

REVIEW

Executive Power and the Discipline of History

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*Crisis and Command: The History of Executive Power from
George Washington to George W. Bush*
John Yoo. Kaplan, 2009. Pp vii, 524.

War by Other Means: An Insider's Account of the War on Terror
John Yoo. Atlantic Monthly, 2006. Pp vii, 292.

*The Powers of War and Peace:
The Constitution and Foreign Affairs after 9/11*
John Yoo. Chicago, 2005. Pp vii, 366.

INTRODUCTION

For all the angst about the proper role of history in constitutional analysis, custom and tradition have long played a central role in foreign affairs and national security law. The standard explanation for this is straightforward. For starters, the relevant constitutional text is cryptic, elusive, and in some cases entirely absent.¹ Nor has judicial

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¹ Congress has the power to “declare War,” issue “Letters of Marque and Reprisal,” and establish “Rules for the Government and Regulation” of the army and navy, US Const Art I, § 8, cls 11–14, while the President is named “Commander in Chief,” US Const Art II, § 2, cl 1. But who can initiate combat and regulate the course of hostilities? The President has the power to make treaties, while the Senate has the power to “Adv[is]e” on their making and “Consent” to their adoption as positive law. US Const Art II, § 2, cl 2. But who has the power to terminate them? The President has the power to execute the laws, US Const Art II, § 1, cl 1, while the

elaboration resolved the textual lacunae. Court interventions have been relatively infrequent, forcing analysts to return repeatedly to the same handful of cases, few of which are particularly clear in their own right. In the last two decades, these problems have been further compounded by a splintering of scholarly consensus about foundational questions in these areas.

History therefore looms large when we confront constitutional questions of war, peace, diplomacy, and security. But there is a twist. The usual debates about constitutional history focus on the challenges of originalism proper: first, of discerning how a particular provision was likely understood when enacted; next, of meaningfully applying that understanding to modern questions; and, finally, of justifying the imposition of that constraint on the living citizens of a democratic republic. National security law and foreign affairs law, by contrast, have a more pronounced concern for post-enactment history as a source of constitutional meaning. This is partly because of the paucity of direct evidence about original meanings in this area.² But it is also rooted in something deeper: what might be described as the felt need to ground our resolution of such high-stakes questions in the organically expressed evolution of American norms over time.³

It is against this background that the post–September 11 work of John Yoo must be assessed. In what he calls a “trilogy” of books written since leaving the Office of Legal Counsel (OLC) in 2003, Yoo has made the case that President George W. Bush’s counterterrorism efforts were well grounded in both law and policy (III, p vii).⁴ *The Powers of War and Peace* draws on a series of his own law review articles—written

courts are charged with exercising the “judicial Power of the United States,” US Const Art III, § 1, cl 1. But whose interpretations of treaty provisions ought to govern?

² On the particular challenges of originalism in this context, see Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 L & Contemp Probs 169, 171 (2004) (“Precisely because the Founding generation 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 by the three branches in light of the likely consequences.”).

³ That instinct finds its principal contemporary expression in *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952), a case that is most famous for Justice Robert Jackson’s tripartite framework for separation of powers analysis. *Id.* at 635–40 (Jackson concurring). Justice Felix Frankfurter’s separate concurrence, and to some extent Jackson’s own opinion, also emphasized our special concern for the lived experience of the American republic as a guide to resolving such high-stakes questions—for custom and tradition as in some sense the ongoing reenactment of practical meaning for the Constitution’s sparse text. *Id.* at 610–11 (Frankfurter concurring); *id.* at 637, 646–49 (Jackson concurring) (noting the appeal of history in separation of powers analysis while expressing skepticism about its determinacy); *id.* at 683–700 (Vinson dissenting) (surveying executive practice since the Founding). Custom and tradition of course play an important role in resolving other kinds of constitutional questions as well.

⁴ Parenthetical page references in the main text will refer to *The Powers of War and Peace* as Volume I, *War by Other Means* as Volume II, and *Crisis and Command* as Volume III. Page 411 of *Crisis and Command*, for example, will be cited in text as “(III, p 411).”

well before Yoo joined the federal government—to read British- and Founding-era history as support for radical presidential preeminence in warmaking and foreign affairs. *War by Other Means*, published after Yoo returned to academia, is essentially an extended white paper defending a series of particular counterterrorism policies, interspersed with first-person descriptions of his time at the Department of Justice. *Crisis and Command* is the capstone of the sequence. Styled as a history of executive power in America, it weaves threads from the first two books into a wide-ranging historical narrative meant to serve as an intellectual foundation for the Bush administration's view of executive power. While the books are not analytically sequential and differ substantially in both tone and approach, their collective coherence becomes apparent with the appearance of the final volume. They touch frequently on questions about individual liberties in wartime, but their signature concern—and the sole focus of the third book—is the separation of powers within the federal government. It is therefore on that problem that this Review will focus.

Yoo has invoked the legacy of Alexander Hamilton throughout this arc of work, in part simply as a proponent of strong executive power, but even more so as a public intellectual telling hard truths to an otherwise ill-informed populace.⁵ Yoo's work seems already to have found the place that it seeks. The first two books received high-profile attention in major academic journals,⁶ leading journals of political and intellectual culture,⁷ and prominent newspapers.⁸ And the last

⁵ Yoo observes that “Jefferson wrote: ‘Hamilton is really a colossus . . . Without numbers, he is an host within himself.’ I decided to take Hamilton as my role model” (II, p xii).

⁶ See, for example, Aaron Nielson, Book Review, *An Indirect Argument for Limiting Presidential Power*, 30 Harv J L & Pub Pol 727 (2007); David J. Bederman, Book Review, 100 Am J Intl L 490 (2006); Kenneth W. Thompson, Book Review, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*, 121 Polit Sci Q 713 (2006); Recent Publications, 119 Harv L Rev 1238 (2006); Michael D. Ramsey, Book Review, *Toward a Rule of Law in Foreign Affairs*, 106 Colum L Rev 1450 (2006); Kenneth Harbaugh, Recent Publications, 31 Yale J Intl L 547 (2006); Gordon Silverstein, Book Review, *Constitutional Contortion? Making Unfettered War Powers Compatible with Limited Government*, 22 Const Comment 349 (2005).

⁷ See, for example, David Luban, *The Defense of Torture*, NY Rev Books 37 (March 15, 2007); Andrew Rudalevige, *Civil Rights, Uncivil Wrongs: The War on Terrorism's Toll on the U.S. Constitution*, 86 Foreign Aff 148 (Jan/Feb 2007); Desmond King, *What Geneva Convention?*, Times Higher Ed Supp 28 (Sept 22, 2006); Lawrence R. Douglas, *Counsels of War*, Times Lit Supp 3 (May 12, 2006); Stephen Holmes, *John Yoo's Tortured Logic*, Nation 31 (May 1, 2006); Andrew C. McCarthy, *Presidential Primacy*, Commentary 80 (Mar 2006); Gordon Silverstein, *All Power to the President*, Am Prospect 49 (Mar 2006); Cass R. Sunstein, *The 9/11 Constitution*, New Republic 21 (Jan 16, 2006); David B. Rivkin, Jr and Carlos Ramos-Mrosovsky, *Rights and Conflicts*, Natl Rev 48 (Nov 21, 2005); David Cole, *What Bush Wants to Hear*, NY Rev Books 8 (Nov 17, 2005).

