California Law Review

Volume 100 | Issue 2 Article 2

4-30-2012

# John Yoo's War Powers: The Law Review and the World

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# John Yoo's *War Powers*: The Law Review and the World

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*John Yoo's 1996* The Continuation of Politics by Other Means: The Original Understanding of War Powers *is surely among the most consequential articles ever to appear in the* California Law Review. *Five years after its publication, Yoo became the principal theorist of the Bush administration's War on Terrorism policies. His expansive theory of presidential primacy became the legal basis for the most controversial of President Bush's policies, including the use of torture (or "enhanced interrogation"), indefinite detention without charge, warrantless wiretapping within the United States, and the claim that neither constitutional protections nor other provisions of domestic and international law constrain treatment of suspected terrorists.*

*Yet the methodology and conclusions of* War Powers *have been subjected to comprehensive and devastating criticism, addressing issues ranging from selective use of evidence to fundamentally misunderstanding the Framers' rejection of monarchical prerogatives in constructing the executive power. Yoo's theory is based on a presumption that the Framers' design was to replicate the British government's allocation of powers between Parliament and the King. To reach the conclusion that the President has primacy in war, subject only to Congress's spending and impeachment power, Yoo ignores the many war powers expressly granted to Congress in Article I and disregards or dismisses the remarkably unanimous statements of prominent Founders disclaiming the British model.*

*After reviewing the criticisms of Yoo's theory, this Essay reflects on how a flawed and eccentric historical theory came to underpin the government's conduct of war and foreign policy. Finally, this Essay*



* Frederick I. Richman Professor of Law, Stanford Law School; Head Articles Editor, *California Law Review*, 1977–78. I am profoundly grateful to those who have worked tirelessly, both in and out of government service, against torture and for justice and human rights.

*examines the implications of this saga for law review publishing, as well as for the participation of legal academics in government and the formation of national policy.*



## INTRODUCTION

Surely one of the most consequential articles ever published in the *California Law Review* (*CLR*), as measured by its effects in the world, is John Yoo's *The Continuation of Politics by Other Means: The Original Understanding of War Powers*.[1] The article sets forth the copiously sourced[2] thesis that the true historical meaning of the Constitution is that it "established a system which was designed to encourage presidential initiative in war."[3] As Yoo later wrote, the President holds "the plenary authority, as Commander in Chief and the sole organ of the Nation in foreign relations, to use military force abroad" and to make decisions about the amount, method, timing, and nature of the use of military force.[4] In the article he asserts that Congress's war powers are limited: "Congress could express its opposition to executive war decisions only by exercising its powers over funding and impeachment."[5] According to Yoo, the Declare War Clause does not grant Congress any power to initiate war, but only the "judicial power"[6] to recognize whether "the nation was

1. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996) [hereinafter Yoo, *War Powers*].

2. The article runs 139 pages with 625 footnotes.

3. Yoo, *War Powers*, *supra* note 1, at 174.

4. Memorandum from John C. Yoo, Deputy Ass't Att'y Gen., Office of Legal Counsel, to the Deputy Counsel to the President, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001) [hereinafter Military Operations Memo], *available at* http://www.usdoj.gov/olc/warpowers925 htm.

5. Yoo, *War Powers*, *supra* note 1, at 174, 197 n.158, 241.

6. *Id.* at 288.

[already] in a legal state of war" for purposes of "domestic" law.[7] Nor do Congress's other war-related powers[8] limit the President's freedom of action in initiating and conducting war. In Yoo's reading, because Congress is to have the "sole judicial power to decide whether the United States is at war"[9] there is no role at all for the judicial branch in matters of war.[10]

*War Powers* has been called Professor Yoo's "breakthrough" work[11] and was instrumental in propelling him to an important job in the Bush administration's Office of Legal Counsel (OLC).[12] There he authored or ghostwrote memoranda that furnished the legal justification for the most significant policies and practices of the Bush administration's "global war on terrorism."[13] OLC opinions are treated as legally binding within the executive branch,[14] and because of Yoo's perceived and claimed expertise in the law of national security and presidential powers, he was given a virtually free hand in crafting opinions on these subjects.[15] These memoranda explicitly relied on

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7. Yoo, *War Powers*, *supra* note 1, at 301, 295.

8. Article I, Section 8 of the Constitution gives Congress power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;" to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;" to "raise and support Armies;" to "provide and maintain a Navy;" to "make Rules for the Government and Regulation of the land and naval Forces;" to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;" and to "provide for organizing, arming, and disciplining, the Militia." U.S. CONST. art. I, § 8.

While *War Powers* does not explicitly go so far, Yoo's later elaboration of his understanding of executive power explicitly states that legislative attempts to limit the President's military decision making would be unconstitutional. *See infra* note 19 and accompanying text.

9. Yoo, *War Powers*, *supra* note 1, at 288.

10. *Id.* at 295.

11. Louis Fisher, *John Yoo and the Republic*, 41 PRESIDENTIAL STUD. Q. 177 (2011) ("With this publication, Yoo attracted attention as a major scholar on the war power and national security law.").

12. Yoo served as deputy assistant attorney general in the Office of Legal Counsel from 2001 to 2003. *Id.* at 178.

13. *See* JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR *passim* (2006); Tim Golden, *A Junior Aide Had a Big Role in Terror Policy*, N.Y. TIMES, Dec. 23, 2005, at A1.

14. *See* Memorandum from David J. Barron, Acting Ass't Att'y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010), *available at* http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf ("OLC's core function . . . is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."); Memorandum from Steven G. Bradbury, Principal Deputy Ass't Att'y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Opinions 1 (May 16, 2005), *available at* http://www.justice.gov/olc/best-practices-memo.pdf ("OLC opinions are controlling on questions of law within the Executive Branch"); Dawn E. Johnson, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1577 (2007) (same); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1464 (2010) (same); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000) (same).

15. Yoo is acknowledged to have been "directly responsible for the contents of" the 2003 Yoo Memo, the Torture Memo, the Classified Bybee Memo, the July 13 Letter, and the Yoo Letter. *See* OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL

*War Powers*, reiterating and further expanding the analysis first advanced in the article. Even though Yoo conceded in *War Powers* that his theories were contrary to the overwhelming consensus of historians and legal academics,[16] they furnished the sole legal justification for many of the most extreme and controversial policies of the Bush administration.

Yoo's OLC opinions advanced a vision of executive power that was breathtakingly unprecedented in its scope, including the claims that:

- the President has "complete authority over the conduct of war";[17] and "independent and plenary authority over the use of military force";[18]
- any statute attempting to regulate or "interfere[] with" the President's use of military force would be unconstitutional,[19] and no law "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response";[20]
- the right of habeas corpus does not apply to detainees held at Guantanamo Naval Base or other locations outside the United States;[21]
- the Detention Act, 18 U.S.C. § 4001(a), which prohibits the detention of American citizens unless pursuant to an Act of Congress, "does not, and constitutionally could not, interfere" with the President's authority to detain U.S. citizens as enemy belligerents;[22]

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COUNSEL'S MEMORANDA CONCERNING ISSUES RELATED TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 251–52 (July 29, 2009) [hereinafter OPR FINAL REPORT], *available at* http://judiciary house.gov/hearings/pdf/OPRFinalReport090729.pdf.

16. *See* Yoo, *War Powers*, *supra* note 1, at 295.

17. Memorandum from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct in Interrogation Under 18 U S.C. §§ 2340–2340A, at 34 (Aug. 1, 2002) [hereinafter Torture Memo], *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf. This memo has been commonly referred to as "the Torture Memo" or "the Bybee Memo."

18. "Congress's power to declare war does not constrain the President's independent and plenary authority over the use of military force." Military Operations Memo, *supra* note 4.

19. Torture Memo, *supra* note 17, at 31; Memorandum from John C. Yoo, Deputy Ass't Att'y Gen., to William J. Haynes, II, Gen. Counsel for the Dep't of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States 13 (Mar. 14, 2003) [hereinafter Yoo Memo], *available at* http://www fas.org/irp/agency/doj/olc-interrogation.pdf. This far-reaching memorandum was dated the day after Bybee's appointment to the Ninth Circuit was confirmed.

20. Military Operations Memo, *supra* note 4 ("These decisions, under our Constitution, are for the President alone to make.").

21. Memorandum from Patrick F. Philbin, Deputy Ass't Att'y Gen. and John C. Yoo, Deputy Ass't Att'y Gen., to William J. Haynes, II, Gen. Counsel, Dep't of Defense, Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001), *available at* http://www.torturingdemocracy.org/documents/20011228.pdf (stating that federal district court could not exercise habeas jurisdiction over alien held at Guantanamo).

22. Memorandum from John C. Yoo to David J. Bryant, Ass't Att'y Gen., Re: Applicability of

- the redefinition of "torture," limiting it to acts causing pain "equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function will likely result";[23]
- specific acts such as waterboarding, "walling,"[24] confinement with insects, sleep deprivation for up to eleven days, and stress positions, as well as combinations of these methods, do not constitute torture and would not violate the Torture Act;[25]
- conduct that does not fall within Yoo's radical redefinition of torture does not violate the War Crimes Act,[26] the Torture Act,[27] the Convention Against Torture, or the Geneva Conventions,[28] and the International Criminal Court lacks jurisdiction over such acts;[29]
- the Geneva Conventions do not apply to the Taliban[30] or al Qaeda operatives;[31]

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18 U.S.C. § 4001(a) to Military Detention of United States Citizens 1 (June 27, 2002), *available at* http://www.justice.gov/opa/documents/memodetentionuscitizens06272002.pdf. The memorandum asserts that § 4001(a), passed in connection with repeal of the Emergency Detention Act, which had been used to intern thousands of Japanese-American citizens during World War II, applies "exclusively to the federal civilian prison system." *Id.* at 7. *See also* Letter from John C. Yoo, Deputy Ass't Att'y Gen., to William J. Haynes II, Gen. Counsel, Dep't of Defense 9 (Feb. 7, 2003), *available at* http://www.aclu.org/files/assets/olc_aclu_ii_2_7_03_full_doc_w_cover_sheet.pdf (attaching white paper titled Response to the Preliminary Report of the ABA Task Force on Treatment of Enemy Combatants).

23. Yoo Memo, *supra* note 19, at 45; *see also* Letter from John C. Yoo, Deputy Ass't Att'y Gen., Office of Legal Policy, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Yoo Letter], *available at* http://news findlaw.com/hdocs/docs/doj/bybee80102ltr html; Torture Memo, *supra* note 17.

24. Memorandum from Jay Bybee, Ass't Att'y Gen., Office of Legal Counsel, Dep't of Justice, to John Rizzo, Acting Gen. Counsel, Central Intelligence Agency, Interrogation of Al Qaeda Operative 2 (Aug. 1, 2002), *available at* http://s3.amazonaws.com/propublica/assets/missing_memos/OLCfinalRedact_01-08-02.pdf (stating that in this technique the interrogator "firmly pushes" the individual into a "flexible wall made of plywood").

