

# *The Law*

## John Yoo and the Republic

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*In his articles, books, and legal memoranda for the U.S. Department of Justice, John Yoo is well known for favoring broad and even exclusive presidential power in the field of national security. Less understood is his dependence on the British model and the prerogatives it extended to the king over external affairs. In his writings, Yoo devotes little attention to the framers' rejection of British executive prerogatives. Even less does he acknowledge their commitment to a republic, a form of government in which sovereign power is vested not in an executive but in the people.*

From his breakthrough article in the *California Law Review* in 1996 to the three books published after leaving the Justice Department, John Yoo has maintained consistency in his arguments for broad presidential power over national security. This article begins by summarizing the basic principles that Yoo developed in 1996 and how they have reappeared in subsequent writings. It then turns to the constitutional principles of an American republic that he takes little notice of. As a result, his constitutional model looks like the British monarchical system embraced by William Blackstone in the 1760s, rather than the republican principles promoted by the framers.

### The 1996 Framework

John Yoo's 1996 article in the *California Law Review* carries this title, "The Continuation of Politics by Other Means: The Original Understanding of War Powers." (All page references in this section are to his article.) His study is lengthy and detailed: 139 pages supported by 625 footnotes. With this publication, Yoo attracted attention as a major scholar on the war power and national security law. He served as general counsel

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for the Senate Judiciary Committee from 1995 to 1996 and as deputy assistant attorney general in the Justice Department from 2001 to 2003.

Anyone writing in this field must carefully study the framers' intent about the initiation of military force against another nation. Yoo concludes that the framers "established a system which was designed to encourage presidential initiatives in war" (174), that the executive "would play the leading role in initiating and ending war" (268), and that "the Constitution gives the President the initiative in war" (295). He qualifies that position at times by analyzing the debate over the declare war clause, when the framers inserted "declare" for "make" and recognized that the president may "repel sudden attacks." To Yoo, this debate clarifies that the president "could not unilaterally take the nation into a total war, but that he might be able to engage the nation in hostilities short of that" (264). He acknowledges that James Madison "quite presciently wanted to prevent the President from using his war powers to enhance his overall power and importance vis-à-vis Congress and the People" (266).

Those qualifications are overshadowed by Yoo's repeated argument that the president has independent and plenary power to initiate war, subject to no judicial checks and to only two legislative constraints: impeachment and the power of Congress to deny funds after the president takes the country to war (174). In conflicts ranging "from Korea to the Persian Gulf, the President has acted to protect what he believed to be American national security interests abroad." Because troops and supplies are needed, the president is forced "to go to Congress before he could take military action" (296). Actually, that is not what Yoo means. President Harry Truman went to war in Korea without first seeking authority from Congress. Therefore, Yoo means that only after the president unilaterally goes to war must he come to Congress for funds *to continue the military operation*. As Yoo explains, "in June 1950, Truman immediately could intervene when South Korea was invaded, but he needed further appropriations for a longer-term commitment (which he sought from Congress a month later)" (296).

Yoo takes the same position with other presidential wars. When President George H. W. Bush sent troops to Saudi Arabia in the fall of 1990 as part of Operation Desert Shield against Iraq, Congress could have decided not to appropriate funds. The president "cannot veto a refusal to pass an appropriations bill. All Congress had to do was nothing" (297). That is not accurate. Presidents always have access to funds not yet obligated. They need not come immediately to Congress for appropriations. Troops can be deployed and placed in harm's way.

Yoo applies his analysis to initiatives by President Bill Clinton in sending military forces to Bosnia, including bombing Serbian positions. "Like President Bush during the Persian Gulf War, President Clinton did not ask Congress for authorizing legislation or for a declaration of war." Clinton claimed that he acted pursuant to his "constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive" (297). He requested only "an expression of support from Congress," not legislation to authorize military action. As Yoo notes, Clinton maintained that he had "unilateral authority to send the military to Bosnia, whether Congress gave its approval or not" (297). If Congress had decided to oppose his intervention, "it easily could have refused" funds for further military operations (298).