⁸ See, for example, Walter Isaacson, *Power and the U.S. Presidency*, Intl Herald Trib 9 (Jan 26, 2010); Fareed Zakaria, *The Enemy Within*, NY Times F8 (Dec 17, 2006); Geoffrey R. Stone, *Taking Liberties: A Former Top Justice Department Lawyer Defends the Post-9/11 Decisions He*

installment has seized perhaps an even more significant role, with major commentators describing *Crisis and Command* as “an eloquent, fact-laden history”⁹ that functions as a “remarkably persuasive,”¹⁰ “vigorously argued,” and “deeply unsettling”¹¹ brief for Yoo’s “expansive understanding of presidential authority.”¹² The attention is not surprising. While recent years have seen an increasingly widespread effort to rehabilitate the Bush administration both in the popular imagination and in professional legal discourse,¹³ Yoo has long

Helped Make, Wash Post T6 (Nov 5, 2006); Michiko Kakutani, *What Torture Is and Isn't: A Hard-Liner's Argument*, NY Times E1 (Oct 31, 2006).

⁹ Deborah Solomon, *Questions for John Yoo: Power of Attorney*, NY Times MM15 (Jan 3, 2010).

¹⁰ Gordon S. Wood, *An American Monarch*, Natl Interest 89, 96 (Jan/Feb 2010) (concluding that Yoo’s examples show that Presidents “can get away with almost anything” in a serious crisis). See also Arthur Herman, *The Power to Protect*, Wall St J A17 (Jan 11, 2010) (“[I]t is hard not to read his analysis without feeling that much of the anti-Bush rhetoric of recent years—not to mention its anti-Yoo variety—has been grounded in ignorance as much as outrage.”); Jack Goldsmith, *The Accountable Presidency*, New Republic 36 (Feb 1, 2010) (“Yoo is right that most of Bush’s controversial counterterrorism programs can find a precedent, and often many, in the actions of past great presidents.”).

¹¹ Jack Rakove, *John Yoo on Why the President Is King*, Wash Post B01 (Jan 10, 2010).

¹² Wood, *An American Monarch*, Natl Interest at 89 (cited in note 10). It should be acknowledged that two of our most eminent historians, Jack Rakove and Gordon Wood, have written reviews of Yoo’s third book that some readers may take as lending plausibility to Yoo’s legal history. One person who read a draft of this Review asked me, in effect, “How can you be disagreeing with Wood and Rakove?”

But Rakove is extremely critical of Yoo’s work as history. See Rakove, *Why the President Is King*, Wash Post at B01 (cited in note 11) (calling the work “selective history” and observing, for example, its “errors of fact”). What Rakove finds to approve in Yoo’s work is a recognition of the general importance of presidential initiative in our history and politics—a description with which it is hard to disagree. See *id.* Rakove nowhere endorses Yoo’s conclusions about Bush’s constitutional claims as a matter of legal history, and many of his specific critiques undermine Yoo’s argument on this central point. See, for example, *id.* (observing the tension between the “underlying republican values” that pervade our history and “the virtues of the presidency that [Yoo] champions”).

Gordon Wood, on the other hand, does seem to endorse Yoo’s constitutional argument in defense of the Bush administration. At the end of a review that mostly summarizes Yoo’s historical narrative, Wood concludes that Yoo “convincingly shows that all of Bush’s controversial actions following the 9/11 terrorist attack . . . can be constitutionally justified by the actions of previous presidents.” Wood, *An American Monarch*, Natl Interest at 96 (cited in note 10). It is possible that by saying “can be constitutionally justified” (instead of simply “were constitutionally justified”), Wood means only to suggest a kind of *prima facie* argumentative plausibility. But with respect to a great historian, even that conclusion would be insufficiently attentive both to the precise legal claims being made and to the way a constitutional argument of the kind Yoo is advancing works. I will let the remainder of this Review serve as explanation.

¹³ See, for example, Marc A. Thiessen, *Courting Disaster: How the CIA Kept America Safe and How Barack Obama Is Inviting the Next Attack* (Regnery 2010); Karl Rove, *Courage and Consequence: My Life as a Conservative in the Fight* 285–304, 332–43 (Threshold 2009); Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (Harper 2008). There have also been serious scholarly efforts to defend particular Bush-era (and in some cases Obama-era) policies, with Kenneth Anderson’s defense of targeted assassinations being an especially recent example. See Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism*

been the boldest in structuring a comprehensive intellectual architecture for Bush's approach to the war on terror.¹⁴

This Review's critique of that architecture begins with the observation that Yoo makes three distinct types of argument. The first is originalist: claims based on the assumption that the Founders' understanding of constitutional text (assuming that we accurately identify it as a matter of history) governs contemporary applications. The second is evolutionary: claims based on the assumption that post-ratification custom and tradition (assuming that we accurately understand them as a matter of history) inform constitutional meaning. On this second approach, congressional acquiescence in an assertion of presidential power becomes legal evidence that the asserted power is in fact constitutional.¹⁵ The third type of argument is a hybrid of political philosophy and political science. In Yoo's work, it comes as a claim that occasional executive overreach is a reasonable price to pay for ensuring that strong leaders can protect America against the vicissitudes of a dangerous world.

This Review focuses on the first two types of argument. While their underlying assumptions about interpretive legitimacy are quite different, those distinctions need not be addressed here. That is because both types of argument rely on the same indispensable predicate: a corpus of historical analysis that is careful, thorough, and accurate. Yoo's constitutional history fails on all counts. It misstates crucial facts, misunderstands important episodes, and misrepresents central primary sources.¹⁶ It applies one set of standards to friendly evidence and another to evidence that undercuts its argument.¹⁷ It omits and obscures

Strategy and Law *2 (Brookings Institution Working Paper Series on Counterterrorism and American Statutory Law, May 2009), online at http://www.brookings.edu/papers/2009/0511_counterterrorism_anderson.aspx (visited Nov 21, 2010).

¹⁴ Yoo himself is not entirely comfortable with the term, acknowledging that it "suggest[s] that we are at war with a combat tactic, not a concrete enemy." He takes the position that the United States "is not at war with every terrorist group in the world . . . but with al Qaeda" (II, pp 12–13). This Review adopts the term as a period-specific descriptor without presuming its analytical validity.

¹⁵ As Justice Frankfurter put it, evidence of "systematic, unbroken, executive practice[s]" can be "treated as a gloss on the 'executive Power' vested in the President by § 1 of Article II," at least if it is "long pursued to the knowledge of the Congress and never before questioned." *Youngstown*, 343 US at 610–13 (Frankfurter concurring). Yoo thus engages in a well-recognized form of argument in his work: Frankfurter extended the invitation, *Dames & Moore v Regan*, 453 US 654, 686 (1981), repeated it, and now Yoo has written the multivolume amicus brief that follows up on it.

¹⁶ See, for example, notes 54, 70–73, 90–95, 106, 128–31, and accompanying text.