25. *Id.* at 1 (approving specific methods of interrogating Abu Zubaydah).

26. 18 U.S.C. § 2441 (2006); Yoo Memo, *supra* note 19, at 32.

27. 18 U.S.C. § 2340A (2006); Yoo Memo, *supra* note 19, at 34.

28. Yoo Letter, *supra* note 23.

29. *Id.*

30. Memorandum from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1959 (Feb. 7, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020207.pdf; Memorandum from John C. Yoo, Deputy Ass't Att'y Gen. and Robert J. Delahunty, Special Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) [hereinafter Yoo Treaties and Laws Memo], *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09 pdf.

31. Yoo Treaties and Laws Memo, *supra* note 30; Memorandum from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), *available at* http://www.justice.gov/olc/docs/

- the President has "plenary constitutional authority, as Commander in Chief" to transfer aliens held outside the United States to third countries, a process known as "extraordinary rendition";[32]
- the President possesses the authority to deploy the military domestically to combat terrorist activities;[33]
- the President has the power to authorize warrantless national security wiretapping without regard to statutory limitations;[34]
- "the Fourth Amendment does *not* apply to domestic military operations designed to deter and prevent further terrorist attacks";[35]
- *Miranda* warnings are not required for interrogations of detainees by military personnel;[36]
- the Fifth Amendment Due Process Clause and the Eighth Amendment Cruel and Unusual Punishment Clause "do not apply to alien enemy combatants held abroad";[37] and that
- the right to counsel does not apply in military commissions.[38]

Yoo has been called "the most important theorist of the 9/11 Constitution."[39] His webpage at the Berkeley Electronic Press refers to him as

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memo-laws-taliban-detainees.pdf.

32. Memorandum from Jay S. Bybee, Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Defense, Re: The President's Power as Commander in Chief to Transfer Captures Terrorists to the Control and Custody of Foreign Nations 1, 6 (Mar. 13, 2002), *available at* http://www fas.org/irp/agency/doj/olc/transfer.pdf (arguing that the President has "plenary power to dispose of the liberty of military detainees").

33. Memorandum from John C. Yoo and Robert J. Delahunty to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Defense, Authority for Use of Military Force to Combat Terrorist Activities Within the United States 6–7 (Oct. 23, 2001) [hereinafter Military Force within the United States Memo], *available at* http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf (stating that the President's power over the use of military force is "plenary" and "[s]uch unenumerated power includes the authority to use military force, whether at home or abroad, in response to a direct attack upon the United States").

34. Memorandum from John C. Yoo, Deputy Ass't Att'y Gen , to the Att'y Gen., (Nov. 2, 2001), *available at* https://webspace.utexas.edu/rmc2289/OLC 131.FINAL.PDF. This memorandum opinion as released has been redacted within an inch of its life, but it is clear that it declares that if the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. ch. 36, were read to restrict the President's ability to conduct electronic surveillance for national security purposes it would be unconstitutional; that Congress may not "restrict the President's inherent constitutional powers, which allow him to gather intelligence necessary to defend the nation from direct attack"; and that "intelligence gathering in direct support of military operations does not trigger constitutional rights against illegal searches and seizures." *Id.* at 9, 17.

35. Military Force Within the United States Memo, *supra* note 33, at 25; *id.* at 27 ("Nor is it necessary that the military forces on our soil be *foreign*").

36. Memorandum from Jay S. Bybee, Head of the Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense, Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.26.pdf.

37. Yoo Memo, *supra* note 19, at 1.

38. *Id.*

39. Cass R. Sunstein, *The 9/11 Constitution*, NEW REPUBLIC, Jan. 16, 2006, at 21 (reviewing

"the key legal architect of the Bush administration's response to 9/11" and says he had "an almost unmatched impact on America's fight against terrorism."[40] Indeed, his role in providing the "most sustained intellectual defense" of the Bush administration's policies was so significant that an article in the *New York Times Magazine* was titled *The Yoo Presidency*.[41]

In the humid environment of the Bush OLC, Yoo's theory of presidential war powers flourished like Audrey.[42] In *War Powers* Yoo spoke of shared powers, designed so that the President and Congress would check each other,[43] even though he concluded that those powers are distributed quite unequally.[44] By 2003 he was declaring:

> [T]he decision to deploy military force in the defense of U.S. interests is expressly placed under Presidential authority by the Vesting Clause. . . . The Framers understood the Commander in Chief clause to grant the President the fullest range of power recognized at the time of the ratification as belonging to the military commander. . . . [A]ny power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—unless expressly assigned to Congress, is vested in the President.[45]

Since leaving the administration, Professor Yoo has continued to press the same arguments in favor of the President's plenary war powers in the academic and popular press, including three books[46] and innumerable op-eds and speeches. He recently proclaimed (inaccurately[47]) that the capture and killing

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JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005)).

40. *Selected Works of John C. Yoo*, BERKELEY ELECTRONIC PRESS, http://works.bepress.com/johnyoo/23 (last visited Jan. 9, 2012).

41. Jeffrey Rosen, *The Yoo Presidency*, N.Y. TIMES MAG., Dec. 11, 2005, at 106; *see also* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1563 (2002) [hereinafter, *Textualism*] (stating that Yoo provided "the most powerful modern indictment of the conventional academic view" of Congress's war powers).

42. *See* LITTLE SHOP OF HORRORS (The Filmgroup 1960); ALAN MENKEN & HOWARD ASHMAN, LITTLE SHOP OF HORRORS (Broadway Musical 1982); LITTLE SHOP OF HORRORS (Warner Bros. Pictures 1986). Audrey—technically, Audrey II—was a man-eating monster plant in the play and films.

43. Yoo, *War Powers*, *supra* note 1, at 303 ("[T]he Framers did not rest the sovereign power of making war in one department, but divided it between the executive and legislature and gave each branch the means to check the other's designs.").

44. Yoo's confidence that Congress's spending power is fully adequate to control the President's authority to commence war seems unrealistic, to say the least. Yoo, however, professes to believe that the perceived difficulty for Congress to deny funding for troops already committed is simply a "failure of political will." Yoo, *War Powers*, *supra* note 1, at 299.

45. Yoo Memo, *supra* note 19, at 4–5.

46. JOHN C. YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005) [hereinafter YOO, POWERS OF WAR AND PEACE]; JOHN C. YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006); JOHN C. YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2010) [hereinafter YOO, CRISIS AND COMMAND].

47. *See, e.g.*, Scott Shane & Charlie Savage, *Harsh Methods of Questioning Debated Again*,

of Osama bin Laden should be credited to the "tough interrogation" and warrantless electronic surveillance programs of "President George W. Bush, not his successor."[48] One observer commented, "John Yoo taking credit on behalf of the Bush administration for Sunday's strike against Osama bin Laden is like Edward John Smith, the captain of the Titanic, taking credit for the results of the 1998 Academy Awards."[49]

Most law review authors can only dream of having even a small fraction of the impact on the world that John Yoo's article—written when he was a junior professor at Berkeley Law—has had. And yet the substance of the article has been subjected to comprehensive and devastating criticism. Fifteen years after its publication, and on the centennial of the distinguished journal in which it appeared, it is appropriate to look back on the influence the article has had and the critiques it has prompted, and to ask whether there are lessons here for legal scholars, legal journals, and the use of legal scholarship in policy making.

In the following pages, I summarize the thesis of *War Powers* and review the major critiques of the article and, more broadly, Yoo's evolving theory of presidential war powers. I then consider the implications of the article for the scholarly responsibility of law reviews, the role of peer review in legal scholarship, and the use of academic scholarship in forming government policy.

## I.
## YOO'S "ORIGINAL UNDERSTANDING"

In Yoo's vision, the "original understanding" is the true and unchanging meaning of the Constitution. Though he begins *War Powers* by describing original understanding as "the best starting point" for interpreting the Constitution, he appears to regard it as the ending point as well. "As a written document, the Constitution's meaning does not change from the meaning it held for its drafters."[50] Yoo also considers actual historical practice since the

N.Y. TIMES, May 3, 2011, at A1 ("[A] closer look at prisoner interrogations suggests that the harsh techniques played a small role at most in identifying Bin Laden's trusted courier and exposing his hideout.").

48. John Yoo, Op-Ed, *From Guantanamo to Abbottabad*, WALL ST. J., May 4, 2011, http://online.wsj.com/article/SB10001424052748703834804576301032595527372 html (killing of bin Laden "vindicate[d]" the "tough interrogations" of Khalid Sheikh Mohammad and Abu Faraj al-Libi; "President George W. Bush, not his successor, constructed the interrogation and warrantless surveillance programs that produced this week's actionable intelligence."); *see also* Dahlia Lithwick, *You Say Torture, I Say Coercive Interrogation*, SLATE (Aug. 1, 2011, 6:04 PM), http://www.slate.com/id/2300550 (quoting Yoo at the Aspen Security Forum, July 27, 2011: "Take a look at how we were able to kill al-Qaida's leader this year. How did we get the intelligence for finding Bin Laden's couriers and ultimately Bin Laden? It was a combination of interrogation methods, sometimes tough or harsh, you can call it torture. I don't call it torture. You can repeat the word *torture* all the time, I can repeat *coercive interrogation* all the time.").

49. Andrew Cohen, *The Unrepentant John Yoo: "Enhanced Interrogation" Got Us Bin Laden*, ATLANTIC, May 5, 2011, http://www.theatlantic.com/politics/archive/2011/05/the-unrepentant-john-yoo-enhanced-interrogation-got-us-bin-laden/238356.

50. Yoo, *War Powers*, *supra* note 1, at 172.

founding to be relevant to constitutional interpretation, and *War Powers* includes a lengthy discussion of presidential use of military force, concentrating particularly on the post-World War II period. But this postframing history does not primarily function as independent evidence of the Constitution's meaning; rather, it shores up the original understanding argument, where a reader might find the evidence thin or contradictory. According to Yoo, it is the original understanding that forms the true meaning of the Constitution. Historical practice "confirms our understanding of the allocation of war powers," but "[u]ltimately . . . it is the constitutional framework that endures."[51]

For someone who places great weight on original meaning, Yoo is not particularly rigorous about the meaning of "meaning." He tells us that the meaning of the Constitution does not change from "the meaning it held for *its drafters*."[52] In the same paragraph he says, "When interpreting the text of the Constitution, we should seek to determine the meaning of its terms as understood by *those who adopted its provisions*."[53] Two sentences further on he refers to how "*Americans of the late eighteenth century would have* defined terms in the Constitution,"[54] and on the same page he refers to "*the Framers'* intent."[55] Thus, in a short space Yoo seems to approve various versions of original meaning—what the drafters were trying to accomplish, what members of the Philadelphia Convention understood by the text,[56] what the delegates to the ratifying conventions understood,[57] and how a hypothetical informed American at the time would have understood the text.[58]

Though this usage seems somewhat looser than one might expect from an originalist, Yoo steadily contends that the Framers did have a "shared understanding"[59] of how they had allocated the nation's war powers, that the text of the Constitution "governs" this allocation, that a determinate meaning of the war powers clauses can be reliably ascertained, and that changed circumstances cannot alter this meaning. Yoo thus aligns himself squarely against those who contend that "[p]recisely because the Founding generation

51. *Id.* at 175.