Anyone who follows American wars understands that it is not “easy” to deny funds for troops sent to combat by presidents. Funds can be cut off, but as we know from the Vietnam War, it can take a decade to attract the necessary votes in Congress. But for Yoo, the appropriations power “provided Congress with ample opportunity to weigh in on the decision to send troops to Bosnia.” By debating and rejecting efforts to deny funding, “Congress chose to permit the executive to pursue war” (298).

In matters of war, Yoo concludes that no judicial checks exist. Following his interpretation, the declare war clause did not vest in Congress the sole initiative to begin wars. Instead, the framers understood that the clause placed “a judicial power” in Congress, “just as the Constitution gave the Senate judicial authority in the trial of impeachments. In these areas, the Constitution places Congress in the position of the court of last resort” (288). Therefore, the federal judiciary “could not exercise appellate jurisdiction over war power decisions because the Constitution allocated to Congress the sole power to declare if war exists.” Permitting courts to review war powers decisions “would prove an unconstitutional extension of appellate jurisdiction beyond the bounds of Article III” (288).

Yoo further argues that the clause “does not add to Congress’ store of war powers at the expense of the President. Rather, the Clause gives Congress a judicial role in declaring that a state of war exists between the United States and another nation, which bears significant legal ramifications concerning the rights and duties of American citizens.” Congress’s power to declare war “also has the additional effect of ousting the courts from war powers disputes” (295). 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.

Under his analysis, federal courts should treat such cases as nonjusticiable “because the Constitution has vested Congress with the sole judicial power to decide whether the United States is at war.” Courts may adjudicate cases that involve “the ramification of the nation’s wartime status,” but in those cases, “the courts must simply accept the actions of the political branches in war matters as valid determinations of whether a state of war exists” (288-89). Courts “cannot act in war powers cases because the Constitution allocates *all* power in the area to the political branches” (300). As explained in the next section, the U.S. Supreme Court rejected that position as early as 1800, 1801, and 1804. So did a significant circuit court decision in 1806.

To read the declare war clause as permitting presidents to initiate war ignores almost every statement made by the framers. Yoo does cite the famous statement by James Wilson at the Philadelphia ratifying convention: “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” (286 n. 547). Yoo relegates his discussion of Wilson to a lengthy footnote, in which he proceeds to dismiss Wilson’s views as “exceptional rather than typical.” In fact, Wilson reflected a broad consensus among the framers. The footnote states that on war power issues, Wilson “doubted the virtues of the British system.” So did every other framer when it came to the war power.

The comment about Wilson and the British system is very revealing. Yoo's interpretation of the Constitution exalts the virtues of the British system, particularly vesting external powers with the executive.

In the footnote, Yoo suggests that he and Wilson are not far apart: "I would suggest that Wilson's meaning is more consistent with my interpretation than might at first appear." The speech at the Pennsylvania ratifying convention "appears to refer to the formal aspects of a declaration of war, rather than to the authorizing process for the commencement of hostilities." Yoo does not elaborate on his reasoning. Apparently it rests on Yoo's position that although only Congress can declare war, presidents may authorize and initiate war. That argument does not take Yoo very far. He decides that "it is perhaps safer just to count Wilson as a dissenter from the prevailing Federalist view on war powers." 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*.

Yoo attempts to weaken the meaning of the declare war clause by saying that it was intended "to make clear that the declaration of war was a power of the national government, not the state governments" (242). It is not necessary to interpret the declare war clause to understand that the states cannot take the country to war. Article I, Section 10, stipulates, "No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." No state shall "grant Letters of Marque and Reprisal." Those powers are reserved to Congress by Article I, Section 8. Congress alone grants letters of marque to authorize private citizens to engage in war, and Congress alone decides on reprisals (small wars) that respond to military actions by other nations.

### The British Model

How does John Yoo vest in the president the authority to initiate war? He does so not by careful and balanced analysis of the framers' intent, but by adopting as his constitutional framework the British model on war and external affairs. His 1996 article concludes 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" (Yoo 1996, 242; all page references in this section are to Yoo's article). As will be explained, the framers vigorously repudiated the British war powers model. To Yoo, when the framers thought about the war power, "they were not excessively worried by the prospect of unilateral executive action. The President was seen as the protector and representative of the People" (174). Here he describes the British, not the American, model. The framers were deeply concerned about unilateral executive commitments to war.

