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**BILL MOYERS JOURNAL**

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## TRANSCRIPT:

September 7, 2007

Bill Moyers talks with Jack Goldsmith

**BILL MOYERS:** Now meet a man who knows a great deal about the difficult tradeoffs between protecting our privacy and defending our security in a time of terrorist threats. Jack Goldsmith had firsthand experience wrestling with the dilemma because his job as head of the Office of Legal Counsel at the Department of Justice was to advise President Bush on what he could and could not do legally. Considered one of the best and brightest conservative lawyers in the administration, a scholar from the University of Chicago, and legal advisor to the Defense Department, Jack Goldsmith was selected by the White House to help shape the legal framework for the government's response to terror.

He dealt with torture, surveillance, and how to detain and try enemy combatants. Sometimes he found himself at odds with powerful allies at the White House. He left in 2004 to teach at Harvard University. And now he's written this book *THE TERROR PRESIDENCY*. While I'm no lawyer, I found it a fascinating account of power politics at a time of war where necessity and law often collide. Welcome, Jack Goldsmith.

**JACK GOLDSMITH:** Thank you very much.

**BILL MOYERS:** I liked your book all the more because I served in government many years ago. And I know something about the pressures that are on people trying to make difficult decisions. So describe to me the mindset that you experienced and felt from others when you took over as director of the Office of Legal Counsel in 2003.

**JACK GOLDSMITH:** The defining atmosphere inside the administration when I was there was one of constant vigilance and constant fear that we were gonna have another attack. Every morning the president and his top advisors read these really horrifying, frightening threat reports.

**BILL MOYERS:** Yeah, the threat matrix, you call it.

**JACK GOLDSMITH:** The threat matrix, as I explain in the book, is basically a summary of every threat that's come into the government against the United States or its allies in the last 24 hours. And it's basically just a chart that lists the basic facts about each of the threats, their sources, their credibility, and the like. George Tenet basically said you read this stuff every morning and you're scared to death.

**BILL MOYERS:** He was the head of the CIA at the time you were there.

**JACK GOLDSMITH:** He was. And that's the way people felt. They're really frightened about another attack.

**BILL MOYERS:** So what does this do to you advise the president?



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**JACK GOLDSMITH:** Well, as a legal advisor, it really made my job especially difficult because often the president, when he wanted to do things to push right up to the edge of the law and not pass the law. But he wanted to go right up to the edge of the law. And it was my job, among others, to advise him about where those lines were.

And whenever I or others would advise him that there was a line that he couldn't cross, that was sometimes viewed as a constraint that might tie his hands in a way that got people killed, frankly. And so it was the tradeoff between trying to abide by the rule of law and trying to do everything possible to prevent another attack was often harrowing.

**BILL MOYERS:** What do you mean, he wants to go right up against the law? Can you give me an example of that? A practical example of that?

**JACK GOLDSMITH:** Well, one example potentially, I can't get into talking about potential interrogation techniques, but in the interrogation of terrorists the administration obviously wanted to know where the line was so that they could use what the president called as tough interrogation techniques to try and get information from the terrorist. George Tenet said that the interrogation program, he said in his memoirs that the interrogation program was by far the most important program we have in the government. That it had done more to save lives and to prevent attacks. And the job of the lawyers was to decide where the line should be drawn, the legal lines.

**BILL MOYERS:** I remember Gonzalez saying you wanna get information in a hurry from somebody you've captured because there may be an attack on the way. And if this guy knows about it, you wanna find out about it as soon as you can. So does that push the law?

**JACK GOLDSMITH:** When they were deciding about the interrogation opinions in the in the summer of 2002, they were sure that on the second anniversary-- the first anniversary of 9/11, that there were gonna be bodies in the streets.

That was the atmosphere under which they were operating. So when they were trying to figure out how far they could go in getting information from the high-level detainees that they had, they really felt like they had to go to the limits of the law because they felt like that those were the stakes. There would be bodies in the streets of Washington.

**BILL MOYERS:** So how does it affect you when you're wrestling with an opinion that you know may actually increase the pain inflicted on another human being?

**JACK GOLDSMITH:** Well, I wrestled with that problem-- pain could have been inflicted whether I said yes or whether I said no. I mean, sometimes-- and-- it was--

**BILL MOYERS:** That's true. But what does the law have to do-- what does your opinion have to do with that?

**JACK GOLDSMITH:** Well, because our opinions determine what, to some degree, what the limit to how far the government could go. And what that meant was that if we ever said, "No, you can't go that far"-- David Addington once said to me, he was the vice-president's counsel. And he once said to me when I said-- when I advised that I didn't think something they wanted to do was lawful, he once said to me, "If you rule that way, then you will have the blood of 100,000 people who die in the next attack on your hands."