52. *Id.* at 172 (emphasis added).

53. *Id.* (emphasis added).

54. *Id.* (emphasis added).

55. *Id.* (emphasis added).

56. This was the only time that "the Founders" assembled in a single room and agreed to adopt a text they had created. *See, e.g.*, CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005).

57. It was the ratifying conventions that exercised the sovereign power of "We the People," though it seems unlikely that the separate ratifying conventions, which did not even discuss every provision of the Constitution, converged on a single meaning.

58. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997); Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1451 (2006) [hereinafter Ramsey, *Book Review*] (reviewing YOO, POWERS OF WAR AND PEACE, *supra* note 46).

59. Yoo, *War Powers*, *supra* note 1, at 173.

had resolved so little, rather than so much, in their new Constitution, it quickly became apparent that many key constitutional issues in foreign affairs would have to be worked out over time."[60]

Yoo takes an eclectic approach to the evidence he considers relevant to determining the original understanding. He believes that the "records of the Constitutional Convention, the state ratifying conventions, and the public debates waged in the press" are relevant "not for signs of legislative intent *per se*, but for indications of how Americans of the late eighteenth century *understood* the legal framework" in which the Constitution was adopted.[61] He finds this understanding less in the text and the Convention debates than in "[t]he relationships between the executive and legislative branches in Great Britain, the colonies, and the states during the Revolution and under the Articles of Confederation."[62] It was the British model, he argues, that created the "shared understanding" underlying the Framers' conception of the executive power.[63] Yoo considers the ratification debates more relevant than the records from the Constitutional Convention, but he acknowledges that the discussion of war powers in the ratifying conventions was sparse and uneven, and this fact is confirmed by its near invisibility in Pauline Maier's monumental history of the ratification.[64] Accordingly, Yoo turns primarily to "untapped sources"[65] such as the constitutions of the various states, with which he presumes the drafters, ratifiers, and the general American public of the time were familiar; the British system as he understands it to have evolved in the seventeenth and eighteenth centuries; and the writings of legal and political theorists such as Blackstone, Locke, Montesquieu, and Vattel.[66]

Yoo concludes, startlingly, that "the war powers provisions of the Constitution are best understood as an *adoption*, rather than a rejection, of the traditional British approach to war powers."[67] In other words, the Framers who little more than a decade before had declared that "the history of the present King of Great Britain is a history of repeated injuries and usurpations" and that it was their "duty, to throw off such government" because it tended to "an

60. Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 378 n.2 (2011) (quoting Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 171 (2004)).

61. Yoo, *War Powers*, *supra* note 1, at 173.

62. *Id.* at 197.

63. *Id.*

64. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 (2010). "War powers" are mentioned on only seven pages of the book, mostly inconsequentially, and the discussions cited in the index of the executive power, the military power of the President, and the President's powers have almost nothing to say about the President's war powers.

65. Yoo, *War Powers*, *supra* note 1, at 172.

66. *See id.* at 195–217.

67. *Id.* at 242 (emphasis added).

absolute Tyranny"[68] decided to grant the very same powers to the President that had led them to rebel against the King.

## II.
## YOO'S WAR POWERS

Yoo contends in *War Powers* that—"[c]ontrary to the arguments by today's scholars"[69]—the Constitution does not give Congress the primary power over war and peace. According to Yoo, the Declare War Clause does not grant Congress any power to initiate or authorize war. Rather, the change in wording from "make war" to "declare war" on August 17, 1787 was intended to limit Congress's power to "declaring," or announcing, that the actions already taken by the President amounted to a legal state of war. Yoo argues that this change allocated to the President all the power of "conducting military operations," including the decision to commence and end war. Congress could only affect such decisions through its appropriations and impeachment powers.

Yoo contends that the Founders intended to locate all executive power, as it was then understood in Britain, in the Executive except for the powers expressly allocated to the other branches. Thus when the Vesting Clause vests "the executive power" in the President, that includes the full set of powers exercised by the King. Similarly, the Commander-in-Chief Clause grants the President all the powers that had "traditionally" (that is, in Britain and other European countries) been given to a nation's supreme military commander (that is, the King).[70] Additionally, Yoo argues that because Article II vests "the executive power" in the President, whereas Article I vests the legislative powers "herein granted" to Congress, the President has the entire war and foreign affairs power of the nation except that which is specifically enumerated and granted to Congress, whereas Congress's powers are limited to those expressly enumerated.

### *A. The Declare War Clause*

The centerpiece of Yoo's argument is that "the Declare War Clause does not add to Congress's store of war powers at the expense of the President. Rather, the Clause gives Congress merely a judicial role in declaring that a state of war exists between the United States and another nation . . . ."[71]

#### *1. Argument from the Text*

Yoo's primary textual argument is based on the Convention's decision to change "make War" to "declare War." The argument crucially depends on the

68. THE DECLARATION OF INDEPENDENCE (U.S. 1776).
69. Yoo, *War Powers*, *supra* note 1, at 295.
70. *Id.* at 252.
71. *Id.* at 295.

assumption that the power to "declare war" as used in the Constitution is synonymous with the power to make a formal declaration of war—that is, that the Clause grants only the power to issue a formal declaration. This assumption ignores the overwhelming evidence of what the Framers said they were doing,[72] as well as evidence of how the term "declare war" was understood at the time.[73]

Yoo correctly observes that at the end of the eighteenth century a formal declaration of war was not a prerequisite to entering into war. Though he recognizes that in the eighteenth century war could be initiated either by formal declaration or through action, Yoo assumes that the Convention intended to give Congress only the power to make a formal declaration. He constructs his preferred meaning of "declare war" from eighteenth-century authorities discussing *formal* declarations of war.

This reasoning is circular—it assumes the conclusion. As Michael Ramsey (himself a "textual originalist") demonstrates, the phrase "declare war" meant "initiating a state of war by a public act."[74] War "can be declared either by commencing hostilities as well as by formal announcement"—"by word or action."[75] Ramsey therefore concludes that Congress was to have *both* powers. Yoo acknowledges that war could be initiated by word or action, but concludes that the Clause refers to only one of these options. This reasoning ignores the fact that both at Philadelphia and in the ratifying conventions delegates used the words "declare" and "make" interchangeably, even after the change from "make war" to "declare war."[76]

Yoo compounds the error by going on to deny that Congress has any power to commence war at all, even through issuing a formal declaration. He argues that the Declare War Clause gives Congress only a "judicial-like"[77] power to affix a legal label to the actions the President has already taken—"[l]ike a declaratory judgment."[78] The President, according to Yoo, has sole control over the decision to go to war. Even the power to "declare war" does not give Congress power to take the nation from peace to war. This conclusion

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72. *See* Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845 (1999) (reviewing LOUIS FISHER, PRESIDENTIAL WAR POWER (1995)) ("[H]is account is at odds with the ample evidence that the Framers decided quite deliberately to change the British system by transferring the power to *initiate* war (and not simply to formally 'declare' it) from the executive to the legislative branch . . . .").

73. *See* Ramsey, *Book Review*, *supra* note 58, at 1462–64.

74. Ramsey, *Textualism*, *supra* note 41, at 1545.

75. *Id.* at 1546.

76. Stromseth, *supra* note 72, at 860 n.79. Reflecting this view of the term, Justice Story wrote that "[t]he power of declaring war is . . . the highest sovereign prerogative . . . ." LOUIS FISHER, PRESIDENTIAL WAR POWER 4 (2d ed. 2004).

77. Yoo, *War Powers*, *supra* note 1, at 300; *see also id.* at 242 ("[A] declaration of war performed a primarily juridical function under eighteenth-century international law."); *id.* at 248 ("[D]eclaration" means "a judgment of a current status of relations, not an authorization of war.").

78. *Id.* at 242.

is contrary to the historical evidence that "declare war" was also used to mean "commence hostilities," that war could be "declared" by word or action, and that the Framers themselves understood and used the term in this fashion. It also seems highly illogical. As Ramsey points out, it is puzzling that the Framers would give Congress, the deliberative body, the power to announce war and the President, "normally the communicative voice in government," the power to initiate it.[79] Thus the textual argument collapses.

*2. Argument from the Convention Debates*

James Madison's notes reflect that he and Elbridge Gerry introduced the change from "make" to "declare," leaving "to the Executive the power to repel sudden attacks."[80] That is, the President was to be authorized to take defensive action if the nation were attacked. Yoo initially interprets Madison's statement as "*at least* expanding the executive's power to respond unilaterally to an attack."[81] He then muses that possibly Madison and Gerry "did not explain its meaning to the assembled delegates," or that "[p]erhaps the lateness of the hour—the debate occurred at the equivalent of 5:00 p.m. on a Friday—may have fatigued the renowned note-taker himself."[82] Let us be clear about what is happening here. To stretch the historical record to fit his novel theory, Yoo imagines events for which there is utterly no evidence and then suggests that Madison may not have understood his own amendment.

To the contrary, from the records of the Convention "it was clear that the delegates were not referring to a declaration as a formality, but as an authorizing act that no branch but Congress could make."[83] Moreover, Yoo's interpretation is at odds with Madison's consistent opposition to giving the President the power to commence war. Madison believed that those who "conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded,"[84] and that "the constitution supposes, what the History of all Govts. demonstrates," that the executive is "the branch of power most interested in war, & most prone to it" and the Constitution "accordingly, with studied care, vested the question of war in the Legisl."[85]

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79. Ramsey, *Book Review*, *supra* note 58, at 1464 ("Something made the Framers think that the power '[t]o declare War' was an important one to shift to Congress; the idea that it was because the Framers thought Congress better suited to make official statements about military policy established by the President seems unlikely in the extreme." (alteration in original)).

80. *See* FISHER, PRESIDENTIAL WAR POWER, *supra* note 76, at 8–10; Stephen M. Griffin, *Reconceiving the War Powers Debate* 18 (Oct. 13, 2011) (Tulane Public Law Research Paper No. 11-06), *available at* http://ssrn.com/abstract=1943652.

81. Yoo, *War Powers*, *supra* note 1, at 261.

82. *Id.* at 262. *See generally id.* at 261–64 (discussing Convention debate on the change).