Why do courts, according to Yoo, have no role on war power cases? He explains that "[n]o provision explicitly authorizes the federal courts to intervene directly in war power questions" (176). Quite true. Student editors at the *California Law Review* should have responded, "Professor Yoo, no provision of the Constitution explicitly authorizes the federal courts to intervene directly in questions of the commerce power, the taxing power,

religious liberties, the Taking Clause, and other disputes that come regularly to the courts.” Apparently no capacity existed at the law review to ask pertinent questions and require answers. Robert Spitzer has analyzed the problem of law reviews permitting the publication of articles that would be unacceptable to professional journals, where competent peer reviewers are available to judge the merits of a submitted manuscript. As one example of deficient law review standards, Spitzer cites Yoo’s article in the *California Law Review* (Spitzer 2008, 105-8).

The students who edited Yoo’s article should have independently examined his claim that “courts were to have no role at all” on war power cases (170). Yoo made it easy for them. Toward the end of the article, Yoo discusses three such cases: *Bas v. Tingy* (1800), *Talbot v. Seeman* (1801), and *Little v. Barreme* (1804). Remarkably, Yoo concludes that those decisions, involving the Quasi-War against France from 1798 to 1800, support his argument “that the Framers did not intend the judiciary to play a role in the decisions on war” (293). When the cases were brought to the Supreme Court and decided there, clearly the judiciary *did play a role*. The Court accepted the war power cases and issued rulings.

On the question of how the war power is allocated between Congress and the president, the Court looked only to Congress for authority. In the 1800 case, it decided that Congress has a constitutional choice when it initiates war. It may issue a formal declaration, consistent with language in the Constitution, or pass authorizing statutes, as it did with the Quasi-War.<sup>1</sup> In 1801, Chief Justice John Marshall spoke unambiguously: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone by resorted to as our guides in this enquiry.”<sup>2</sup> The 1804 case involved a conflict between what Congress provided by statute and what President John Adams authorized by proclamation. To a unanimous Court, the national policy established by Congress necessarily trumped the inconsistent proclamation.<sup>3</sup> 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.

A circuit court decision in 1806 further underscores the preeminence of Congress in matters of war. The government prosecuted Colonel William S. Smith under the Neutrality Act for engaging in military actions against Spain. In defense, he claimed that he acted “with the knowledge and approbation of the executive department of our government” (the Thomas Jefferson administration).<sup>4</sup> The court ruled that no president or executive official could authorize a military adventure that violated the Neutrality Act. Neither the president nor anyone in his administration would waive or ignore the statute: “The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.”<sup>5</sup> The court inquired, “Does [the president] possess the power of making war? That power is exclusively vested in congress.”<sup>6</sup> Observe the language: not merely to *declare*, but to *make*.

1. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40, 43 (1800).

2. *Talbot v. Seeman*, 1 Cr. (5 U.S.) 1, 28 (1801).

3. *Little v. Barreme*, 6 U.S. (2 Cr.) 170, 179 (1804).

4. *United States v. Smith*, 27 Fed. Cas. 1192, 1229 (C.C.N.Y. 1806) (No. 16,342).

5. *Ibid.*, 1230.

6. *Ibid.*

Yoo makes no mention of this important case in his 1996 article or in any of his three books devoted to national security law. Nor does he take account of the framers' intent to incorporate safeguards into the Constitution. As David Gray Adler notes, the framers "sought to incorporate principles and elements of constitutionalism, separation of powers, and checks and balances. In this effort, the Founders drew no distinction between foreign and domestic affairs" (2007, 136). Court rulings from 1800 to 1806 "demonstrated the capacity and willingness of the judiciary to play an integral role reviewing the legality of policies involving war and foreign affairs." Those rulings "reinforced the plenary power of Congress over matters of war and peace, and served to restrain the executive" (Adler 2007, 141).