¹⁷ Examples abound. When Presidents acquiesce to Congress or seek congressional blessing, Yoo explains it as a purely discretionary political choice. See, for example, III, pp 75–76, 187–88, 216, 347–48, 356–57. But when Congress supports (or fails affirmatively to oppose) executive action, Yoo frames it as a legal concession of the President's constitutional preeminence. See, for example, III, pp 59–61, 76, 193–96, 205–11, 275. Anti-Federalist descriptions of

evidence that contradicts its claims.¹⁸ It neither addresses nor even cites major scholarship that reaches opposite conclusions about the precise historical issues in question.¹⁹ It omits thematically relevant presidencies that appear to teach uncongenial lessons.²⁰ And its overwhelming concern with present-day problems overpowers its primary obligation as history: to faithfully assess the past on its own terms.²¹

Article II are treated as central to understanding the Vesting Clause (I, pp 109–16; III, pp 37–38), but Anti-Federalist understandings of how the Constitution treats international and domestic law are waved aside (I, pp 118–20). When OLC interprets a torture ban couched in terms of “severe pain” by reference to Medicare law, Yoo presents the strategy as a standard technique of statutory interpretation (II, p 175). But when the Supreme Court cites a classic statement of procedural due process in resolving a novel problem of habeas law, he dismisses it as a risible resort to a case about welfare benefits (II, pp 159–60).

¹⁸ See, for example, text accompanying notes 153–55 and note 172 and accompanying text. See also William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 Cornell L Rev 695, 725 (1997).

¹⁹ See, for example, David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 Harv L Rev 689, 767–804 (2008); David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 Harv L Rev 941, 951–1098 (2008).

²⁰ The wholesale exclusion of Theodore Roosevelt is particularly difficult to understand. Yoo devotes a total of five chapters in *Crisis and Command* to individual presidents. Those presidents rank first (George Washington), second (Abraham Lincoln), third (Franklin D. Roosevelt), fourth (Thomas Jefferson), and ninth (Andrew Jackson) on the “greatness” list that Yoo uses to structure the book (III, p xvi). Not only does the fifth-ranked Theodore Roosevelt fail to rate a chapter, but there are only four sentences in the entire 446-page book that even mention his name (III, pp ix–x, 401, 438). This omission is even more mysterious given Roosevelt’s renowned “stewardship” theory of the presidency, which was oriented toward precisely Yoo’s core themes of bold action and greatness in the executive branch (III, p ix).

It is perhaps relevant to this puzzle that the elder Roosevelt theorized a stewardship power that was inherent but not indefeasible. In other words, he expressly recognized Congress’s right to overrule him. Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* 357 (Scribner’s Sons 1920) (“I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.”). See also Arthur M. Schlesinger, Jr., *The Imperial Presidency* 83 (Houghton Mifflin 1973); Forrest McDonald, *The American Presidency: An Intellectual History* 294–98 (Kansas 1994); Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* 245 (Yale 2008). Roosevelt did not squarely address and reject the concept of an illimitable crisis power, but his repeated emphasis on congressional supervision over a presidential steward is in substantial tension with it. More important, his actual practice in office showed deference to standing law even in the military context. Barron and Lederman, 121 Harv L Rev at 1035–37 (cited in note 19).

²¹ To be fair, with constitutional history it is not just inevitable but in some sense the whole point to seek lessons from the past. But Yoo’s presentism drowns his history. He reframes what sometimes seems like every single historical episode in present-day terms, in a way that is as narratively distracting as it is analytically distorting. To take but one example, *The Prize Cases*, 67 US (2 Black) 635 (1862), were certainly not about whether the Confederacy had to be left as “a matter for the criminal justice system” (III, p 212). No one suggested that the Army of Northern Virginia had to be confronted by constables waving arrest warrants. Rather, the Supreme Court was deciding whether tobacco, cotton, coffee, and other seaborne cargo were subject to seizure under blockade law during a civil war. The Court’s decision to uphold the forfeitures is simply indeterminate on the contemporary detention and targeting questions to which Yoo alludes with this trope. Consider II, p 130 (arguing that conflict with al Qaeda is “not solely a criminal

As a matter of constitutional history, Yoo's first two arguments fail. His Article II claims therefore depend entirely on the third mode of argumentation, and specifically on the following proposition: we are better off with a system that ensures a legally unfettered executive in times of crisis, even at the risk of enabling unscrupulous leaders to abuse that authority. This Review does not attempt to resolve the theoretical validity of that argument, which Yoo himself does not seriously develop. But the argument must be understood for what it is: a first-principles assertion about political theory that has little to do either with law qua law or with the discipline of history.

The Review is divided into four Parts. Part I outlines Yoo's separation of powers thesis and suggests a framework for assessing it as a matter of constitutional history. It identifies three discrete propositions that Yoo must defend in order to ground Bush administration policies in a plausible understanding of history: executive preeminence in conflicts with Congress, executive immunity from effective judicial supervision, and executive supremacy in starting armed hostilities. Part II sets the stage for a review of these propositions with a focused assessment of the Founding. Part III turns to a particularized exploration of each proposition as a matter of post-enactment history. It demonstrates that Yoo offers virtually no plausible evidence for his historical claims and fails to account for central pieces of evidence that directly contradict them. Part IV outlines Yoo's sketched suggestion that the risks of excessive passivity outweigh the risks of executive overreach. It criticizes the limited historical evidence that Yoo offers on this score, but it does not attempt to resolve the proposition as a matter of abstract theory. The Review concludes with a brief exploration of the President's emergency power as it was understood by Thomas Jefferson: a right to break the law, combined with an obligation to admit doing so and to seek absolution after the fact. It suggests that some readers might find Jefferson's views a surprisingly attractive response to the outlier hypotheticals that often drive discussion in America's ongoing fumble toward a legal framework for confronting an age of terror.

I. A FRAMEWORK FOR ASSESSMENT

A. Our Commander in Crisis

It will not come as much of a surprise that Yoo holds an unusually broad vision of presidential emergency power—the conditions

justice matter"). At most, *The Prize Cases* might serve as a single link in an extended chain of argument by analogy, but Yoo's characterization of what the case was about is quite misleading.

that trigger it, the activities it authorizes, and the duration of its existence. While it is often difficult to pin him down on specific claims, Yoo seems to assert that Presidents have the power to do just about anything they want in the name of a national security authority whose legal contours are left to their sole discretion.

1. Virtually no limit to national security powers.

“Chief executives,” Yoo says, “can draw upon a deep well of constitutional authority when they act in the face of peril” (III, p ix). But he never explains in conceptual terms what happens when this national security power is triggered.²² In broad strokes, his thesis appears to be that the President can take bold action to defend the country, not only in the absence of congressional authorization, but even in the face of explicit congressional prohibition.²³ But beyond that, Yoo’s approach quickly becomes binary: either we concede that the President is a totally independent guarantor of American safety, or we condemn him to be what the *Youngstown Sheet & Tube Co v Sawyer*²⁴ dissenters called an executive “messenger boy.”²⁵ In particular, Yoo leaves no opening for even initial steps toward a rational limit on the kind of actions that national security powers can authorize.²⁶

²² He often answers the question by restating it: “the Constitution creates a mass of executive power that can help Presidents rise to the challenges of the modern age” (III, p 401); the Founders created a presidency that had “its own independent powers, equal to those of the legislature” (III, p 20); and so on.