Those were the stakes that we were considering. Now, obviously that meant that I did everything I could, bent over backwards, to try to find a lawful way for the president to do what he wanted. So that was the atmosphere in which we were making decisions every day.

**BILL MOYERS:** And yet at the same time, I was amazed to read in your book that they were also concerned. All the people you were dealing with, the people writing opinions, making the decisions, were also concerned with not being prosecuted later for what they did. They were very worried about future prosecution for acts they performed in making these decisions.

**JACK GOLDSMITH:** Right. This presidency and this war - is under a set of legal constraints, really criminal legal constraints, that no prior president in a war of this scope or these stakes has been subject to.

**BILL MOYERS:** Where do they come from?

**JACK GOLDSMITH:** The set of laws that have grown up since the 1970s in response to Watergate and the abuses of the '60s and '70s and the intelligence agencies. And these laws have been developing and they really haven't been pressed in wartime crisis before. We've also had during that same period a rise of legal culture that is more hostile to the executive branch, the rise of independent counsels, foreign prosecutors, and the like.

So as fearful as everyone was of another attack and not being able to prevent it, they were also, at the same time, fearful of crossing the line. And they were really fearful that some of these criminal laws are vague, uncertain. We were-- we're under enormous pressure to go right up to the line. How far can we push through the gray areas of the law? How is it gonna look in five years when someone looks at this? What if some prosecutor down the road decides that we went too far?

**BILL MOYERS:** One of the fascinating parts of your book is your confirmation that the vice-president's office, as I read it, is really the true source of power in this administration. And that the vice-president's counsel, David Addington is, whom you call the eyes, ears, and voice of the vice-president, became one of your chief antagonists.

**JACK GOLDSMITH:** Right. David was one of my chief antagonists. I wouldn't say that I think that the vice-president was really running the administration. I mean, the president didn't agree with the vice-president on everything. And obviously the vice-president had a lot of influence.

But the vice-president and the president basically shared the same view of executive power. And it was a view of executive power that the vice-president had held for 20 or 25 years since he served in the Ford administration. It's also true that his counsel, David Addington had the same view as the vice-president. And he was a very, very powerful articulator of those views.

**BILL MOYERS:** You come to an illuminating moment for me in the book when you realize that, quote, "these people in the White House think of power as the absence of constraint. They could do anything as long as no one pressed back."

**JACK GOLDSMITH:** They did view presidential power in terms of the absence of constraint. This is why they didn't go to Congress because-- in the early years, because they thought going to Congress, Congress may say no. Congress may not give us everything we want. The very act of going to Congress may imply that we don't have the power on our own. And so they viewed presidential power as operating with minimum of constraint. And that's the conception of power that I certainly came not to share. And I talk in the book about Franklin Roosevelt who faced many similar-

**BILL MOYERS:** And Abraham Lincoln.

**JACK GOLDSMITH:** And Abraham Lincoln. But Roosevelt in particular faced many similar-- analogous problems as-- President Bush has in the post-9/11 period. But Roosevelt understood in a way that was really profound, I think, how his power could be increased and enhanced and he could do more in wartime and in crisis if he got Congress on board. And he understood contrain the idea of take of trading constraints, small constraints on presidential power or oversight or at least deliberation and consent in exchange for more power.

**BILL MOYERS:** What I don't understand, Mr. Goldsmith, is that the Republicans, their party, Bush's, Cheney's party was in control of Congress. Why didn't the Republican president go to the Republican majority and say, "Here's what I want"?

**JACK GOLDSMITH:** It was a puzzle to me about why the administration didn't go to Congress. And the answer was it was David Addington would always ask two questions. And this really captured the view of-- this really captured why they didn't go to Congress. One was, "Do we have the power to do it on our own? Do we have -- do we think we have the legal authorities, are there precedents that allow us to do this?" And the answer was almost always yes. The second question is, "If we go to Congress and try to get this affirmative authorization from Congress, is there a chance that Congress is gonna say no or to constrain us a little bit?"

The answer to that question was yes. And, therefore, if we could possibly be constrained and the president couldn't so what he wanted to do and people might get killed. And because of that chain of logic which basically these powers the absence of

constraint-- they didn't go to Congress in the first four or five years.