Yoo offers other reasons to exclude courts from questions of the war power and foreign relations. He refers to a speech by John Marshall, as a member of the House of Representatives, when "he declared that the President was 'the sole organ of the nation in its external relations'" (182). The quotation is accurate, but Yoo provides zero *context* for the speech. Marshall did not mean that the president possesses exclusive and plenary power in external relations. That was the British model. Anyone reading Marshall's full speech would understand that he was merely defending the decision of President John Adams to hand over to British authorities a British citizen accused of murder. Plainly, Adams was acting under the explicit authority of the Jay Treaty, not some kind of inherent or extraconstitutional authority. At no point in Marshall's career as a member of the House, as secretary of state, or as chief justice of the Supreme Court did he advocate exclusive or plenary authority for the president over external affairs (Fisher 2006, 2007). In his books, Yoo relies repeatedly on the "sole organ" doctrine to magnify presidential power without once explaining what Marshall meant by the term (Yoo 2005, 183; 2006, 102; 2009, 291).

## Creating a Republic

Yoo nowhere concedes that the framers carefully studied the British model, including its commitment of the war power to the executive, and firmly and plainly said, *no*. That decision, nurtured by the framers, is central to democratic and constitutional systems. It separates America from most governmental systems, especially the British model of the 1780s. The framers repeatedly anticipated and warned against the dangers of executive wars. They understood that the existing models of government in Europe placed all of their external affairs in the executive. It was their considered decision to transfer the war power to the legislative branch in order to secure the principle of self-government and popular sovereignty. They understood that in a republican form of government, sovereign power rests with the citizens.

In his *Second Treatise on Civil Government* (1690), John Locke identified three functions of government: legislative, executive, and "federative" (1690, §§ 145-46). The last embraced "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth" (§ 146). To Locke, the federative power (what today we call war and foreign policy) was "always almost united" with the executive. Any effort to separate the executive and federative powers, he counseled, would

invite “disorder and ruin” (§§ 147–48). No one can read the U.S. Constitution and conclude that the framers adopted Locke’s model of the federative power.

Locke’s model is amplified in the writings of William Blackstone, the eighteenth-century British jurist. In Book I of his *Commentaries on the Laws of England* (1765), a work of central importance to the framers, he defined the king’s prerogative as “those rights and capacities which the king enjoys alone” (1765, 232). Some of those powers he called *direct*, that is, powers “rooted in and spring from the king’s political person,” including the right to send and receive ambassadors and the power of “making war or peace” (232–33). In placing in the king the sole power to make war, Blackstone observed that individuals who entered society and accepted the laws of government necessarily surrendered any private right to make war: “It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war” (249).

Part of Blackstone’s principle that excludes private citizens from engaging in war is included in the U.S. Constitution, but the powers he “rooted” in the executive were transferred to Congress. Congress passed the Neutrality Act of 1794, imposing criminal penalties on citizens who attempted to make war on another country.<sup>7</sup> Congress did not in any way embrace Blackstone’s definition of war as an exclusive executive power. The statute treated war as the power of the *national government*, not the president. As noted in the *Smith* case of 1806, the Neutrality Act foreclosed any effort or authority on the part of the executive branch to initiate war.

Blackstone promoted other exclusive foreign policy powers for the executive. The king could make “a treaty with a foreign state, which shall irrevocably bind the nation” (Blackstone 1765, 244). The U.S. Constitution divides that power between the president and the Senate. The king could issue letters of marque and take acts of reprisal, powers “nearly related to, and plainly derived from that other of making war” (250). Quite so. That is why the framers placed the power of letters of marque and of reprisal expressly in Congress. Blackstone insisted that when the king exercises external powers, he “is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him” (243). That position is essentially the one that Yoo promotes. No judicial check exists, and the only legislative check consists of impeachment and withholding funds. The notion of a British prerogative for the king was fully repudiated by the framers. It is wholly at odds with a republic.