²³ His discussion collapses the distinction between the independent existence of a presidential power and its immunity from control or defeasance by Congress. See Saikrishna Bangalore Prakash, *A Taxonomy of Presidential Powers*, 88 BU L Rev 327, 334–37 (2008). See also Jules Lobel, *Conflicts between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 Ohio St L J 391, 446–47 (2008).

²⁴ 343 US 579 (1952).

²⁵ *Id.* at 708 (Vinson dissenting).

²⁶ By the later volumes, Yoo has dropped earlier suggestions that the Constitution might “provide the executive branch with expanded domestic powers . . . *only* when war is declared” (I, p 151) (emphasis added). In the end, the closest he comes to adumbrating a legal limit is with the suggestion that the President’s “sweeping powers on the battlefield” may not “reach all the way back to the home front” (III, p 342). See also DOJ, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 33 (Jan 19, 2006) (“Memorandum in Support of NSA Activities”), online at <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf> (visited Nov 21, 2010) (critiquing this form of “foreign-to-domestic presidential bootstrapping”). This point arises as part of what appears to be Yoo’s concession that *Youngstown* was rightly decided because Truman’s steel seizure encroached on domestic rights (III, p 420; II, pp 184–87; I, p 23).

The problem is that, on Yoo’s account, the battlefield is now everywhere (II, pp 8, 50; III, pp 421–22). See also Memorandum from Deputy Assistant Attorney General John Yoo and Special Counsel Robert J. Delahunty to William J. Haynes II, Department of Defense General Counsel, *Authority for the Use of Military Force to Combat Terrorist Activities within the United States* 3–4, 29 n 34 (Oct 23, 2001) (“OLC Domestic Terrorism Memorandum”), online at <http://www.usdoj.gov/opa/documents/memomilitaryforcecombatatus10232001.pdf> (visited Nov 21, 2010). So what actually follows from Yoo’s reference to a battlefield distinction? If the executive

The only coherent difference between “good” and “bad” exertions of presidential power appears to be a virtue-based notion of patriotism. The sole limit on the President’s “reservoir of power” (III, p 426), in other words, lies in the President’s own belief that the action in question actually serves the national interest. However alien this theory of virtuous individual restraint may be to the animating genius of our political system,²⁷ acting constitutionally basically means thinking of your country first. Our great Presidents were not “dictators,” as Yoo puts it, because “they used their executive powers to the benefit of the nation” (III, pp xi, 397; II, pp 97–98). The epitome of an “out-of-control executive,” by contrast, is an administration “seeking to harass its political enemies” (II, p 96) for the President’s own “personal interests” (III, p 397).

2. Broad and self-judging trigger conditions.

Paired with these nearly limitless national security powers is an apparently self-judging right to “call [them] forth” (III, p 404). While Yoo does acknowledge that “not every President is a Lincoln, and not every crisis rises to the level of the Civil War” (III, p 249), he insists that the process of finding legal balance on these questions must take

branch cannot be legally restrained from detaining American al Qaeda members on US soil or running a domestic wiretapping program, it is hard to see how the principle provides any serious limit at all. Yoo does not even appear to view the exclusion and mass detention of Japanese Americans (which were quickly approved by Congress) as constitutionally illegitimate (III, pp 315–21). At most, *Korematsu v United States*, 323 US 214 (1944), is “one of the most criticized decisions in American history” (III, p 319), the internment itself was “terrible” (I, p 151), and the “debate over the necessity of [these measures] continues” (III, p 321).

²⁷ This selfless patriotism test is completely at odds with a principal theory of our constitutional structure. James Madison emphasized that precisely the *recognition* of human ambition was the genius behind the separation of powers as a guarantor of liberty. With inhumanly virtuous leaders in short supply, our Constitution capitalizes instead on the thoroughly unvirtuous fact of private ambition to animate a sort of invisible hand of liberty. See Gordon S. Wood, *The Creation of the American Republic, 1776–1787* 547–53, 602–06 (North Carolina 1969) (detailing the debate between Whig and Federalist political theorists). Theory aside, students of modern history may not find a leader’s sincere belief in her own virtue particularly reassuring.

Yoo’s contrary assumptions at times make his work read like a secular *Lives of the Saints*. Washington understands “instinctively” what history is calling him to do (III, p 96); Jefferson acts “unerringly” (III, p 126); FDR “call[s] forth his constitutional powers” (III, p 297) like a court magician; Reagan sallies forth on behalf of the “Free World” (III, p 333) and carries the courts with him by sheer tenacity until they finally “jump[] off the Reagan revolution train” in *Morrison v Olson*, 487 US 654 (1988) (III, p 379). More than anything, Yoo grounds Presidents’ will to power in a kind of moral largeness or Romantic incandescence: “Acting beyond the written Constitution [is] not for the weak of heart or the low in status” (III, p 124), and restraining that power simply “make[s] the office more comfortable for the risk-averse” (III, p 422). National security crises are an “accelerant” for executive power, “causing it to burn hotter, brighter, and swifter. It may burn out of control or it may flame out quickly” (III, p vii). In such circumstances, only a great heart can wisely navigate the ship of state between the “Scylla [and] Charybdis” of presidential tyranny and legislative dominance (III, p 433).

place only within the executive branch (III, pp vii–viii). Even as a substantive matter, his definition of “crisis” is notably capacious. Perhaps the best example is the Louisiana Purchase. Even granting Jefferson’s questionable assumption that the purchase was legally impermissible, Yoo argues that the purchase was a straightforward exercise of the President’s national security powers. Why? Because of the long-term “threat to national security” presented by territorial limits on westward expansion, shipping difficulties for American exporters, and the possibility of border intrigue with colonial powers (III, pp 116–17, 121–22).²⁸ If these slow-bubbling obstacles to national growth were a “crisis” sufficient to “call forth” emergency powers, then there is little of national political consequence that could not qualify.

Yoo does propose that “[o]nce a crisis passes, presidential powers should recede” (III, p 249). His leading example is Andrew Johnson’s efforts to oppose congressional Reconstruction. The resulting impeachment, Yoo suggests, shows that Presidents should defer further to Congress “as the crisis wanes” (III, pp 252–54; II, p 97).²⁹ But it is unclear whether this principle has any theoretical purchase at present—or any practical purchase ever.³⁰ Whatever the crisis power entails, only the President can switch it on, only the President can decide how long it lasts, and only the President can decide when to switch it off.³¹

B. Seeking Specific Claims

Beyond these general characterizations of executive power, getting at the analytical structure of Yoo’s enterprise takes some doing. He initially describes his survey of executive power as an effort “to describe the relationship between the constitutional authorities of the office[] and presidential success as measured by scholars of the Presidency” (III, p x). (*Crisis and Command* itself is structured around chapters on five of the Presidents who rate highest in various “best

²⁸ Consider I, pp 110–11 (quoting Anti-Federalist concerns that opportunities for crisis “will not be wanting”).

²⁹ Of course, a case could be made that the secession crisis was absolutely ongoing. No element of Yoo’s account explains why presidential emergency powers should not have continued in force if Johnson thought that an aggressive approach to Reconstruction threatened the prospects for long-term peace.