83. Griffin, *supra* note 80, at 19.

84. Stuart Streichler, *Mad About Yoo, or Why Worry About the Next Unconstitutional War?*, 24 J.L. & POL. 93, 98 (2008) (emphasis removed) (quoting James Madison, Helvidius No. 1 (1845)).

85. *Id.* at 98 (quoting Letter from James Madison to Thomas Jefferson (Apr. 2, 1797)).

Contrary to Yoo's claim that the Framers reposed extraordinary power in the President because they "were not excessively worried by the prospect of unilateral executive action,"[86] a host of Founders "vigorously repudiated the British war powers model" at the Convention because they "were deeply concerned about unilateral executive commitments to war."[87] Fisher quotes James Wilson (who "did not consider the Prerogatives of the British Monarch as a proper guide in defining the executive powers"[88]), Alexander Hamilton (the Senate would have the "sole power of declaring war"[89]), Edmond Randolph, John Jay, John Rutledge, Charles Pinckney, Elbridge Gerry (who declared that he "never expected to hear in a republic a motion to empower the Executive alone to declare war"[90]), Roger Sherman ("the Executive shd. be able to repel and not to commence war"[91]), and George Mason (who was for "clogging rather than facilitating war" and against "giving the power of war to the Executive"[92]). John Jay made similar statements during the ratification conventions (the King can declare war and raise armies, but the President cannot because "these powers are vested in other hands"[93]). Yoo quotes many of these statements, but either dismisses them as unrepresentative, interprets them in accordance with his own views, or suggests possible meanings that seem implausible. A particularly egregious example is the treatment of Wilson's statement that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c." Yoo cites this statement for the proposition that the Framers understood that "vesting the President with all 'executive powers' would give him the power over war and peace."[94] This claim is diametrically opposed to Wilson's statement, which could not be clearer in stating that the power "of war & peace" is "of a Legislative nature."

Perhaps because the debates at the Philadelphia Convention do not support his views, Yoo relies more heavily on statements made at the ratifying conventions. There was little discussion of war powers at the ratifying

86. Yoo, *War Powers*, *supra* note 1, at 174.

87. Fisher, *John Yoo and the Republic*, *supra* note 11, at 180; *see also* Ramsey, *Book Review*, *supra* note 58, at 1460, 1466–67; D.A. Jeremy Telman, *A Truism That Isn't True? The Tenth Amendment and Executive War Power*, 51 CATH. U. L. REV. 135, 182–87 (2001) (pointing out the same disparity).

88. FISHER, PRESIDENTIAL WAR POWER, *supra* note 76, at 5. Yoo quotes this statement for the proposition that the Framers understood that "vesting the President with all 'executive powers' would give him the power over war and peace." Yoo, *War Powers*, *supra* note 1, at 278. Yoo's claim is diametrically opposed to Wilson's statement, which clearly says that the power "of war & peace" is "of a Legislative nature." Yoo, *War Powers*, *supra* note 1, at 286 n.547.

89. FISHER, PRESIDENTIAL WAR POWER, *supra* note 76, at 5.

90. Fisher, *John Yoo and the Republic*, *supra* note 11, at 185.

91. *Id.*

92. *Id.*; *see also* Griffin, *supra* note 80, at 18.

93. Fisher, *John Yoo and the Republic*, *supra* note 11, at 186.

94. Yoo, *War Powers*, *supra* note 1, at 278.

conventions, and the separate state conventions did not discuss the same topics. Moreover, both Federalists and Anti-Federalists frequently misrepresented the document during the ratification conventions in order to obtain votes.

Yoo can hardly ignore the statement of James Wilson at the Pennsylvania ratifying convention that:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large[.][95]

Though he acknowledges the statement, Yoo sweeps it aside, concluding that Wilson's views were "exceptional rather than typical" and that "it is perhaps safer just to count Wilson as a dissenter from the prevailing Federalist view on war powers."[96] As Louis Fisher points out, however, "Wilson was far from being a dissenter. He was a leading exponent of the position that, other than presidential actions to 'repel sudden attacks,' *the whole of the war power is vested in Congress*."[97]

Similarly, Yoo reads Alexander Hamilton, undoubtedly the most vigorous advocate among the Framers for a strong executive, as being staunchly in favor of a monarchical executive, while ignoring his statement that "the models of Locke and Blackstone had no application to America,"[98] and that it was up to Congress "to make or declare war."[99] Indeed, Hamilton later wrote that the Constitution

> provided affirmatively, that, "The Congress shall have power to declare war"; the plain meaning of which is, that it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war, . . . in other words, it belongs to Congress only, to go to war.[100]

Furthermore, Yoo's characterization of the power to declare war as a "judicial" power has no support in any of the statements of the Framers.[101] He simply deduces it from his belief that the Clause refers only to the power to issue a declaration of war.

In short, contrary to Yoo's tortured reading of the historical record, there was never "a serious debate over where to locate the power to authorize war.

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95. *Id.* at 286 n.547; *see also* Streichler, *supra* note 84, at 99.

96. Yoo, *War Powers*, *supra* note 1, at 286–87 n. 547.

97. Fisher, *John Yoo and the Republic*, *supra* note 11, at 180.

98. *Id.* at 184.

99. *Id.* at 185.

100. Streichler, *supra* note 84, at 100. Yoo's use of Hamilton in his Department of Justice memos has been called an "exercise in distortion." Fisher, *John Yoo and the Republic*, *supra* note 11, at 184 (quoting David Gray Adler).

101. Fisher, *John Yoo and the Republic*, *supra* note 11, at 179 ("No one at the Philadelphia Convention or the ratifying conventions, or anyone writing in the *Federalist Papers* spoke of Congress having a 'judicial' role when it declares war. It is a *legislative* role. To my knowledge, Yoo is the only individual who makes this argument.").

Rather, there was impressive harmony and agreement. No member of the founding generation presented a serious argument that the executive should have power to decide when war should be commenced."[102]

*3. Argument from Presidential Practice*

Yoo argues that the early presidents acted vigorously in employing military force based on their understanding of the President's primacy in war. He acknowledges that presidential actions after ratification cannot tell us what the drafters thought, but asserts that those actions provide further evidence of how the founding generation would have understood the text.

Fisher observes, however, that these same presidents also acknowledged Congress's primary role in war. For example, Washington wrote in 1793 that "[t]he Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure."[103] Jefferson said in 1801, in connection with the Barbary pirates, that he was "[u]nauthorized by the Constitution, without the sanction of Congress to go beyond the line of defense" and in 1805, in connection with conflicts with Spain, that "Congress alone is constitutionally invested with the power of changing our condition from peace to war."[104] Moreover, many of the actions Yoo cites as examples of unilateral presidential action actually had congressional authorization.[105] Indeed, "[a]t no point during the first forty years of activity under the Constitution, did a President or any other important participant claim that Presidents could exercise force independently of congressional control."[106]

Yoo's argument also ignores relevant Supreme Court decisions. Chief Justice Marshall, a prominent ratifier, wrote for a unanimous Supreme Court soon after the founding that "[t]he whole powers of war [are], by the constitution of the United States, vested in congress . . ." and that "it is the exclusive province of congress to change a state of peace to a state of war."[107]

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102. Griffin, *supra* note 80, at 15.

103. Fisher, *John Yoo and the Republic*, *supra* note 11, at 187 (quoting Washington); *see also* Mortenson, *supra* note 60, at 427 (quoting Washington); Steichler, *supra* note 84, at 99 (quoting Washington). Yoo does not refer to Washington's statement at all in *War Powers*. He cites it in *Crisis and Command* but asserts that Washington must have simply meant that funding would have to come from Congress. YOO, CRISIS AND COMMAND, *supra* note 46, at 75.

104. Fisher, *John Yoo and the Republic*, *supra* note 11, at 185.

105. *See* Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1652–54, 1663–64 (2000).

106. Abraham D. Sofaer, *The Power over War*, 50 U. MIAMI L. REV. 33, 50–51 (1995).

107. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) ("Does [the President] possess the power of making war? That power is exclusively vested in congress . . . . [It is] the exclusive province of congress to change a state of peace into a state of war."). *See* Fisher, *John Yoo and the Republic*, *supra* note 11, at 181 (discussing these cases).

### *B. Congress's Other Article I Powers*

Yoo concedes that Congress does have a role in war. "The Framers intended Congress to participate in war-making by controlling appropriations"[108] and potentially by the use of the impeachment power.[109] Though Congress might use its appropriations and impeachment powers as bargaining chips to put pressure on the President, however, it was to have no other formal war powers.

Notably, the argument that Congress's war powers are limited to appropriations and impeachment almost completely ignores other express congressional war powers. Yoo discounts the power to issue letters of marque and reprisal (which authorize private capture of foreign ships or property and retaliation for attacks) by classifying it also as a mere judicial function.[110] And his argument simply ignores[111] Congress's other war powers: to raise and support armies; provide and maintain a navy; make rules for the government and regulation of the land and naval forces; provide for calling out the militia to suppress insurrections and repel invasions; provide for organizing, arming, disciplining and governing the militia; make rules concerning captures on land and water; and define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.[112] All of these powers represent departures from British law and indicate that Congress was to have a central, indeed a primary, role in matters of war.

### *C. The Vesting and Commander-in-Chief Clauses*

Yoo conjures the President's "plenary" and "inherent" power over war-making from the Vesting Clause and the Commander-in-Chief Clause,[113] powers that, he modestly acknowledges, "at first glance appear somewhat paltry."[114] The Vesting Clause provides that "the executive power shall be vested in a President."[115] As "executive power" is not defined in the Constitution, Yoo reconstructs its meaning by placing it "in the legal context of its day."[116] He contends that the Framers transposed to the Constitution the understanding of executive powers with which they were familiar—the prerogatives held by the British Crown and exercised by the royal governors in the colonies. And because Article II vests "the executive power" while Article I

108. Yoo, *War Powers*, *supra* note 1, at 295.
109. *Id.* at 174, 241.
110. *Id.* at 250–51.
111. *See id.*
112. U.S. CONST. art. I, § 8. One might also add the power to regulate foreign commerce and Congress's role in making treaties.
113. *See* Yoo Memo, *supra* note 19, at 4 ("The decision to deploy military force in the defense of U.S. interests is expressly placed under Presidential authority by the Vesting Clause.").
114. Yoo, *War Powers*, *supra* note 1, at 176.
115. U.S. CONST. art II, § 1, cl. 1.
116. Yoo, *War Powers*, *supra* note 1, at 242.

vests the powers "herein granted," he concludes that although Congress's powers are limited to those enumerated, the President's powers are residual, consisting of all powers traditionally recognized as executive that were not specifically conveyed to the other branches. By the time of his service in the government, Yoo had extended this argument to maintain that the Vesting Clause conveyed all of the prerogatives appertaining to the British King, excepting only those powers that were expressly given to Congress by Article I (that is, the power to "declare" war, appropriate funds for military activities, and impeach federal officers).[117]

With respect to the Commander-in-Chief Clause,[118] Yoo contends that it was intended not just to give the President control over the tactics and strategy of military operations, but to convey all of the power over military affairs held by the British King.[119] His analysis fails to consider the remainder of the Commander-in-Chief Clause, which provides that the President is commander in chief of the militia "when called into the actual Service of the United States."[120] It is Congress that has the power to call the militia into service, just as it is Congress that has the power to "raise and support" the armies the President is to command, to "provide and maintain a navy," and to make rules for the government and regulation of the land and naval forces.[121] Yoo's theory places too much weight on the mere phrase "commander in chief," particularly in light of the express powers that are given to Congress. The real basis for Yoo's conclusion is not textual analysis but his conviction that the Framers meant to give the President the same military powers as the King.