The American framers could not have been more explicit in rejecting the British model of an executive who possesses exclusive control over external affairs. At the Philadelphia Convention, Charles Pinckney said that he was for “a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war which would render the Executive a Monarchy, of the worst kind, towit an elective one.” John Rutledge wanted the executive power placed in a single person, “tho’ he was not for giving him the power of war and peace” (Farrand 1966, 1:64–65).

James Wilson supported a single executive, but he “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers.” Some

7. 1 Stat. 381–84 (1794).

of those prerogatives were of a Legislative nature. Among others that of “war & peace &c.” Edmund Randolph worried about executive power, calling it “the fœtus of monarchy.” The delegates at the convention, he said, had “no motive to be governed by the British Governmt. as our prototype.” If the United States had no other choice, it might adopt the British model, but the “fixt genius of the people of America required a different form of Government.” For more than a century, town hall meetings, broad public debate, and years of community service—all directed toward self-government—set Americans apart. Wilson agreed that the British model “was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it” (Farrand 1966, 1:65-66).

Breaking free of monarchy and a strong executive had profound implications. Blackstone looked to the British king as the “pater familias of the nation.” As historian Gordon Wood explains, to be a “subject” of the king “was to be a kind of child, to be personally subordinated to a paternal dominion.” Subjects were necessarily “weak and inferior, without autonomy and independence” (Wood 1993, 11-12). The American colonists refused to be subjects, either to the king or to Parliament. Self-government means that individuals take charge of their lives and their communities, functioning as adults, not as children. Republican government in the United States cannot survive if citizens (and members of Congress) look to the president as “pater familias,” deferring to executive military initiatives.

It is quite true that Alexander Hamilton looked to the British system with admiration and affection. In a lengthy speech at the Philadelphia Convention, he admitted that in his “private opinion he had no scruple in declaring . . . that the British Govt. was the best in the world” (Farrand 1966, 1:288). Having revealed his personal preference, he quickly admitted that the models of Locke and Blackstone had no application to America and its commitment to republican government. Hamilton’s draft constitution broke free of Blackstone by requiring the president to seek the Senate’s approval for treaties and ambassadors. In another rejection of Blackstone, the Senate would have “the sole power of declaring war” (Farrand 1966, 1:292).

In his memos for the Justice Department, John Yoo relied heavily on Hamilton to expound on broad and unchecked powers for the president in external affairs. In analyzing those memos, David Gray Adler finds that this use of Hamilton “represents a striking exercise in distortion—through sins of commission and omission” (2010, 536). Hamilton’s use of such words as “unity” and “energy” were misinterpreted by Yoo to build support for a theory of plenary executive power that Hamilton never supported. As Adler demonstrates, essays by Hamilton in the *Federalist Papers* that advanced more moderate views of presidential power were simply ignored by Yoo.

## Going to War

The Constitution vests in Congress the power to regulate foreign commerce, an activity that the framers understood to have a close relationship to the war power. Commercial conflicts between nations were often a cause of war. In *Gibbons v. Odgen*

(1824), Chief Justice Marshall said of the commerce power that “it may be, and often is, used an instrument of war.”<sup>8</sup> Guided by history and republican principles, the framers placed that power and responsibility squarely with Congress.

At the Philadelphia Convention, the framers were determined to withhold from the president the power to take the country to war against another nation. Pierce Butler wanted to give the president this power, arguing that he “will have all the requisite qualities, and will not make war but when the Nation will support it” (Farrand 1966, 2:318). In that sentiment of trust to the president, he stood alone. James Madison and Elbridge Gerry moved to change the draft language from “make war” to “declare war,” leaving to the president “the power to repel sudden attacks,” but not to initiate war. Roger Sherman agreed: “The Executive shd. be able to repel and not to commence war.” Gerry expressed shock at Butler’s position. He “never expected to hear in a republic a motion to empower the Executive alone to declare war.” George Mason spoke against “giving the power of war to the Executive, because not <safely> to be trusted with it.” He was for “clogging rather than facilitating war.” The motion to insert “declare” in place of “make” was agreed to (Farrand 1966, 2:319). Butler, recognizing his isolation, appeared to move his position closer to other delegates (Adler 2007, 124).