³⁰ By *Crisis and Command*, Yoo has left behind earlier assurances that the war with al Qaeda has a foreseeable end (II, p 148). He argues that the Cold War itself was a “semipermanent state of national emergency” in which the novel element was not the scope of the powers claimed by Cold War Presidents but the “duration and magnitude” of the underlying threat (III, p 332).

³¹ When the President does it, that means it is not illegal. Consider *OLC Domestic Terrorism Memorandum* at 13 (cited in note 26) (emphasizing “the President’s constitutional authority to determine both when a ‘national emergency’ arising out of an ‘attack against the United States’ exists and what types and levels of force are necessary or appropriate to respond to that emergency”).

of” surveys.) His real thesis is, until the final chapter of the third book, approached only elliptically—but it is the sole reason that people will pay attention to Yoo’s history, and it is certainly his most important argument.

In short, Yoo’s episodic account of the American presidency charts a direct line to George W. Bush’s twenty-first century assertions of constitutional preeminence (III, pp 410–24, 439–44). Far from representing a “monarchic seizure of power” (II, p 234), Bush’s policies were either “well within the example of past Presidents” or “sought [even] greater accommodation with the other branches” than his predecessors (III, p 411). On Yoo’s account, the historical support for this claim is unequivocal. There is no question, he says, that “the Bush administration’s domestic pursuit of al Qaeda terrorists” merely “followed the example of past Presidents confronted with grave security challenges” (III, p 421). “Today’s conflict over presidential power does not truly arise over whether the authorities in question *exist*,” he concludes, but only over “whether now is the right time to exercise them” (III, p 411) (emphasis added).³²

An argument that leans so hard on history must be precise about what the facts show and what they do not. With that in mind, I propose the following framework for assessing the evidence he proffers for that thesis.

The Bush administration positions that pressed hardest on the boundaries of executive power can broadly be divided into three categories: executive preeminence in conflicts with Congress, executive immunity from effective judicial supervision, and executive supremacy in starting armed hostilities. On each of these issues, the administration often framed its starkest constitutional claims as alternatives to statutory arguments of varying quality. But even where Bush’s public stance did not rest solely on constitutional preeminence, his assertion of it matters deeply. In the first place, we do not know what other claims of authority might have been made (or might yet be made) on these

³² This certitude permeates the work: “To be sure, the [Bush] administration made broad claims about its powers under the President’s constitutional authorities, but this book shows that it could look to past Presidents for support” (III, p 413). “On the domestic front, the Bush administration’s exercise of presidential power followed the path marked by its predecessors . . . His exercise of power may have been different in amount, but not in kind” (III, pp 418–19). “Whether [Bush’s] claims ultimately have merit” is solely a question of policy assessment and political judgment: “whether they were used at the right moment” (III, p 417). Given the consistency of these arguments, the one instance in which Yoo disclaims them is not convincing: “[S]ome may read this book as a brief for the Bush administration’s exercise of executive authority in the war on terrorism. It is not” (III, p x).

grounds.³³ Equally important, a President's open threat of defiance shapes every interaction with the other branches. And the assertion itself—especially when adopted by as authoritative a voice as the chief executive of our republic—aims to establish a new public definition of constitutional legitimacy, tomorrow if not today. Let us take the three claims in turn.

1. Preeminence in conflicts with Congress.

This problem is exemplified by perhaps the most prominent separation of powers conflict during the Bush administration: the Terrorist Surveillance Program. In the wake of September 11, the administration started a new program of electronic surveillance directed at suspected terrorists. Government lawyers knew that the Foreign Intelligence Surveillance Act of 1978³⁴ (FISA) posed an enormous obstacle to the program. The administration shored up unpersuasive statutory arguments³⁵ by claiming an Article II prerogative to disregard FISA as an unconstitutional limitation of the President's responsibility to defend the homeland.³⁶ The FISA example thus stands for the administration's assertion of a wide-ranging prerogative to ignore federal statutes.³⁷

³³ Consider Michael D. Ramsey, *Torturing Executive Power*, 93 *Georgetown L J* 1213, 1252 (2005) (concluding—before news about the then-unknown Terrorist Surveillance Program had broken—that “the Administration has not claimed a power to . . . violate statutes” or asserted any other such “constitutionally dubious propositions with respect to executive power”). Given traditional assumptions about presidential behavior, Ramsey's erroneous assumption was plausible at the time. But it suggests how difficult it is now to assume that the Bush administration's vigorously defended theories of executive supremacy were otherwise merely theoretical.

³⁴ 50 USC § 1801 et seq.

³⁵ See Curtis Bradley, et al, *On NSA Spying: A Letter to Congress*, 53 *NY Rev Books* 42, 42–43 (Feb 9, 2006); Elizabeth B. Bazan and Jennifer K. Elsea, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* 27–42 (CRS Jan 5, 2006), online at <http://www.fas.org/sgp/crs/intel/m010506.pdf> (visited Nov 21, 2010); Memorandum from David Kris, Former Assistant Deputy Attorney General 1–7 (Jan 25, 2006), online at <http://balkin.blogspot.com/kris.fisa.pdf> (visited Nov 21, 2010). But see II, pp 115–16 (arguing that the Authorization for Use of Military Force authorized non-FISA electronic surveillance); *Memorandum in Support of NSA Activities* at 34 (cited in note 26) (similar).

³⁶ See Joint Inspectors General, *Unclassified Report on the President's Surveillance Program* 11, 13 (FAS July 10, 2009), online at <http://judiciary.house.gov/hearings/pdf/IGTSPReport090710.pdf> (visited Nov 21, 2010) (quoting an unreleased OLC memo's assertion that FISA “cannot restrict the President's ability to engage in warrantless searches that protect the national security” or otherwise “restrict the President[]” from “gather[ing] intelligence necessary to defend the nation from direct attack”); *Memorandum in Support of NSA Activities* at 3, 28–36 (cited in note 26) (similar). See also *In re Sealed Case*, 310 F3d 717, 742 (FISA Ct Rev) (“We take for granted that the President does have that authority [to conduct warrantless searches] and, assuming that is so, FISA does not encroach on the President's constitutional power.”).

³⁷ See text accompanying notes 56–57.

2. Immunity from effective judicial supervision.

The Bush administration's claims on this score parsed out at various levels of aggression. At a minimum, administration lawyers argued for rapidly escalating deference to the executive branch on national security questions: in factfinding, on interest balancing, and even when adopting rules of law. The administration also sometimes suggested (even in concededly justiciable cases) that the courts should be sidelined altogether as constitutionally unauthorized to interfere in the national security arena. Yoo's own language sometimes pushes toward a more radical reading still, which is to say skepticism of the courts' power to constrain the President's national security decisionmaking at all—perhaps even at the level of compliance with particularized judgments.³⁸ Each of these variants is essentially subsumed within what Yoo calls the problem of an “imperial judiciary.”³⁹

3. Supremacy in starting armed hostilities.

More contested in constitutional theory than in practical fact has been the President's authority to commence military hostilities without congressional authorization. Yoo has long argued that congressional approval is unnecessary for authorizing combat and that the Constitution places the President “squarely at the tiller” on these questions.⁴⁰ The Bush administration adopted precisely this view: congressional support for the Iraq and Afghanistan wars was politically useful but constitutionally unnecessary (I, pp 156–57).⁴¹

* * *

I do not suggest these categories of presidential authority as an exhaustive typology or even an especially novel set of insights. But they will serve as reference points for this Review's contention that Yoo not only fails to offer a plausible affirmative case for his claims but also ignores or effaces extensive evidence that completely contradicts them. Whether measured at the level of particular pieces of evidence, larger political episodes, or historical trendlines more generally, he offers no plausible historical account to substantiate his contention

³⁸ See text accompanying notes 118–23.