In his OLC memos, Yoo pressed his unconventional views on the Commander-in-Chief Clause and stated them even more forcefully:

> It has long been the view of [OLC] that the Commander in Chief Clause is a substantive grant of authority to the President [citing only to a memo from William J. Rehnquist, then head of the OLC, on the Vietnam War and Yoo's own September 25, 2001 memo[122]]. This authority includes all those powers not expressly delegated by the Constitution to Congress that have traditionally been exercised by commanders in chief of armed forces.[123]

117. Memorandum from John C. Yoo to David J. Bryant, *supra* note 22, at 2. As discussed above, Yoo's list of Congress's powers inexplicably omits a great number of clauses in Article I, Section 8.

118. U.S. CONST. art. II, § 2, cl. 1.

119. Yoo, *War Powers*, *supra* note 1, at 252 ("Americans of the Framers' generation would have widely understood the commander-in-chief power as a continuation of the English and colonial tradition in war powers.").

120. *Id.*

121. U.S. CONST. art. I, § 8.

122. Military Operations Memo, *supra* note 4.

123. Memorandum from John C. Yoo to David J. Bryant, *supra* note 22, at 2.

### *D. The British Model*

The Constitution does not define "the executive power." Rather than looking to the many statements by the Framers—in the Convention debates, the ratifying conventions, *The Federalist*, and other documents—for evidence of how they used the term and what powers they thought were appropriate to the American Executive, Yoo asserts that "the war powers provisions of the Constitution are best understood as an *adoption*, rather than a rejection, of the traditional British approach to war powers."[124] The argument for this claim is replete with statements in the subjunctive, such as what—he assures us—the Framers "would have understood"[125] or "would have been familiar" with.[126] He concludes that the Vesting Clause grants the President all of the royal prerogatives of the British King (which he interprets in a pro-Crown manner),[127] except for the power to make a formal declaration of war and the power to fund war.

Yoo claims that the Anti-Federalists, who argued against ratification because they thought the Constitution was too monarchical, actually got it right, and understood the Constitution better than its proponents. He asserts that the Anti-Federalists "correctly claimed that the Constitution's system did not deviate all that much from the British Constitution as it existed in practice" and that "indeed, the Federalists appear to have ceded to the Antifederalists the truth of their arguments."[128] He explicitly agrees with the Anti-Federalist characterizations of the Constitution. "Implicit in the Antifederalist attack was an understanding of the British Constitution consistent with the one offered in this Article. . . . [T]he Antifederalists recognized that Congress would possess the same check on the President that Parliament exercised against the King—the power of the purse."[129]

It is hard to take seriously an interpretive method that embraces as correct the arguments the Anti-Federalists deployed to try to prevent ratification, and ignores or dismisses the views of the drafters and proponents. The Anti-Federalists did not desire a President who held royal prerogatives—they wanted a weaker national government. And the Federalists consistently wrote and spoke of giving Congress, rather than the President, the power over war and peace. If Yoo's views really had been the shared understanding of "executive power" in 1787–89, the Constitution would never have been ratified, because no one desired to have another King.[130]

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124. Yoo, *War Powers*, *supra* note 1, at 242 (emphasis added).

125. *See, e.g.*, *id.* at 172–73, 174, 242, 252, 254, 256.

126. *See, e.g.*, *id.* at 204, 246, 262.

127. *See* John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 HARV. L. REV. 754, 765–68 (2007).

128. Yoo, *War Powers*, *supra* note 1, at 278.

129. *Id.* at 276.

130. *See* Griffin, *supra* note 80, at 20 ("Those skeptical of the proposed Constitution in the ratifying conventions were not fans of increased executive power. It is reasonable to infer that the

Yoo's reading of the historical materials does not give adequate weight to the Framers' complicated attitudes toward executive power. The Framers had learned from their experience with the Articles of Confederation that a stronger national government was necessary, one that possessed both a robust legislature with far greater powers than the Continental Congress and a separate executive able to act with greater "energy," as well as an independent judiciary to provide a check on the legislative and executive branches. But it had been little more than a decade since the Framers had thrown off the onerous executive powers of the King and his royal governors, and they did not desire to replicate them in the new government.[131] "Yoo's theory ignores the great efforts expended in the Revolutionary era to free the United States from the excesses of executive power experienced" during the colonial period.[132]

Yoo claims that there was a consensus among the founding generation that the new government would "follow[] in the[] footsteps"[133] of the British model, and that the relationship between Congress and the President would parallel that between Parliament and the King. But the assumption that the Constitution embodied the views of Blackstone, Locke, and Montesquieu is unwarranted.[134] Streichler rightly comments that despite the "general proposition that the Constitution's framers operated within the Anglo-American political tradition," it would be inappropriate "to conclude that particular powers exercised by the king, like the power to decide on war, were granted to the President because they were with the Crown. After all, the American Constitution expressly allocated several of the monarchy's war powers to Congress, including the power to declare war."[135]

The Framers made it clear that they consciously and deliberately rejected the British constitutional model, particularly with respect to the powers of war and foreign affairs. For example, Edmund Randolph called executive power the "foetus of monarchy" and declared that the delegates "had no motive to be governed by the British Governmt. as our prototype" because the "fixt genius of the people of America required a different form of Government."[136] James

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Constitution could not have been ratified had it been admitted that the president had the power to commence war, other than in cases of necessity."); Mortenson, *supra* note 60, at 396.

131. *See* Telman, *supra* note 87, at 180.

132. *Id.*

133. Yoo, *War Powers*, *supra* note 1, at 197; *see also id.* at 255 ("We should construe the Constitution's spare language concerning war powers within the context of eighteenth-century British, colonial, and state governments, which had employed a system of executive initiative balanced by legislative appropriation.").

134. Griffin, *supra* note 80, at 25–28.

135. Streichler, *supra* note 84, at 101; *see also* Fisher, *Presidential War Power*, *supra* note 76, at 1 ("[E]xisting models of government in Europe placed the war power securely in the hands of the monarch. The framers broke decisively with that tradition. Drawing on lessons learned at home in the American colonies and the Continental Congress, they deliberately transferred the power to initiate war from the executive to the legislature.").

136. Fisher, *John Yoo and the Republic*, *supra* note 11, at 184.

Wilson, who drafted the Vesting Clause for the Committee of Detail, said he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive power,"[137] especially because the power "of war & peace" was "of a Legislative nature."[138] Hamilton, in *The Federalist No. 69*, contrasted the King's power as a hereditary monarch having the power not only to command troops but also to declare war and to raise and fund fleets and armies "by his own authority" with the President's limited power, which would "amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy," with Congress holding the right to declare war, raise, regulate, and fund armies.[139]

Yoo quotes this passage from Hamilton, but to discredit it he first scoffs at Hamilton's description of the President's power ("a second-rate King") and goes on to state that *The Federalist No. 69* was not "the authoritative explanation of the Constitution."[140] Yoo declares that Hamilton "carefully avoided explaining whether the formal powers transferred from King to Congress were actually significant."[141] He characterizes Iredell's similar distinction between the powers of the President and the King, at the North Carolina ratification convention, as "overdr[awn]."[142]

In short, contrary to Yoo's theory, the evidence shows that the Framers "rejected the English Model—the monarchical model" because of their "deep aversion to an unrestrained, unilateral executive power . . . ."[143] As Louis Fisher put it, to interpret the debates as giving the President the power to commence war

> would defeat everything that the framers said about Congress being the only political body authorized to take the country from a state of peace to a state of war. The president had the authority to "repel sudden attacks"—*defensive* actions. Anything of an offensive nature, including *making* war, is reserved only to Congress.[144]

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137. *See* Mortenson, *supra* note 60, at 394 n.49.

138. Moreover, the view that the Framers gave the President the equivalent of the royal prerogatives and then subtracted out certain specified powers that were given to Congress is inconsistent with the historical development of the constitutional text. The drafters "started with foreign affairs and war powers authority concentrated in the Senate and then shifted a carefully delineated subset of *some* of those powers, step-by-step, to the President." *Id.* at 394 (emphasis added).

139. THE FEDERALIST NO. 69 (Alexander Hamilton); *see also* Yoo, *War Powers*, *supra* note 1, at 277–78.

140. Yoo, *War Powers*, *supra* note 1, at 277–78.

141. *Id.*

142. *Id.* at 278.

143. David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. OF INT'L L. & FOREIGN AFF. 75, 76–77, 88–89 (2007); Telman, *supra* note 87, at 183 ("The Framers flat-out rejected the theory of executive power that Yoo claims they incorporated into the Constitution.").

144. Fisher, *John Yoo and the Republic*, *supra* note 11, at 185; Stromseth, *supra* note 72, at 860 n.79 ("Yoo's formalistic reading . . . does not square, however, with the powerful evidence that the

In the end, the most telling critique of *War Powers* may simply be that its conclusions are completely at odds with what we know of the purposes and concerns of those who wrote and ratified the Constitution.[145] Michael Ramsey, himself an originalist, puts a provocative twist on this idea, suggesting that originalists will not be persuaded by Yoo's argument because it "simply drifts too far from the Framers' expressed understandings of their own text, and from the historical meanings of the words they used," but that "evolving constitutionalists" will have a harder time refuting Yoo's arguments because their interpretive theories rely on policy judgments that are less subject to falsification.[146]

## III.
## LAW REVIEWS AND LEGAL SCHOLARSHIP

At least one critic has suggested that *War Powers* should never have been published, and that a peer-reviewed journal would have insisted on a more searching and rigorous editorial review.[147] Though it may be true that a peer-reviewed history journal would have insisted on substantial revisions or would not have accepted the article as written, I do not believe that *CLR* can be seriously faulted for publishing the article.

The publication process for legal scholarship is not well equipped to ensure that articles have been rigorously reviewed by experts in the field, as is the norm in other disciplines. Our profession relies primarily on student-run and student-edited general interest journals rather than on peer-reviewed journals. The drawbacks of this system are well known.[148] Selection, the vetting of methodology and findings, and text editing are performed entirely by

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Founders understood Congress to possess the power to decide whether the United States should initiate or commence war against another state with which the United States was at peace . . . .").