**BILL MOYERS:** We won't ask for approval because we may not get it?

**JACK GOLDSMITH:** They don't ask for approval because they may not get it and then we're gonna be in a worst position in trying to protect Americans.

**BILL MOYERS:** There's a very moving section in your book when you talk about going to the prison in South Carolina, I believe, where the Muslim captive was being held. And you were allowed to look in. He doesn't see you but you see him. I mean, I felt some softening on your part--

**JACK GOLDSMITH:** Well, I don't know if it was a softening. It was my-- see, it was actually there were two prisoners. We visited Jose Padilla in Charleston, the Charleston brig. But it was actually Yelsir Hamdi, in----in the Norfolk-- brig who was an American citizen and enemy combatant.

**BILL MOYERS:** Hamdi.

**JACK GOLDSMITH:** And I wouldn't call it softening my position. But it was my-- it was actually my second week in Washington, and I was still working in the Defense Department. And I fully supported and the administration's authority to detain enemy combatants, including American citizens, without charge or trial, just as Franklin Roosevelt with hundreds of thousands of German and Italian soldiers in World War II. And I knew that we had the legal authorities to do this. But when I went to this dilapidated prison in a naval brig in Norfolk and we saw this young man in-- who was a foot soldier for the Taliban. And he was off in a wing by himself. And we saw him through a fuzzy black and white television in the corner of a room. And he was sitting in the corner of his isolated cell.

And he hadn't seen many people for a long time. And he was in a fetal position in his bed, sitting there. And I did have this moment where I said I know we have a legal authority to do that. But is this the right way-- to do this? And I used that story to start off a chapter about how-- the administration often mistook legal authorities for prudent exercises of power. . So I did have a soft moment, I guess you'd call it there-- but that was my reaction.

**BILL MOYERS:** You write that some of the opinions, the earlier opinions that you were called upon to examine again, you write that some of the opinions were deeply flawed, sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authority on behalf of the president. That's a pretty strong description.

**JACK GOLDSMITH:** It is a strong description. And-- that was my view of the matter. I was pretty astounded when I-- when I read them.

**BILL MOYERS:** What would-- what would the response be when you said, "Well, hey, wait a minute, this is not right"?

**JACK GOLDSMITH:** Well, it-- had different responses for different opinions and different issues. With regard to the interrogation opinions, I was able to-- there were two of them. One of them I was able to replace and fix without any controversy at all. The other one, later in my term right before I resigned, I withdrew without being able to put in a replacement opinion. And that caused more of a stir within the government.

**BILL MOYERS:** What was the stir?

**JACK GOLDSMITH:** Well--

**BILL MOYERS:** What did they wanna do you said you can't do?

**JACK GOLDSMITH:** Well, there wasn't anything they wanted to do necessarily I said that they can't do. But when the Abu Ghraib scandal broke and when these opinions that I had six months earlier concluded were flawed leaked out, I was under understandable pressure to stand by the opinion of my predecessor because-- many people in the government had relied on these opinions and had taken-- actions and reliance on them.

These programs had been vetted at the highest levels of the government and briefed to the Congress. And what I was basically doing was pulling out the legal foundation

for what had been going on our at least trying to fix it 'cause I thought it was flawed. So it was very disruptive because when the Justice Department says that an opinion we're relying on is flawed, that really, really makes people worried. The Central Intelligence Agency in particular has a history of-- being asked to do aggressive things for the country and then later, in a different political environment-- getting in trouble for it.

And they thought when they went to the Department of Justice and got these interrogation opinions that they were-- they had a golden shield, as one lawyer told me. And I was in the unfortunate position of having to withdraw and try to redo that golden shield. And I wasn't happy about it. I wasn't happy about the consequences. Did everything I could to do it - as calmly and with as little disruption as possible. But-- that's what happened.

**BILL MOYERS:** I wanna talk to you about the most amazing scene you ever witnessed. That's your term for what happened. You actually wound up at the hospital that night when Gonzalez, the White House counsel and the White House chief of staff, Andrew Card, came to the hospital to try to persuade Attorney General John Ashcroft to give his permission to some secret-- policy that was about to expire. Why was it the most amazing scene you ever witnessed?

**JACK GOLDSMITH:** Well, because I was there with Deputy Attorney General and Acting Attorney General Jim Comey. And he had-- made a ruling on the basis of my legal advice, which he agreed with. And they were there to seek reconsideration from Ashcroft, from Attorney General Ashcroft.