Some might argue from the Philadelphia debates that although Congress may “declare” war, the president is at liberty to “make” war. That was never the understanding. Such an interpretation 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. When President Jefferson took military action against the Barbary pirates in 1801, he informed Congress of the event and asked for future guidance. He said he was “[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense.” It was up to Congress to authorize “measure of offense also” (Richardson 1897-1925, 1:315). In 1805, after conflicts developed between the United States and Spain, Jefferson issued a public statement that articulated fundamental principles: “Congress alone is constitutionally invested with the power of changing our condition from peace to war” (Richardson 1897-1925, 1:377). Hamilton, a strong defender of presidential power in external affairs, acknowledged that it was up to Congress “to declare or make war” (Syrett 1974, 1:461-62).

The purpose of the declare war clause is to preserve republican government by keeping the power to initiate war in the legislative branch. The framers placed in Congress the authority to initiate wars because they believed that executives, in their search for fame and personal glory, have a natural appetite for war. Moreover, their military adventures are destructive to the interests of the people (Treanor 1997). In *Federalist* No. 4, John Jay expressed his opposition to executive wars, a prominent statement never mentioned by John Yoo in his *California Law Review* article, his three books, or his Justice Department memos. If anyone could have been sympathetic to executive power in foreign affairs it would have been Jay, whose duties during the

8. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 192 (1824).

Continental Congress gave him special insights into the need for executive discretion to carry out foreign policy. But to Jay, initiating war was fundamentally different from general foreign policy duties:

[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These, and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people. (Wright 2002, 101)

In *Federalist* No. 69, Hamilton wrote that the president has “concurrent power with a branch of the legislature in the formation of treaties,” compared to the power of the British king who “is the *sole possessor* of the power of making treaties” (Wright 2002, 450). The royal prerogative in foreign affairs, he noted, evolved in America into a shared power between the executive and legislative branches in a republic. The British and American models were different in the field of military activities. The power of the king “extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies” (Wright 2002, 446). Unlike the king of England, the president “will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union” (Wright 2002, 446).

At the Pennsylvania ratifying convention, James Wilson expressed a prevailing sentiment that the system of checks and balances would guard against quick decisions to engage in war. It would not be “in the power of a single man, or a single body of men,” to involve the nation in war, because “the important power of declaring war is vested in the legislature at large” (Elliot 1836-45, 2:528). To Jay, war was not (as Yoo insisted) a mere juridical act to acknowledge presidential wars. In North Carolina, James Iredell compared the limited powers of the president with those of the British monarch. The king of Great Britain “is not only the commander-in-chief but has power, in time of war, to raise fleets and armies. He has also authority to declare war.” By contrast, Jay noted, the president “has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands” (Elliot 1836-45, 4:107).

Article II designates the president as commander in chief. That title does not carry with it an independent authority to initiate war or to act in a manner free of legislative control. The Constitution provides that the president “shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Congress, not the president, does the calling. Article I grants Congress the power to provide “for calling forth the Militia to execute the laws of the Union, suppress Insurrections, and repel invasions.” Presidential use of the militia depends on policy enacted by Congress. When Congress passed legislation in 1792 to establish national policy for the militia, it provided that before the president could call up the militia, he would first have to be notified of a military threat “too powerful to be suppressed by the ordinary course of judicial proceedings.” Only after an associate justice or a federal district judge verified for the president those conditions could he call forth the military to suppress an insurrection. That judicial check was

removed when Congress revised the legislation in 1795, but Congress can at any time determine by law how and when the president uses the militia.<sup>9</sup>

In the *California Law Review*, John Yoo interprets the commander in chief clause to grant the president exclusive, plenary power to initiate war. He observes that the Constitution does not expressly “require the President to seek legislative permission before engaging the military” (254). Had the framers intended “to prohibit the President from initiating wars, or to require him to receive congressional approval beforehand,” they could have said so, borrowing language from Article I, Section 10, that “No state shall . . . engage in war” (255). Yoo adds, “In light of the eighteenth-century meaning of ‘declare war’ and ‘Commander in Chief,’ those who participated in the ratification likely viewed the Constitution as creating a structure in which the President played the primary role in war, and a significant, if not primary, role in determining peace” (269).