145. *See generally* Jack N. Rakove, Remarks on The American Presidency at War: The Imperial Presidency and the Founding at the University of California, Berkeley, School of Law (Sept. 19, 2008) ("[W]hat is the historical story one could tell, that would say, the Framers of our Constitution, once they started thinking about this, would have wound up with a more monarchical position than that that would have been practiced in Britain in the early 1780's? It just, to me, is completely implausible as a matter of what they were thinking, how they were speaking, what they were debating."). Video of Professor Rakove's remarks is available at http://www.youtube.com/watch?v=4WmtK4dkZik&feature=related and http://www.youtube.com/watch?v=xuxNcl4u8ng. The panel also included John Yoo, Louis Fisher, and Gordon Silverstein.

146. Ramsey, *Book Review*, *supra* note 58, at 1451–52.

147. Fisher, *John Yoo and the Republic*, *supra* note 11, at 180–81 ("Apparently no capacity existed at the law review to ask pertinent questions and require answers. . . . The students who edited Yoo's article should have independently examined his claim. . . . Students at the *California Law Review* should have insisted on coherence, consistency, and clarity in Yoo's article. No such obvious contradiction would be permitted in a scholarly journal."); *see also* ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING (2008).

148. *See, e.g.*, Richard A. Posner, *Against the Law Reviews*, LEGAL AFF., Nov./Dec. 2004, at 57, *available at* http://legalaffairs.org/issues/November-December-2004/review_posner_novdec04 msp.

students who have only a modest amount of training in law, generally no training or experience in editing, and familiarity only by happenstance with specialized subjects or interdisciplinary fields. Peer review is formally nonexistent. In some cases editors may send a submission to one or two faculty members for their views of its interest and contribution to the field, but these faculty comments seldom approach the carefulness or comprehensiveness of peer review as it is practiced in other academic disciplines. Furthermore, faculty input is almost always limited to the selection decision. The primary focus of the editing process is on checking and multiplying citations and stylistic revisions.

Cite checking is done by a team of students, usually the least experienced members (or aspiring members) of the journal, each of whom is assigned a different section of the piece. If a cited source is correctly quoted, it would be unusual for an editor to check other works to see whether the passage is representative of the writer's thought, or to verify whether the sources cited by the author represent the range of views within the profession. If the article involves a technical topic such as statistical analysis, gene replication technology, or an empirical study of the effects of the Sarbanes-Oxley rules, it is unlikely that the author's methodology will receive a careful review by an expert at this or any other stage.

Our discipline may be at the mercy of this particular problem because we are wedded to the student-run and student-edited law review. Law professors recognize the pedagogical value of law reviews in giving students the opportunity to work closely with established scholars on their most current work. Such experience is also highly valued by judges and private employers. One cannot fault student editors for not having faculty-level expertise sufficient to lead them to question the whole enterprise, particularly when the author is a faculty member at their own school. The student editors of *War Powers* would not normally be expected to have the expertise necessary to critique the historical methodology of an article so copiously sourced to Founding-era materials and secondary sources from both the eighteenth and twentieth centuries. Indeed, it is far from clear that the article should be regarded as unpublishable, as opposed to simply "a minority view" or "wrong."[149] Moreover, because legal academia values "brilliance," novelty, and sweeping if

149. Yoo's methodology has been praised by some, including some who disagree with his conclusions. *See, e.g.*, Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685, 1696 (2002) (stating author "has little quarrel with the historical account" in *War Powers*, though, as a "textual originalist" like Yoo, he finds Yoo's understanding of the meaning of "declare war" to be too narrow); Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2098–100 (1999) (Yoo's work on treaties shows "superior rigor" to most "originalist accounts of history" though author disagreed with his conclusions); Jack Rakove, *John Yoo on Why the President is King*, WASH. POST, Jan. 10, 2010, at B1 (*Crisis and Command* is a "deeply serious history, of the presidency, sometimes selective in its emphasis").

unfalsifiable theories, there is, I believe, more of a tendency toward overclaiming than is the norm in many other disciplines. Thus there was nothing really out of the ordinary in *CLR*'s decision to publish *War Powers.* Nevertheless, the article illustrates some of the pitfalls of relying on student-edited law reviews for publishing specialized or methodologically complex scholarship, and it may be appropriate to improve the processes by which law reviews evaluate the methodology and conclusions of the articles they publish.

An example of these issues is an article published by the *Stanford Law Review* purporting to demonstrate empirically that affirmative action is bad for black law students and produces fewer black lawyers than would a race-blind system.[150] The article attracted a great deal of press and the author appeared on television to discuss his theory.[151] After the article was published, it was harshly debunked by statisticians, economists, historians, sociologists, and other scholars. The *Stanford Law Review* devoted an entire issue to these critiques and the author's response.[152] Even this thoroughgoing effort to publish contrary views, however, could not adequately correct public perceptions on an important social issue. The critiques of the article suggest that if it had undergone peer review, it probably would not have been published, at least in its original form and using its original methodology.

One might argue that to avoid such problems, student-edited journals should refrain from publishing articles whose methodology should be peer-reviewed, but this would deprive authors working in some of the most important fields of current legal scholarship from publishing in the most prestigious journals. It does seem appropriate, however, to suggest that law reviews should make a serious attempt to incorporate components of peer review into the publication process.

For example, it would not jeopardize the independence of law reviews to make soliciting comments from faculty members knowledgeable in the subject a regular part of the selection process. There are certain types of articles in which the lack of peer review is especially likely to lead to problems. These include empirical studies involving statistical analysis, work containing formal mathematical modeling, work that turns on scientific or technical matters, and—perhaps surprisingly to some—historical scholarship, particularly when the author draws from history a prescription for contemporary policy. As David Shapiro has observed, "[W]hen legal academics, and especially those who are not professional historians, turn to history as an aspect of their inquiry into a problem of current importance, they tend to find in their investigations that

150. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 372 (2004).

151. *See* Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1909–11 (2005) (describing media reactions).

152. 57 STAN. L. REV. 1807 (2005).

history supports their personal values and preferences, or to put it more tactfully, their hypotheses."[153]

At least when a work announces itself as a novel departure and argues that its reading of history dictates specific policy choices for today, a law review should be careful to assure that the methodology is valid, the cited evidence is representative, and the conclusions are well-supported. These efforts should include, where appropriate, seeking input from faculty outside the law school.

A consortium of law reviews has inaugurated an intriguing approach, following a pilot program at the *South Carolina Law Review*. Authors may submit their manuscripts to the Peer Reviewed Scholarship Marketplace (PRSM) on an exclusive basis. PRSM sends the article to several reviewers and six weeks later makes the articles, with comments from the anonymous reviewers, available to its member journals, in much the same fashion as the manuscript submission service ExpressO.[154] The process is intended to offer journals a way of getting expert reviews of articles on a wide variety of topics without having to seek out individual reviewers, and to help authors make their work more attractive to journals by providing them with assurances of its merit. The success of the venture will depend on the quality of the peer review it can provide[155] and on how many law reviews agree that peer review will improve their selection process.

On the other side of the printing press, perhaps academics should feel a greater responsibility to respond in print to articles with which they disagree. A dialogue between distinguished academics has the capacity to produce more nuanced understanding, and some such exchanges have resulted in classics of legal scholarship.[156]

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153. David L. Shapiro, Ex parte Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 87 (2011). Professor Shapiro observes that we see the past

> through the prism of our own preferences, especially when we are using the past to support an argument about how to deal with the present. Moreover, I am convinced that this frailty is given strength by the almost inevitable ambiguity of the raw materials themselves, by the almost infinite expansiveness of those materials, and by the difficulty of fully understanding—not just intellectually but emotionally—the context in which the materials had their origin.

*Id.* at 88.

154. *See Home*, PEER REVIEWED SCHOLARSHIP MARKETPLACE (PRSM), http://legalpeer review.org/index.php (last visited Jan. 8, 2012). Of course a peer-reviewing service would be more difficult to create than a submission service such as ExpressO, which does not evaluate the submissions. The ExpressO service is described at *ExpressO: Express Online Deliveries*, BEPRESS, http://law.bepress.com/expresso (last visited Jan. 10, 2012).

155. PRSM invites "all members of the legal profession—judges, professors, and practitioners" to apply to become reviewers. *Reviewers*, PEER REVIEWED SCHOLARSHIP MARKETPLACE (PRSM), http://legalpeerreview.org/reviewers.php (last visited Jan. 10, 2012).

156. One example is the series of articles published in the *Harvard Law Review* on John Hart Ely's classic work on *Erie*. *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Abraham Chayes, *Some Further Last Words on Erie—The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *Some Further Last Words on Erie—The Necklace*, 87 HARV. L. REV. 753 (1974); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974). A recent

## IV.
## THE LONG ARM OF THE LAW REVIEW: THEORY BECOMES NATIONAL POLICY

Even assuming that the criticisms of Yoo's historical analysis are correct, law reviews publish plenty of misguided or incorrect theories. Our operating theory is that the cream will rise to the top, good speech will crowd out bad. In the world of legal scholarship, peer review happens after publication rather than before. In the case of *War Powers*, however, the theory did not stay in the academic pond. Rather like the walking catfish of Florida,[157] it migrated to government, where—unopposed by more mainstream theories—it provided the legal justification for a whole suite of policies that were extreme, illegal, and harmful to the nation at home and abroad. Had it not been for these legal opinions, it is likely that the Bush Administration's programs of torture and mistreatment of detainees, secret domestic wiretapping, the use of CIA and private contractor personnel rather than experienced FBI and military interrogators to conduct "gloves-off" interrogations, and the insistence on devising ad hoc procedures such as military commissions and jurisdiction-stripping in an attempt to avoid statutory and constitutional constraints in the "Global War on Terrorism" would at least have been substantially less enthusiastically pursued.

How did an interpretation of executive power that was avowedly novel, "[c]ontrary to the views of today's scholars," strongly criticized even before President Bush took office,[158] and repudiated in harsh terms by other officials in the Bush administration both contemporaneously and afterward, come to be the lever that moved world affairs?

The answer lies in a management failure that was, unfortunately, typical of the Bush administration in times of crisis—shaping policy to match political ends, placing politically reliable but inexperienced individuals in charge of complex policy decisions, isolating policy making from dissenting views, and reacting to crisis by concluding that extreme measures were required. For example, inexperienced political appointees were brought in to head FEMA with devastating results during Hurricane Katrina;[159] the government insisted

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example is David Shapiro's response to John Harrison's revisionist reading of *Ex parte Young*, *supra* note 153.

157. *See* Clarias batrachus, SMITHSONIAN MARINE STATION AT FT. PIERCE, http://www.sms.si.edu/irlspec/clarias_batrachus htm (last visited Jan. 8, 2012).

