past, *Power and Constraint* also does not consider the president's accountability to the victims of abuse. Indeed, Goldsmith evinces much greater concern

[7] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 225 (2005).

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about the effects on the careers and families of executive branch officials caused by "brutal public criticism" (p. 235), "demoralizing" (p. 111) and "traumatic, expensive, and possibly career-ruining investigations" (p. 120), and "stressful" (p. 143) after-action reviews, than he evinces about the effects of torture and indefinite detention on innocent people swept up in the war on terrorism.

In this connection, the contrast is telling between the Canadian and U.S. responses to the case of Maher Arar, a Canadian citizen suspected of having ties to Al Qaeda, who was forcibly sent by the United States to Syria where he was tortured. After a two-year investigation, a Canadian commission found that there was no evidence linking Arar to Al Qaeda or any other terrorist group, and, in 2007, Canada acknowledged its accountability to Arar for the assistance it gave in rendering him to Syria, issued a formal apology, and provided millions of dollars in compensation. The United States, by contrast, opposed Arar's lawsuit and succeeded in having it quashed on state secrets grounds.[8] Some might well conclude that Arar's ordeal suggests an executive accountability deficit, but the case does not even get a mention in *Power and Constraint*. For Goldsmith, the test of presidential accountability is not whether the executive branch must answer to persons it has wrongfully treated, like Arar. Rather, the test of accountability is "the ability of our institutions to redirect presidential wartime initiatives that do not garner the approval of the other institutions of government and of the people" (p. 209). It is the capacity for "self-correction" (*id.*).

Second, in focusing on the distributed system of checks and balances, the book glosses over substantive reasons for the pushback against the Bush administration's initial policies. According to Goldsmith, many of the Bush administration's policies were grounded in well-established precedents regarding presidential wartime powers; for example, the decision to use military commissions to try enemy combatants. As he claims, "Bush [did] things that past Commanders in Chief had done in wars with little if any congressional or judicial interference—surveil the enemy, target him, detain him, interrogate him, and try him before a military commission" (p. 37).

So why did the Bush administration's policies provoke such a different reaction than had previous assertions of presidential powers? Goldsmith offers a number of explanations. First, new technologies helped "defeat governmental secrecy" (p. 75) by providing "untold new sources of information and analysis about the government's war operations" (p. 79). As a result, "accountability journalism" had "hundreds of astounding . . . successes since 9/11 in disclosing deep governmental secrets" (p. 56). Second, new players, particularly inspectors general and military lawyers, emerged within the executive branch to act as checks on presidential power. Third, laws adopted before 9/11, such as the Freedom of Information Act,[9] first enacted in 1966, helped create a preexisting "ecology of transparency" (p. 118)[10] that was beneficial to those opposing the expansion of secret executive powers. Finally, the war on terrorism was unlike any previous war in its lack of any temporal or spatial boundaries. As Goldsmith notes, old precedents were "troubling" when applied in "a novel and seemingly endless war" (p. 167). And as the "'war on terrorism'

[8] For a detailed discussion of the Arar case, see KURT EICHENWALD, 500 DAYS: SECRETS AND LIES IN THE TERROR WARS (2012).

[9] 5 U.S.C. §552 (2012).

[10] The phrase is attributed to Seth Kreimer. *See* Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U.PA. J. CONST. L.1011 (2008) *at* https://www.law.upenn.edu/journals/conlaw/articles/volume10/issue5/Kreimer10U.Pa.J.Const.L.1011%282008%29.pdf.

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[now put in quotes by Goldsmith] dragged on, . . . the mood of the country . . . chang[ed]" (p. 66).

But while I agree that these factors were all important, perhaps the decisive reason for the extraordinary pushback against the Bush administration was the extraordinary way that it prosecuted the war on terrorism. To the extent that Goldsmith discusses what was unusual about the Bush administration's approach, he focuses on its unilateralism and "expansive rhetoric" (p. 40), and draws lessons of a procedural character. The president needs to work with the other branches of government to build legitimacy, he concludes. If only the Bush administration had consulted more with Congress, if only it had been less "oblivious to . . . trust concerns" (p. 167), if only it had not "invited a reputation as a lawless cowboy" (p. 40), then perhaps its policies would have survived unscathed.

In contrast to Goldsmith, I see the bigger problems with the Bush administration's policies as substantive, not procedural. What provoked military lawyers to file an amicus brief in *Rasul* describing the "administration's claims about GTMO as a 'monarchical regime'" (p. 175), and led conservative senators like Lindsey Graham and John McCain to support legislation that constrained the executive branch, was not the unilateral nature of the policies but rather their substance—for example, the nonapplication of the Geneva Conventions to the war in Afghanistan, and the permissibility of enhanced interrogation techniques such as waterboarding, which McCain condemned as "all torture" following a briefing (p. 120).