³⁹ See John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, 2006 Cato S Ct Rev 83, 110–11.

⁴⁰ John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal L Rev 167, 242, 292, 305 (1996).

⁴¹ See note 147 and accompanying text.

that the Bush administration's claims of executive power were grounded in custom and tradition.

II. HISTORICAL EVIDENCE: THE FOUNDING

Much of *The Powers of War and Peace*, as well as the first two substantive chapters of *Crisis and Command*, relies on an originalist mode of argumentation. With the exception of the power to initiate hostilities, very little in Yoo's treatment of the Founding maps cleanly onto Bush's assertions of executive power. Instead, for the most part, Yoo's arguments about the Founding serve to establish presumptions and burdens of proof—to place a thumb on the scale for weighing the legal significance of episodes that took place later in American history.⁴²

Yoo begins by covering the familiar argument that the impetus for an Article II executive came from the Founders' painful experience of trying to run a country through a Continental Congress that has often been described as little more than an ambassadors' conference table (III, pp 9–11, 17). America had created this problem for itself. Its Revolutionary horror of tyranny led to a firm embrace of decentralization at every level, with state constitutions written “to undermine the structural integrity of the executive branch” in governorships throughout the former colonies (III, p 9; I, pp 60–73).

Revolutionary fear of executive abuses produced legislative ones instead: “the results were legislative abuse, special-interest laws, and weak governments” (III, p 9). On the domestic front, experience with dominant legislative control left many with a new belief that legislatures were prone to both tyranny and instability. These tyrannies expressed

⁴² There is an enormous literature on the development of American political thought from the colonial period through the early Republic. For two competing views of how the Founders understood executive power, compare Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L J* 231, 234–35, 252–55 (2001); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 *U Ill L Rev* 701, 756–69 (2003), with Curtis A. Bradley and Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *Mich L Rev* 545, 571–626 (2004); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L J* 1725, 1755–1810 (1996). For a good start on the treatment of American political thought in the historical literature proper, see generally Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (Simon & Schuster 2010); Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (North Carolina 1997); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Vintage 1996); John Phillip Reid, *Constitutional History of the American Revolution* (Wisconsin 1993); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap 1992); Gordon S. Wood, *The Radicalism of the American Revolution* (Knopf 1991); Forrest McDonald, *Novus Ordo Seclorum: The Ideological Origins of the Constitution* (Kansas 1985); J.G.A. Pocock, ed, *Three British Revolutions: 1641, 1688, 1776* (Princeton 1980); Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (Knopf 1979); Wood, *Creation of the American Republic* (cited in note 27). For a wonderfully cheerful account of the Philadelphia Convention itself, see generally Clinton Rossiter, *1787: The Grand Convention* (Macmillan 1987).

themselves in many guises: economic protectionism and “oppression of minorities” (principally property holders, lenders, and other locally unpopular groups), as well as swings and instability in policymaking (III, pp 15, 17, 39–40). The legislatures also disappointed as vehicles for the conduct of foreign and military affairs (III, pp 15–16). A series of foreign affairs failures spurred demands for more effective conduct of the young nation’s foreign policy. Bullied by the British, French, and Spanish from abroad, beset by the alarming specter of Shays’s Rebellion at home, and riven by sectional conflict over foreign policy, the Framers had “Congress’s dismal record and the looming threat of chaos and disorder . . . at the forefront of the[ir] minds . . . as they met in Philadelphia” (III, p 11).

Yoo sensibly summarizes the argument that the Founders responded to these problems by recentralizing executive power in the Constitution. Three particularly important reforms were introduced in the executive branch: structural independence, a substantive veto over legislative policymaking, and a significant role in foreign affairs (III, p 17).

First, instead of a Continental Congress as the sole political organ of national government (I, pp 75–76), the Founders introduced an individual and independent executive officer, the President, who existed as a separate constitutional branch of government rather than as a constituent element of Congress (III, pp 34–35, 38–39; I, p 141). In a significant change from most state charters—and rejecting a central aspect of both the Virginia and New Jersey Plans for a federal constitution—the national presidency was neither appointed by the legislature nor incarnate in a multimember committee (III, pp 17, 401–02). Rather, the President was elected through the “Rube Goldberg contraption” of the Electoral College, a compromise solution whose “shift toward selection by the people [was] unmistakable” (III, pp 28–30). This resulted in a structurally independent presidency in the hands of a single person, more directly responsible to the national electorate than any other officer and at least theoretically independent from congressional sponsorship and congressional control.

Second, the President was granted the power to veto legislative action. The veto was primarily intended to stabilize swings in legislative opinion by thwarting efforts to enact new substantive law (III, pp 17, 24–25). It also bolstered the structural independence of the executive branch, providing a mechanism by which the President could defend against legislative incursions (III, p 22). Yoo rightly notes the mutually reinforcing nature of these first two reforms. The veto’s role in

checking “dangerous encroachments”⁴³ by the legislature would not be much good if the President were not structurally independent of Congress. And the structural independence of the President would not be much good if it could be stripped away by a simple majority of the legislature. Together these innovations established the presidency as a meaningful legislative brake on Congress’s capacity to pass new law.

The third important development was a shift of at least some substantive powers away from the legislature and to the newly created presidency. It is here that Yoo’s history starts to run into problems. It is not that his basic point is wrong; indeed, about some aspects of this shift there can be no debate. Yoo is right to emphasize, for example, that the President was given the initiative in appointing ambassadors and making treaties (III, p 30). But he is much less interested in the fact that the Founders simultaneously retained a structurally indispensable role for the legislature in these areas: approving ambassadorial appointments (III, p 30), “advis[ing]” on the “mak[ing]” of treaties, and “consenting” on treaties once drafted (III, p 28). Instead, he aggressively downplays senatorial significance. The Constitution, he says, “weights matters heavily in favor of the [President],” giving “the executive branch the effective ability to control the setting of foreign policy and diplomatic relations with other nations” (III, p 28).⁴⁴ The Senate is barely an afterthought.

With this groundwork in place, Yoo can proceed to dismiss the possibility of any integral foreign affairs role for the Senate, a position that is otherwise far from obvious as a matter of text and structure.⁴⁵ But this move is strongly at odds with Yoo’s heavy reliance in other settings on the power of process. He rightly stresses that the conditional presidential veto—which is a structurally weaker version of the Senate’s absolute check on treaties and nominations—is understood to concentrate enormous leverage in the President as a matter of both predictive political science and actual historical practice (III, pp 167–68 & n 115, 406–07). And when discussing proposals for legislative selection of the President, he fairly underscores the power that would have inhered in such procedural supervision: “Allow legislative selection of the executive, [Gouverneur] Morris warned, and the President ‘will not be independent of it; and if not independent, usurpation and tyranny on

⁴³ Federalist 51 (Madison), in *The Federalist* 347, 350 (Wesleyan 1961) (Jacob E. Cooke, ed). See also Federalist 48 (Madison), in *The Federalist* 332, 333 (“The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”).