158. *See* Fisher, *Unchecked Presidential Wars*, *supra* note 105, at 1658–68; Stromseth, *supra* note 72; Telman, *supra* note 87.

159. *See, e.g.*, Kevin Drum, *FEMA's Failures*, WASH. MONTHLY (Sept. 12, 2005, 1:57 AM), http://www.washingtonmonthly.com/archives/individual/2005_09/007104.php (noting that neither Joe Allbaugh, appointed to head FEMA in January 2001, nor Michael Brown, who succeeded him in December 2002, had any previous experience in disaster management; disaster specialists on FEMA's top staff were replaced by inexperienced political appointees); SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, U.S. HOUSE OF REPRESENTATIVES, 109TH CONG., A FAILURE OF INITIATIVE: FINAL REPORT (2006), *available at* http://www.gpoaccess.gov/katrinareport/fullreport.pdf.

that Iraq had weapons of mass destruction despite red flags and evidence to the contrary, paving the way to a war that has lasted eight years and cost trillions;[160] Army Chief of Staff General Eric Shinseki was "vilified, then marginalized" for advising that hundreds of thousands of troops would be needed in Iraq;[161] and the catastrophic decision to disband the Iraqi army bypassed the Joint Chiefs of Staff.[162]

Yoo, like the rest of the Bush administration, had only been on the job for a few months. Suddenly the September 11 terrorist attacks made war powers, which had previously seemed a somewhat arcane and theoretical topic, an urgent legal issue. Shock at the enormity of the attacks produced an atmosphere of crisis, fear, and emergency. Retaliation against Afghanistan was immediate, and planning for war in Iraq began the day after the attacks,[163] continuing with a secret presidential directive to the Pentagon less than a week later to prepare military options for an invasion.[164] In fact, just a week after Bush's inauguration, the National Security Council discussed plans for the occupation of Iraq,[165] and within six weeks of the inauguration the Pentagon produced a memo discussing how to divide up Iraq's oil.[166]

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160. *See, e.g.*, Martin Chulov & Helen Pidd, *Curveball: How US Was Duped by Iraqi Fantasist Looking to Topple Saddam*, THE GUARDIAN, Feb. 15, 2011, http://www.guardian.co.uk/world/2011/feb/15/curveball-iraqi-fantasist-cia-saddam.

161. Thom Shanker, *New Strategy Vindicates Ex-Army Chief Shinseki*, N.Y. TIMES, Jan. 12, 2007, at A13.

162. Gen. Peter Pace, Vice Chairman, Joint Chiefs of Staff, Remarks at the Council on Foreign Relations, Washington, D.C. (Feb. 17, 2004) (transcript available at http://www.cfr.org/iraq/conversation-peter-pace/p6785) ("We were not asked for a recommendation or for advice.").

163. *See, e.g.*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 334 (2004) (discussing Richard Clarke's recollection of a discussion with President Bush on September 12, 2001), *available at* http://www.gpo.gov/fdsys/pkg/GPO-911REPORT/pdf/GPO-911REPORT pdf; *The Iraq War, Part I: The U.S. Prepares for Conflict, 2001*, NAT'L SEC. ARCHIVE (2010), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB326/index htm ("On September 11 al-Qaeda struck and George Bush immediately assumed that Saddam Hussein was involved. The same held true for Donald Rumsfeld; famously, within hours of the attacks he directed the Joint Chiefs of Staff to look for evidence to justify attacking Saddam Hussein. . . . National security staff met at the White House on September 12 and . . . Rumsfeld and Wolfowitz again argued for attacking Iraq. . . . Bush endorsed the strategy of overthrowing Iraq's government.") (citations omitted).

164. *See* Glenn Kessler, *U.S. Decision on Iraq Has Puzzling Past; Opponents of War Wonder When, How Policy Was Set*, WASH. POST, Jan. 12, 2003, at A1.

165. Rebecca Leung, *Bush Sought "Way" to Invade Iraq?* CBS NEWS (Jan. 9, 2004), http://www.cbsnews.com/stories/2004/01/09/60minutes/main592330.shtml (reporting on a "60 Minutes" interview of Paul O'Neill by Lesley Stahl; interview segment available at http://www.cbsnews.com/video/watch/?id=592691n&tag=contentBody;storyMediaBox); RON SUSKIND, THE PRICE OF LOYALTY: GEORGE W. BUSH, THE WHITE HOUSE, AND THE EDUCATION OF PAUL O'NEILL (2004). In Suskind's book, former Treasury Secretary Paul O'Neill reveals that overthrowing Saddam Hussein was discussed at the first meeting of the National Security Council, of which he was a member, and that two days later the NSC discussed a memo dated January 31, 2001 and titled "Plan for Post-Saddam Iraq." *Id.*

166. Leung, *supra* note 165 (Suskind "obtained one Pentagon document, dated March 5, 2001, and entitled 'Foreign Suitors for Iraqi Oilfield Contracts,' which includes a map of potential areas for exploration").

In this crisis atmosphere, OLC was called on to give legal opinions very quickly. Jay Bybee, the head of OLC, later testified that he was unfamiliar with the legal issues related to war and, regarding Yoo as an expert, essentially turned war powers matters over to him. Despite Yoo's lack of experience outside academia[167] and the fact that his views on war powers were concededly out of the mainstream, there was no effort to provide oversight by more experienced lawyers.

Yoo's professional experience was largely in academic or political contexts where he was free to espouse controversial views, and he had great confidence in those views. Stephen Bradbury, who became head of OLC in 2005, told investigators for the Office of Professional Responsibility (OPR) during its investigation into the "torture memos" that "part of the problem with Yoo's work on the Commander-in-Chief section was his entrenched scholarly view of the subject."[168] In his view, Yoo

> had a deeply ingrained view of the operative principles. And to the extent there were sources that reflect that view, he may bring them in and cite them. . . . And if a court here or a court there or a commentator here or a commentator there takes a different view, that's almost of secondary importance because he had such a firmly held view of what the principles were.[169]

Such views could be given freer rein because the questions had seldom arisen in a practical context and the raw material of scholarship was correspondingly sparse. Yet, in the words of Alberto Mora, general counsel of the Navy during Yoo's tenure, Yoo's analysis "spots some of the legal trees, but misses the constitutional forest."[170]

Yoo's inclination to march to his own drummer was intensified by the lack of supervision from more experienced lawyers in the office as well as the security restrictions that severely limited the number of people outside the OLC who had knowledge of his memos. The OLC opinions, as well as documents and information relevant to them, were classified and the Bush administration was parsimonious in granting clearances.[171] The Joint Chiefs and State Department were not involved in formulating the opinions, and when they did

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167. Outside of clerkships and academia, Yoo's only practice experience was as general counsel to the Senate Judiciary Committee in 1995–96. Yoo's biographical information is available in his faculty profile, *John Choon Yoo*, BERKELEY LAW FACULTY PROFILES, http://www.law.berkeley.edu/php-programs/faculty/facultyProfile php?facID=235 (last visited Jan. 10, 2012).

168. OPR FINAL REPORT, *supra* note 15, at 122.

169. *Id.*; *see also id.* at 228–29 (discussing instances in which the OLC memoranda failed to take account of applicable treaties, laws, and prior positions taken by the U.S. government); *id.* at 251–53 (misrepresentation of authorities, failure to disclose that position taken was a minority view).

170. Memorandum from Alberto J. Mora, Gen. Counsel of the Navy, to Inspector Gen., Dep't of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues 17 (July 17, 2004), *available at* http://www newyorker.com/images/pdf/2006/02/27/moramemo.pdf.

171. OPR FINAL REPORT, *supra* note 15, at 260.

learn of OLC's advice, their objections were disregarded or suppressed.[172] Nor were any experienced FBI or military interrogators involved in formulating interrogation policy. Instead, the policy reflected folk wisdom about the efficacy of harsh treatment and torture. The OPR Report noted that drafts of the opinions were not circulated to national security experts in the Criminal Division of the Justice Department, or to the State Department.[173]

The audience for Yoo's memos was a small group of like-minded officials who concentrated decision making among themselves. Thus policy making and legal analysis became insulated not only from divergent opinions, but from input from experts who did not happen to be part of the group. Alberto Mora, general counsel of the Navy, William H. Taft IV, general counsel of the State Department, and Secretary of State Colin Powell attempted to reverse the administration's decision that the Geneva Conventions did not apply but their objections were sidelined.[174]

OLC's clients knew what actions they wanted to take, and the OPR investigation found that the OLC lawyers tended to respond to pressure to give the client what it wanted.[175] The clients emphasized that if a favorable opinion was not forthcoming, either the government would not be able to take the actions necessary to protect the country, or people who carried out the President's directives might be subject to prosecution.[176] Yoo's memos

172. *See infra* note 174 and accompanying text (regarding the concerns of Alberto Mora, William H. Taft IV, and Colin Powell).

173. OPR FINAL REPORT, *supra* note 15, at 259–60. The report concluded that drafts should have been circulated to all attorneys and policy makers with expertise and a stake in the issues involved. *Id.*

174. *See infra* notes 182–184 and accompanying text.

175. OPR FINAL REPORT, *supra* note 15, at 227 ("We also found evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result, at the expense of their duty of thoroughness, objectivity, and candor."); *id.* ("[T]he client [CIA] clearly regarded OLC as willing to find a way to achieve the desired result . . . ."). The opinion memoranda were addressed to Gonzales, Haynes (general counsel of the Department of Defense), and Rizzo (acting general counsel of the CIA). In their response to the draft *OPR Report*, Yoo and Bybee also referred to Vice President Cheney's general counsel David Addington as their client, *id.* at 198 n.152, and Addington referred to himself as OLC's client. *Id.* at 198. The report discusses pressure applied on the OLC by Cheney and Addington. *See id.* at 51, 52, 58; *see also id.* at 142–45 (describing the "significant pressure on OLC and [DOJ] from the White House"). For example, in 2004, Addington threatened to prevent any promotion in government for Patrick Philbin, the attorney responsible for withdrawing the Bybee Memo. In 2005, he made good on the threat by "strenuously objecting" to Philbin's proposed promotion to Principal Deputy Solicitor General, leading to a personal call from Cheney to Gonzales and Gonzales's subsequent retreat from the proposal "to maintain good relations with the White House." *Id.* at 143 n.115; *see also id.* at 143–44 (noting one insider believed OLC knew "[Cheney] and Addington would be 'furious'" if it issued an opinion that "shut down or hobbled" the interrogation program).