Goldsmith's account suggests that the Bush administration's policies were not so different from those of its predecessors; hence, he views the extraordinary pushback by Congress and the courts as showing the emergence of a new paradigm of an accountable presidency. But is it any wonder, or cause for celebration, that an administration that "furiously opposed" a bill that banned the CIA from committing "cruel, inhuman, or degrading treatment or punishment" (p. 119) would lose the confidence of Congress and the courts? Goldsmith notes that the *Hamdan* case meant that "it was *now* a crime for any CIA official to commit 'outrages upon personal dignity, in particular humiliating and degrading treatment'" (p. 120, emphasis added), implying that previously these practices had been seen as permissible. What is remarkable is not that Congress and the courts pushed back against such practices, but that a liberal Western democracy like the United States would assert a privilege to engage in them in the first place.

Does Goldsmith's story show that the system works? Although at times this seems to be the subtext of *Power and Constraint*, he recognizes that the mere fact that people agree about a set of policies does not mean that the policies are morally justified or politically wise. Agreement can establish sociological legitimacy but it does not, in itself, imply normative legitimacy. After all, there was also broad agreement about the internment of Japanese-Americans during World War II, and about the policy of "separate but equal" to permit racial segregation in public facilities. But consensus did not make those policies right. Even with respect to sociological legitimacy, it is unclear whether a stable equilibrium has emerged, as Goldsmith acknowledges in his afterword. Certainly, the recent controversies over drone strikes suggest a continuing lack of consensus about the appropriate extent of presidential powers.

But regardless of what the future holds, Goldsmith has performed a valuable service in describing how we got to where we are today. His account adds detail and nuance to standard analyses of the various checks on presidential authority, and reminds us of the

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power of law and legitimacy within, if not among, nations.

DANIEL BODANSKY
Sandra Day O'Connor College of Law
Arizona State University

Are Women Human? And Other International Dialogues. By Catharine A. MacKinnon. Cambridge MA.: Harvard University Press, 2006. Pp. viii, 405. Index. $24.50, £18.95, €22.10.

This collection brings together writings by Catharine A. MacKinnon over the twenty years between 1985 and 2006. MacKinnon, now the Elizabeth A. Long Professor of Law at the University of Michigan Law School, has been a central figure in feminist scholarship in law since the 1970s. Unlike many academics, MacKinnon has always combined her writing with activism. She is perhaps best known for her work with Andrea Dworkin on developing municipal ordinances in the United States that prohibited pornography as a form of sex discrimination and provided civil remedies against publishers of pornography. MacKinnon's writing also led to the recognition of sexual harassment as a matter of sex discrimination,[1] a development that has influenced the law in many countries.

Feminist analysis in law owes a huge debt to Catharine MacKinnon. The clarity of her vision, her unflagging energy, and her charismatic presence have given feminist legal scholarship credibility and momentum. I recall vividly the first time that I encountered MacKinnon's writings in the 1980s and their illumination of the legal community that I inhabited. Her work has provided a potent way of looking at the world through a feminist lens, and a vocabulary to formulate its injustices.

This book charts MacKinnon's journey from the national to the international spheres. As she recounts in the preface, her involvement with the Canadian Women's Legal Education and Action Fund in the mid-1980s to work on cases under the newly adopted Canadian Charter of Rights and Freedoms prompted an interest in comparative legal perspectives. In 1991, during the violent breakup of Yugoslavia, MacKinnon began to work with Bosnian women who had been raped by Serbian forces, and she brought various court cases on their behalf seeking reparation for the violence that they had suffered. More recently, MacKinnon has been the special adviser on gender to the prosecutor of the International Criminal Court.

The book reflects a tumultuous period in international law and politics. Its scope stretches from the end of the Cold War in 1989 and the revival of the UN Security Council, through the establishment of two ad hoc international criminal tribunals (for the former Yugoslavia in 1993 and for Rwanda in 1994), to the terrorist attacks of September 11, 2001, the entry into force of the Rome Statute for the International Criminal Court in 2002, and the invasion of Iraq in 2003. The book also covers major human rights innovations at the national level, such as the introduction and development of the 1982 Canadian Charter of Rights and Freedoms and the 1996 South African Constitution. Various women-specific instruments were adopted during this period. These include the Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (entry into force 2000), the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (entry into force 1995), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (entry into force 2005). The scope of the book also coincides with the era of the Nairobi (1985) and Beijing (1995) World Conferences on Women. This period was also one in which the feminist analysis of international law and institutions developed, inspired in no small measure by MacKinnon's scholarship.

Are Women Human? contains twenty articles and speeches grouped into four sections entitled: "Theory and Reality," "Struggles Within States," "Through the Bosnian Lens," and "On the Cutting Edge." In such a collection, there is inevitably some overlap in the writing, but the extensive footnoting and the index greatly assist the reader. The

[1] CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

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