⁴⁴ Consider III, pp 394–95.

⁴⁵ And that is setting aside the historical evidence, which suggests that “the founders appeared to assume that the Senate[] . . . [had] some sort of role in the formulation and negotiation of treaties.” Bradley and Flaherty, 102 Mich L Rev at 626 (cited in note 42).

the part of the Legislature will be the consequence” (III, p 24).⁴⁶ On those questions, the Constitution’s substantive allocations of power and subject matter jurisdiction are plausibly treated as almost secondary; it is the procedural structures that create the critical check-points of control. But when Yoo shifts his attention to foreign affairs and war powers, he forgets that lesson entirely.⁴⁷ He seems unaware of how his celebration of process in some contexts conflicts with his dismissal of it in others.

Yoo’s discussion of the allocation of warmaking powers is similarly overdrawn. He returns to his familiar argument that congressional power to “declare” war covers virtually nothing beyond “the legal function of defining the status of hostilities and neutrals” (III, p 27; I, pp 33, 149–50) and that the Constitution’s use of that phrase rather than the power to “make,” “engage in,” or “declare on” war necessarily excludes the power to begin or to commence war (I, pp 144–51; III, p 27). While the first two books more straightforwardly acknowledge his status as an outlier on this question of historical understanding (I, pp 25–26, 144–45; II, p 124), the discussion of this question in *Crisis and Command* notes only that “[s]ome claim that the original understanding . . . requires Congress to authorize all wars” (III, p 74). It certainly does not describe the basis for the opposite view, much less acknowledge how discredited Yoo’s views are among scholars who have studied the historical question.⁴⁸

Yoo resolves these difficulties with Founding-era understandings by reframing the question. Specifically, Yoo suggests that the burden

⁴⁶ To be sure, there is a distinction between the affirmative power to select and the negative power to reject. The former might well yield greater practical influence over a process by setting an anchor for negotiation.

⁴⁷ That is, the veto power transformed the President into the nation’s preeminent legislator, and legislative selection would have rendered the President a creature of Congress. But the Senate’s negative on treaties and ambassadors is so irrelevant as to reduce it to an essentially ministerial role in foreign affairs.

⁴⁸ In John Hart Ely’s words, “the ‘original understanding’ of the . . . framers and ratifiers can be obscure to the point of inscrutability. . . . In this case, however, it isn’t. . . . [A]ll wars, big or small, ‘declared’ in so many words or not . . . had to be legislatively authorized.” John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 3 (Princeton 1993). See also, for example, Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 *Tex L Rev* 299, 368–77 (2008); Louis Fisher, *Presidential War Power* 184–206 (Kansas 2d ed 2004); H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Essay in Constitutional Interpretation* 139 (Carolina 2002); Michael D. Ramsey, *Textualism and War Powers*, 69 *U Chi L Rev* 1543, 1597–1609 (2002); Treanor, 82 *Cornell L Rev* at 699–700 (cited in note 18); Ely, *War and Responsibility* at 3–10 & nn 1–56; Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* 74–81 (Yale 1990); Leonard W. Levy, *Original Intent and the Framers’ Constitution* 30–53 (MacMillan 1988); Charles A. Lofgren, *War-Making under the Constitution: The Original Understanding*, 81 *Yale L J* 672, 677–83 (1972).

is on his opponents to *disprove* his claims about executive power. He gets there by arguing that the starting point for understanding the President was the English king. If the Hanoverian experience provides the “baseline” for the Founders’ understanding (III, pp 31–32), calculating the American President’s powers is simple. We start with the agglomerated totality of kingly prerogatives, and then go about subtracting individual powers one by one—but only on the basis of explicit exceptions and restrictions imposed during the drafting of the Constitution. No deviations from royal power occurred except for those that were explicitly adopted during the Founding (III, pp 31–32; I, p 93).⁴⁹ Everything else was conveyed back to the President as part of a “[R]estoration” of royal authority (I, p 56). This baseline move is crucial at every stage of Yoo’s Founding-era analysis.

This move, startling on its face, strays quickly into implausibility.⁵⁰ There is certainly good evidence that drafters and ratifiers alike wanted to retreat from the post-Revolutionary overreaction to centralized authority. It is also clear that the Founders did not adopt readily available models from state constitutions that could have clarified

⁴⁹ This tracks a move made by advocates of a substantive Vesting Clause, who argue that “the ‘executive Power’ . . . referr[ed] to an understood bundle of powers . . . [and so] an enumeration became necessary only for those few instances in which the Founders were deviating from the prevailing understanding.” Bradley and Flaherty, 102 Mich L Rev at 550 (cited in note 42). See also, for example, Steven G. Calabresi and Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 Yale L J 541, 561 n 69 (1994) (explaining that “‘the executive Power’ . . . is probably not so much [a philosophically self-defining] type of power as it is a grab bag of many specifically enumerated powers, all of which we think of as belonging to the Executive”). This argument leads Yoo and others to conclude that “the deeper design of the Constitution itself requires us to construe any ambiguities in the scope of the executive power in favor of the President.” Yoo, 69 U Chi L Rev at 1676–81 (cited in note 18). See also III, p xv (similar); *OLC Domestic Terrorism Memorandum* at 6 (cited in note 26) (similar).

Strong forms of the Vesting Clause thesis have been criticized as historically naïve. See, for example, Bradley and Flaherty, 102 Mich L Rev at 573 (cited in note 42) (“Unlike proponents of the Vesting Clause Thesis, the leading historians of the period have emphasized the dramatic discontinuity and conflict in American constitutional thinking.”); Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1, 41 (1994) (“[M]odern constitutionalists treat the terms ‘executive’ or ‘legislative’ or ‘judicial’ as describing fully developed categories that carve up the world of governmental power without remainder, as if governmental power were the genus, and executive, legislative, or judicial were the only species. But the founders’ vision was not so complete.”). Even James Wilson, for example—a strong supporter of executive power who drafted the Vesting Clause for the five-man Committee of Detail—said that he “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers,” especially because the power “of war & peace” was “*of a Legislative nature*” (III, p 22) (emphasis added). And another delegate recorded Madison as having said that the “executive powers *ex vi termini*, do not include the Rights of war & peace &c” (III, p 451 n 8).