176. Michael Isikoff reported that in a meeting in early 2002 Yoo raised the possibility that "the political climate could change" and prosecutions could be brought under the War Crimes Act unless the President issued a determination that the Conventions did not apply. Michael Isikoff, *Memos Reveal War Crimes Warnings*, DAILY BEAST (May 16, 2004, 8:00 PM), http://www.thedailybeast.com/newsweek/2004/05/16/memos-reveal-war-crimes-warnings html.

provided legal support for whatever the President and his advisers proposed to do, and a client who is pleased with a lawyer's advice may be inclined to seek it again—especially if the advice may confer immunity from prosecution even if it turns out to be wrong. Indeed, Yoo (but not Bybee, his nominal boss) ultimately became a member of the administration's "war council."[177]

All of these circumstances contributed to "motivated reasoning"—the psychological phenomenon in which emotions and strongly held previous beliefs can affect reasoning.[178] That is, "[p]eople are more likely to arrive at those conclusions that they want to arrive at."[179] And motivated reasoning is a bad way to make policy involving war and military force—even, and especially, when the stakes seem existential.[180]

In sum, circumstances combined to produce a perfect storm of management failure. In this case, a law review article was consequential, as I use the term, because it generated attention that led to a job in a location and at a time uniquely positioned to allow the author to put his theory into reality in crucial areas of national policy. Stephen Bradbury concluded from Yoo's example that it might be wiser not to place academics into policy-making positions:

> In my view, there's something to be said for not being a scholar or a professor in this job [in OLC]. . . . And taking a more practical approach, and one where you don't think you know the answers already, because you haven't got a body of scholarly work, you know,

177. *See* JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 66 (2008) (reporting that the War Council consisted of David Addington, Alberto Gonzales, William J. Haynes, Timothy Flanigan, and John Yoo); *see also* Chitra Ragavan, *Cheney's Guy*, U.S. NEWS & WORLD REP., May 21, 2006, at 6 (recounting one former official's description of them as a "very narrow, tight group").

178. Motivated reasoning is the tendency to seek out and remember information that confirms prior beliefs or expectations and disregard or discredit information that contradicts those beliefs. It is related to "confirmation bias," the tendency to attend more to confirming information than to disconfirming information, and to "cognitive dissonance," the tendency to try to relieve the tension between inconsistent beliefs. *See, e.g.*, Zina Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990), *available at* http://www.psych.utoronto.ca/users/peterson/psy430s2001/Kunda Z Motivated Reasoning Psych Bull 1990.pdf; Monica Prasad et al., *"There Must Be a Reason": Osama, Saddam, and Inferred Justification*, 79 SOC. INQUIRY 142 (2009), *available at* http://sociology.buffalo.edu/documents/hoffmansocinquiryarticle_000.pdf; Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Discovered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098 (1979); *see also* LEON FESTINGER ET AL., WHEN PROPHECY FAILS (1956) (cognitive dissonance).

179. Kunda, *supra* note 178. A fascinating study of how such motivated decision making led to the Challenger disaster is found in JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS (2004).

180. *See* OPR FINAL REPORT, *supra* note 15, at 254 ("[S]ituations of great stress, danger and fear do not relieve Department attorneys of their duty to provide thorough, objective, and candid legal advice, even if that advice is not what the client wants to hear.").

> you've already developed on these questions. And I just think that for practical reasons that's healthy.[181]

Though Bradbury's criticism of dogmatism is surely correct, the broad conclusion that academics should not serve in policy-making positions seems unjustified. Academics have served honorably in government for generations. They can bring a wide range of professional knowledge and intellectual rigor to government, helping to offset political pressure and conventional wisdom as the basis for policy making while gaining practical experience and institutional knowledge to inform and guide their future scholarship.

At any given time *most* government lawyers are not former academics, and government lawyers—contemporaneously in the Defense and State Departments as well as later at the OLC—had no difficulty in rejecting Yoo's broad claims of executive power out of hand. In fact, they were among the strongest critics of the legal opinions that were based on the *War Powers* analysis.

Alberto Mora, who was general counsel to the Navy during Yoo's OLC tenure, waged a dogged, courageous, but ultimately futile battle to prevent the Department of Defense from adopting Yoo's theories.[182] Mora described the memo on interrogation techniques as "profoundly in error," declaring that the statement that it was permissible to use cruel, inhuman, and degrading treatment not amounting to torture was "a clearly erroneous conclusion that was at variance with applicable law, both domestic and international, and trends in constitutional jurisprudence," and that "the memo espoused an extreme and virtually unlimited theory of the extent of the President's commander-in-chief authority."[183] Secretary of State Colin Powell and State Department general counsel William H. Taft IV (a former Acting Secretary of Defense under President George H. W. Bush) also argued strenuously against Yoo's analysis of the Geneva Conventions.[184]

Jack Goldsmith, Bybee's immediate successor at the OLC, withdrew the Yoo Memo and the Torture Memo. His draft of a replacement for the Yoo Memo, which was unfinished at the time of his departure in July 2004, stated that the Yoo Memo "is flawed in so many respects that it must be withdrawn,"

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181. OPR FINAL REPORT, *supra* note 15, at 122 (alterations in original).

182. For a description of Mora's efforts and those of other career military personnel, see Memorandum from Alberto J. Mora, *supra* note 170.

183. *Id.* at 17; *see also* Jane Mayer, *Annals of the Pentagon: The Memo*, NEW YORKER, Feb. 27, 2006, *available at* http://www newyorker.com/archive/2006/02/27/060227fa_fact (reporting on Mora's efforts).

184. *See* Memorandum from Colin L. Powell, Sec'y of State, to Counsel to the President and Ass't to the President for Nat'l Sec. Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf; Memorandum from William H. Taft IV, Legal Adviser, Dep't of State to Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), *available at* http://www.slate.com/features/whatistorture/pdfs/020202.pdf.

"contains numerous overbroad and unnecessary assertions of the Commander-in-Chief power," is "too simplistic," and "makes overly broad and unnecessary claims about possible defenses to various federal crimes, including torture."[185] Yoo's definition of "severe pain" was "misleading and unhelpful," and the assertion that Congress lacks authority to regulate wartime interrogation is "plainly wrong."[186] The Commander-in-Chief analysis "is misleading and under-analyzed to the point of being wrong."[187]

Dan Levin replaced Goldsmith as acting assistant attorney general. "Levin stated that when he first read the Bybee Memo, he remembered 'having the same reaction I think everybody who reads it has—this is insane, who wrote this?'"[188] Levin issued a replacement for the Bybee Memo that withdrew and criticized the discussion of "severe pain," deleted the Commander-in-Chief section as well as the discussion of possible defenses, and modified the discussion of specific intent, which he characterized as "just ridiculous."[189]

In short order Levin was replaced as head of OLC by Stephen Bradbury. According to the Office of Professional Responsibility Report, Bradbury told investigators that Yoo's view of the Commander-in-Chief power "was not a mainstream view," that the memo did not adequately consider counter-arguments, and that "somebody should have exercised some adult leadership in that respect."[190]

Shortly after taking office President Obama revoked all of the Bush OLC memos regarding detention and interrogation, declaring, "From this day forward, . . . officers, employees and other agents of the United States Government . . . may not, in conducting interrogations, rely on any interpretation of the law governing interrogation . . . issued by the Department of Justice between September 11, 2001 and January 20, 2009."[191]

The OPR ultimately issued its *Final Report* finding that the Bybee and Yoo memos "contained seriously flawed arguments and . . . did not constitute thorough, objective, or candid legal advice," and that their legal analysis was "inconsistent with the professional standards applicable to Department of Justice attorneys."[192] At the final level of review, however, the OPR's finding

185. Dep't of Justice, Office of Prof'l Responsibility, Report: Investigation into the Office of Legal Counsel's Memoranda on Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 85–88 (Dec. 22, 2008) (draft report), *available at* http://judiciary house.gov/hearings/pdf/OPRFirstReport081222.pdf (quoting Goldsmith's June 15, 2004, draft memorandum at 1 n.1).

186. *Id.* (quoting Goldsmith's June 24, 2004, draft memorandum at 28 n.26, 36–37 n.38).

187. *Id.* at 86 n.74 (quoting a June 30, 2004, Goldsmith email).

188. *Id.* at 92 (internal quotation marks omitted).

189. *Id.* at 97. The replacement memo was posted on the OLC website on December 30, 2004. *See id.* at 98.

190. *Id.* at 90. On May 10, 2005, Bradbury issued a memo to replace the Bybee Memo. *Id.* at 4–5.

191. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

192. OPR FINAL REPORT, *supra* note 15, at 226.

of professional misconduct and proposed referral to state bar disciplinary authorities were reduced to a finding of "poor judgment."[193]

It is apparent that the problem was not that a single government lawyer followed an eccentric legal theory, or that other government lawyers could not understand that the theory was wrong. Rather, this was a case of a severe management failure in which policy was made by a small group that held extreme views, and in which a culture of secrecy and document classification made it nearly impossible for anyone outside the group to have any effect on policy.

## CONCLUSION

*War Powers* is seriously flawed as a piece of historical scholarship. Nevertheless, it is not unusual for law professors to write flawed scholarship or for law reviews to publish it. And it is not realistic to expect student-run law reviews to be adequate gatekeepers to prevent all flawed scholarship from publication, particularly when specialized knowledge is required to discern the flaws.

But when scholarship jumps the academic pond and becomes the basis for national policy, when it leads to monumental effects in the world, then it is cause for concern. In this case, a relatively junior government lawyer was able to see his theories implemented as national policy because good policy-making practice was abandoned in a time of crisis. A small group of like-minded people held decisions close through aggressive use of classification and failed to involve others with relevant expertise who would normally be part of the policy-making process. Yoo was willing to provide legal opinions justifying the policies the group wished to pursue, and his compliance led to his being asked to provide opinions on a wide variety of matters. It is telling that a number of government lawyers in the State and Defense Departments, as well as career military personnel, who became aware of these legal memoranda strongly opposed them, and his successors at OLC repudiated and withdrew them.

The most important of these policy consequences was the justification of torture and other extreme treatment of suspected terrorists based on the theories advanced in *War Powers*. Waterboarding, for example, has been prosecuted by the United States as a war crime when engaged in by our adversaries or even by domestic law enforcement.[194] Other "enhanced" techniques, such as prolonged

193. Memorandum from David Margolis, Assoc. Deputy Att'y Gen., for the Att'y Gen., Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 1–2, 68–69 (Jan. 5, 2010), *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

194. For a summary of the government's history of condemning water torture and punishing those who engage in it, whether U.S. personnel, enemy soldiers, or domestic law enforcement, *see* OPR FINAL REPORT, *supra* note 15, at 234–35.

use of sleep deprivation and stress positions, are also widely recognized as torture or cruel, inhuman, and degrading treatment.[195] It appears that the U.S. government is not going to fulfill its obligations under international and domestic law to investigate and punish violations of the prohibition against torture, even though the government has simultaneously asserted in foreign courts that they should not exercise universal jurisdiction to hear claims of war crime violations by the United States because our criminal justice system is pursuing enforcement. But we should never forget that torture is always illegal, and can never be justified by exigency or immunized by executive power.

195. *See id.* at 143–44, 156, 236–37.