It was the most amazing scene I'd ever witnessed because, first of all, I couldn't believe-- he was obviously extremely ill. He'd had a serious operation the day before. He-- when we walked into the room, he had lost a lot of weight since I'd seen him last. He looked ashen. He looked terrible. He had the tubes and wires coming out of his body.

And it was the most amazing scene because in this what seemed like near-death state to me and they came in and made their request, he kind of, in an astonishing way, came to life, sort of lifted himself off the bed a bit, color came into his face. And in an amazingly clear and accurate two-minute speech, he said, "These are the Justice Department's concerns. Share these concerns. I don't appreciate you visiting me here. I'm not the attorney general in any event. Jim Comey is." And then he collapsed back into his bed. And--

**BILL MOYERS:** Did you think he was gonna die?

**JACK GOLDSMITH:** I did. That was my thought. I thought that-- that this-- it seems like that's it. He just expired himself. He didn't, thank god. But-- it was an extraordinary scene.

**BILL MOYERS:** What did Mrs. Ashcroft do?

**JACK GOLDSMITH:** Mrs. Ashcroft, who was sitting behind her husband the entire time watching this scene play out with her obviously extremely critically ill husband, and she was deeply distressed. It was apparent from her face about what was going on. And she-- I don't know her well, but she's a very sweet woman. And as they turned to walk out of the room, she basically just stuck her tongue out at them in anger and disappointment or disapproval.

**BILL MOYERS:** As you look back on it, what do you-- what does it represent to you?

**JACK GOLDSMITH:** To me the hospital scene represents the central conflict that I talk about in the book. They were there because they needed to get Justice Department to sign off because they were talking about laws that they were afraid without just-- they were-- the fear of law part of what dominated-- terrorist-related decision making. They were also there because they worried terribly that the Justice Department's legal advice, if accepted, would result in tying the president's hands in a way that would-- cause another attack.

And this is at a time when two other things were happening. So they were under real pressure. One, as George Tenet wrote in his memoirs, it was a time when the threats from terrorists were greater than at any point since 9/11. It was also at a time when the 9/11 Commission was meeting in public hearings and berating the administration every day for not finding the needle in a haystack in 9/11 - and pounding on them to be more aggressive, less risk averse, more proactive. So those are the pressures that they-- the conflicting pressures that led them to this extraordinary scene in the

hospital room.

**BILL MOYERS:** And they were never resolved those pressures. They still--

**BILL MOYERS:** --exist today.

**JACK GOLDSMITH:** I'm quite confident they haven't diminished one bit since I left.

**BILL MOYERS:** Because right after 9/11 the president said we're in a national emergency. And nobody's ever changed that definition. Are we still in a national--

**JACK GOLDSMITH:** We're still technically in a national emergency. The emergency he declared just after 9/11 is still in place and has been renewed every year since 9/11. So technically we're still in a state of national emergency.

**BILL MOYERS:** Doesn't this mean that president can continue to claim and the president after him continue to claim extraordinary powers as commander-in-chief?

**JACK GOLDSMITH:** Well, we're not only in a national emergency but Congress and the Supreme Court has agreed that we're in war. There's a lot of debate about whether we should call this the war on terrorism. But whatever you think about the rhetoric and the label, the legal authorities for war are in place. Congress and the courts have made that clear.

And for the foreseeable future, that means, I believe, that the president's war powers will be triggered. And the president has heightened powers and authorities during war. And that means for the foreseeable future, yes, that the president will have extraordinary authorities.

**BILL MOYERS:** The book ends with- a plaintive-- lament about the growth of presidential powers. It's not about Bush, per se, but about the growth of presidential powers. What concerns you as a lawyer and a citizen about this expanding definition of the powers of the president?

**JACK GOLDSMITH:** Well, if I could just qualify what you said first. I'm not sure I would characterize it as a lament. At least I would say that I came away from government understanding having a full-- appreciation for why it's extraordinarily important to have a powerful presidency and a presidency that can move quickly and aggressively to check the threat.

I also came away, and this perhaps is the lament part, thinking and understanding that the executive branch is a very dangerous place in the sense that the president can control the military and the intelligence authorities. He can interpret the law for himself. And he can act in secret. And any institution and all those things are necessary for him to do the things to keep us safe. But they're also-- the qualities of the presidency that, for hundreds of years, have led people to worry about presidential abuse in wartime. So-- those twin — the necessity for the presidency is more than ever. And the dangers of the presidency are more than ever.

**BILL MOYERS:** Jack Goldsmith, I hope a lot of people read THE TERROR PRESIDENCY. Thank you for joining me on THE JOURNAL.

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