The framers plainly rejected this model of presidential wars. To them, the commander in chief clause had several purposes. First, it preserves civilian supremacy over the military. The individual leading the armed forces is an elected official, not a general or admiral. Attorney General Edward Bates in 1861 concluded that the president is commander in chief not because he is “skilled in the art of war and qualified to marshal a host in the field of battle.” He possesses that title for a different reason. Whatever military officer leads U.S. armies against an enemy, “he is subject to the orders of the *civil magistrate*, and he and his army are always ‘subordinate to the civil power.’ ”<sup>10</sup> Congress is an essential part of that civil power. The president as commander in chief is subject to statutory restrictions, as the Court unanimously held in *Little v. Barreme* (1804). Civilian supremacy would be in jeopardy if the president were left free to operate beyond statutory bounds or violate the law (Spitzer 2008, 99-103).

The authority to “repel sudden attacks” and take defensive actions does not permit the president to initiate wars and exercise the constitutional authority of Congress. Offensive actions require prior congressional authority. President George Washington wrote in 1793, “The 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” (Fitzpatrick 1939, 73).

The second value of the commander in chief clause is accountability. Hamilton in *Federalist* No. 74 wrote that the direction of war “most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” The power of directing war and emphasizing the common strength “forms a usual and essential part in the definition of the executive authority” (Wright 2002, 473). Presidential leadership is essential but cannot operate outside legislative control.

## Justice Department Memos

The constitutional principles developed by John Yoo in the *California Law Review* later appeared in memos during his service in the Justice Department. Shortly after the

9. 1 Stat. 264, sec. 2 (1792); 1 Stat. 424 (1795). For further details on this period, see Fisher (2008).

10. 10 Op. Att’y Gen. 74, 79 (1861).

terrorist attacks of 9/11, in a memo of September 25, 2001, he wrote, “During the period leading up to the Constitution’s ratification, the power to initiate hostilities and to control the escalation of conflict had been long understood to rest in the hands of the executive branch.” (There was no U.S. president until 1789; Yoo must have been referring to state governors and perhaps British precedents.) His support for that broad principle comes from a single source: his article in the *California Law Review* (Greenberg and Dratel 2005, 5). His memo also relied on John Marshall’s “sole organ” speech to build a claim for “the President’s plenary authority in foreign affairs ever since” (Greenberg and Dratel 2005, 9), without explaining, from the context of Marshall’s speech, precisely what he meant, which clearly was *not* plenary authority for the president in foreign affairs.

In a January 9, 2002, Office of Legal Counsel (OLC) memo, jointly authored with Robert J. Delahunty, Yoo wrote, “From the very beginnings of the Republic, this constitutional arrangement has been understood to grant the President plenary control over the conduct of foreign relations” (Greenberg and Dratel 2005, 51). An August 1, 2002, memo by OLC head Jay Bybee asserted, “Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”<sup>11</sup> Although Bybee’s name appears on this memo, it is reasonable to attribute any generalizations about national security law to his deputy, John Yoo. When Bybee appeared before the House Judiciary Committee on May 26, 2010, he stated,

John Yoo brought an enormous amount of experience to the Office of Legal Counsel. And he brought—it is true that he brought experience in areas where I did not have experience, either through litigation experience at the Department of Justice or in private practice or in teaching. These were not areas in which I taught. John had written substantially in the area of treaties and national security. He had written specifically about the war powers of the President. . . . I would also add that John brought experience that I don’t think anybody else among my deputies brought, as well. . . . So to say that I had no training in issues of war or interrogation, I would say this is arguably true.<sup>12</sup>

OLC memos had a clear impact on the “working group” established within the Pentagon to determine procedures for interrogating detainees, both at Guantánamo and later at Abu Ghraib. A draft of March 6, 2003, stated, “the President enjoys complete discretion in the exercise of his Commander-in-Chief authority including in conducting operations against hostile forces.” Accordingly, criminal statutes, including those that impose criminal penalties on interrogators accused of torture, “are not read as infringing on the President’s ultimate authority in these areas.” Consistent with Yoo’s analysis in the

11. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, “Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,” at 39 (August 1, 2002), available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>, superseded by “Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A” (December 30, 2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm>. The August 1, 2002, memo is also reprinted in Greenberg and Dratel (2005, 173-217). The language that I cite comes from page 207.

12. Transcript of May 26, 2010, House Judiciary Committee Interview of Former Assistant Attorney General Jay Bybee, pp. 226-27, available from the House Judiciary Committee website at <http://judiciary.house.gov/hearings/pdf/BTranscript.pdf>.

*California Law Review*, the George W. Bush administration concluded that “Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war” (Greenberg and Dratel 2005, 256).

The following passage appears in the working group’s draft: “In the *Prize Cases*, 67 U.S. (Black) 635, 670 (1862), for example, the Court explained that whether the President, ‘in fulfilling his duties as Commander-in-Chief,’ had appropriately responded to the rebellion of the southern states was a question ‘to be *decided by him*’ and which the Court could not question, but must leave to ‘the political departments of the Government to which this power was entrusted’ ” (Greenberg and Dratel 2005, 259). That language reappears in the final version produced by the working group (Greenberg and Dratel 2005, 306), dated April 4, 2003. The argument first appeared in John Yoo’s memo of September 25, 2001, including the incorrect date for the case, which was decided in 1863, not 1862 (Greenberg and Dratel 2005, 5). When one looks at the September 25 memo, the citation for Court’s language is “id.,” but that refers to the previous footnote: Yoo’s 1996 article for the *California Law Review*. The page reference to the article is not to a particular page but to “196-241.” Nothing in those pages refers to the *Prize Cases*.

Turning to the citation to the *Prize Cases*, “67 U.S. (Black) 635, 670,” some of the language referred to does come from page 670, but the Court begins in this manner: “Whether the President is fulfilling his duties, as Commander-in-chief, in suppressing an insurrection . . . ” In other words, the Court in the *Prize Cases* did not address war power in broad terms, including military operations against other nations, but only the president’s duty in times of a *domestic insurrection*. The Court stated that under such conditions, it is “a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.”<sup>13</sup>

The *Prize Cases* has nothing to do with a foreign invasion of the United States or a U.S. offensive action against another country. President Abraham Lincoln’s blockade of the South was a measure taken in time of civil war. Justice Grier carefully limited the president’s power to defensive actions: “Congress alone has the power to declare a national or foreign war.” The president “has no power to initiate or declare a war against either a foreign nation or a domestic State.”<sup>14</sup> Richard Henry Dana, Jr., representing Lincoln, took exactly the same position during oral argument. He said the blockade against the South had nothing to do with “the right *to initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress.”<sup>15</sup> Words could not be more clear. Yoo never cites those passages.

## Conclusions

Deficient standards and procedures in student-run law reviews can have serious consequences. The misconceptions and distortions that appeared in John Yoo’s article in

13. *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863).

14. *Ibid.*, 668.

15. *Ibid.*, 660.

the *California Law Review* later surfaced in Justice Department memos after 9/11, not only in his memos but also in those under the name of OLC head Jay Bybee. From there, they were incorporated into the “working group” memos prepared by the Pentagon to decide methods of coercive interrogation for detainees, applied first in Guantánamo and later at Abu Ghraib in Iraq. Any pretense of professional scholarship was abandoned. Bits and pieces from John Marshall’s “sole organ” speech in 1800, the *Prize Cases*, and other documents were torn from context to yield positions never intended. Evidence that contradicts the assertion of plenary, exclusive presidential power over war—ranging from Jay’s *Federalist* No. 4 to President Washington’s statement in 1793—is simply ignored. In the quest for presidential power unrestrained by judicial and legislative checks, John Yoo and others who shaped memos and policies moved from American constitutionalism and republican principles to the British model of monarchical prerogatives. The damage to the United States and its reputation around the world has been profound, including its capacity to effectively combat terrorism and protect American interests.

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