⁵⁰ And that is setting aside Yoo’s failure to confront crucial aspects of the Glorious Revolution of 1688 when discussing the background of Article II’s “executive power.” Compare Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative* 3–41 (Greenwood 1998), with I, pp 49–51; III, pp 7–8 (discussing only the English Constitution’s reallocation of control over legislation and funding).

many aspects of the separation of powers (I, pp 64–67, 72–73). But it is a long way from those observations to concluding that “executive power” meant all of the powers held by George III (III, pp 31–32; I, pp 31–54, 107–08). The very sequence of events at the Convention contradicts Yoo’s regal hypothesis: the delegates 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 (I, pp 90–106; III, pp 20–32).⁵¹ And if they were thinking of a baseline, the state governorships—which is to say, a set of highly restrained positions that had only recently begun to gain power through reform—made a much more recent and far more domesticated candidate in a nation proudly declaring itself to be a republic.⁵²

Most troublesome for Yoo’s clinically arithmetic approach to deriving the essence of “executive power,” though, are the fundamental characteristics of Founding-era political thought: ferment, uncertainty, and new ways of thinking about how to put an incomplete, hotly disputed, and occasionally self-contradictory separation of powers

⁵¹ Yoo appears to deal with this problem by describing earlier iterations of the Senate as an “executive council” that, besides having legislative control over taxing, spending, and commerce regulation, also “shared executive power” with the President (III, p 23). Thus, the argument presumably goes, the Committee of Detail’s return of a new allocation centered on the sole vesting of the executive power in the President wiped out any implications that might otherwise be drawn from earlier drafts (III, p 25). There are two problems with this argument. First, the earlier allocations of power were themselves framed around similar understandings. See, for example, Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 64–65 (Yale 1911) (discussing the Virginia Plan’s grant of “the executive powers of [the old Continental] Congress” to a single executive officer). Second, the Committee of Detail’s vesting of “the executive power of the United States” in a single President was *itself* structured in conjunction with allocations of the power “to make War” to Congress as a whole, Farrand, ed, 2 *Records of the Federal Convention* at 167–68, and to the Senate of the powers “to make Treaties; to send Ambassadors; and to appoint the Judges of the Supreme (national) Court.” *Id.* at 169.

⁵² Yoo assumes that these governorships carried substantive powers identical to the king’s, albeit hamstrung by procedural and structural restraints. But this conclusion rests on interpretations of text in state constitutions that is similar to the language of Article II—thus simply restating the question to be determined. If everything reduces to contestable readings of what John Locke, William Blackstone, and Baron de Montesquieu said about executive power, then any particular argument about specifically American history is makeweight—it adds very little to the Vesting Clause theorists’ exegesis of a limited set of tracts on political philosophy. See I, pp 36–45.

To be clear, Yoo is not alone in rejecting the gubernatorial baseline. Saikrishna Prakash, for example, concludes that “[t]he anemic and defenseless state executives were not the templates for the federal chief executive. Rather, most state executives stood as reminders of what to avoid.” Prakash, 2003 U Ill L Rev at 756–69 (cited in note 42). That is clearly true to a substantial extent, but it is of little help in identifying a baseline. The conclusion that the Founders wanted the President to be stronger than most state executives seems just as consistent with the proposition that Article II executive power enhanced its way upward from state governorships (by, for example, specifically making the President a unitary actor) as with the proposition that it ratcheted its way downward from the king (by, for example, specifically eliminating the power to declare wars).

framework into practice for the first time.⁵³ And yet Yoo repeatedly returns to the English understanding of kingship, as if the Founders' developing unease with a headless state meant that they wiped post-Revolutionary history clean and began afresh with a neat chalkboard exercise in subtraction from the very king they had cast off less than fifteen years before (III, pp 46–47).⁵⁴

His own text elsewhere suggests the weakness of this argument. It forces him to conclude, for example, that one of the Framers' proposals in Philadelphia utterly “failed to transfer the . . . powers . . . of making war and peace . . . to *any* institution in the new government” (I, p 93) (emphasis added).⁵⁵ And he concedes that Hamilton's initial proposal for the executive was doomed precisely because “Hamilton admitted that he took his inspiration from the British monarchy” (III, p 23). Framing presidential power in monarchical terms “practically guarantee[d] that his proposals would go nowhere” (III, p 23).⁵⁶ Yoo's

⁵³ See, for example, Flaherty, 105 *Yale L J* at 1756–87 (cited in note 42) (describing the American political system's migration from theories of mixed government, through pure republicanism, to the separation of powers); Glenn A. Phelps, *George Washington and American Constitutionalism* 121 (Kansas 1993) (“The skeleton of a constitutional government was present [in the Constitution], but it was without sinew and lacked clear definition. Perhaps the best indicator of the new Constitution's lack of clarity was the degree to which the Founders themselves . . . disagreed over its interpretation.”). See also sources cited in note 42.

⁵⁴ There are serious problems with Yoo's use of source material here. For evidence of what “the executive power” was thought to entail, Yoo relies heavily on the powers granted to the chief executives of Massachusetts and New Hampshire, two states that adopted second-generation reform constitutions intended to mitigate the problems experienced by other states under legislature-dominated frameworks. He emphasizes that those states gave their chief executives “the full power . . . to encounter, . . . repel, resist and pursue, by force of arms . . . and also to kill, slay, destroy, if necessary, and conquer, by all fitting ways . . . every such person and persons as shall, at any time hereafter . . . attempt . . . the destruction, invasion, detriment, or annoyance of this state” (I, pp 68–69). It is a striking grant of power. But so far as I can tell, Yoo nowhere cites the concurrent limitation imposed in the very same sentence of these constitutions: their requirement that the state executive's war powers must all be “exercised agreeably to the rules and regulations of the constitution, and the laws of the land.” NH Const of 1784, Pt 2 (superseded 1792), reprinted in Francis Newton Thorpe, ed, 4 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America* 2464 (GPO 1909); Mass Const of 1780, Pt II, ch II, § I, art VII, reprinted in Thorpe, ed, 3 *The Federal and State Constitutions* at 1901. This problem has been pointed out by other commentators, see, for example, Barron and Lederman, 121 *Harv L Rev* at 783–85 (cited in note 19), but Yoo repeats the claim in his subsequent work (III, p 16).

⁵⁵ The proposal conveyed “the legislative powers of the old Congress” to the new one, but “removed the vesting of the executive power from the executive branch” and enumerated the executive's power as “extending only to executing the laws and appointing officers” (I, p 93). See also Farrand, ed, 2 *Records of the Federal Convention* at 129–33 (cited in note 51). Yoo's exceptionally implausible interpretation of this proposal underscores the problems with his view that “the” executive power descended in a kind of apostolic succession from the king, through colonial governors, Continental Congress, and state executives, to the President (I, pp 65–73, 79, 86, 141; III, pp 10, 12–17).

⁵⁶ See also Rossiter, *The Grand Convention* at 178 (cited in note 42) (describing Hamilton's speech as “an unreal interlude” that “provoked almost no response, favorable or unfavorable”).

recognition of this viscerally negative public response is difficult to square with the conclusion that “British Kings” were the “baseline” for the presidency in foreign affairs (III, pp 31–32), particularly when so much of this argument rests on what were in essence Anti-Federalist caricatures of the presidency as a kingship (I, pp 108–14; III, p 37).

Yoo’s discussion of the Founding is thoroughly unconvincing on any of the national security questions that matter. It is with the subsequent history that Yoo tries more plainly to make his mark in *Crisis and Command*, and it is with the subsequent history that the three categories of presidential power discussed above become most relevant as guides for evaluation.

III. HISTORICAL EVIDENCE: CUSTOM AND TRADITION

A. Preeminence in Conflicts with Congress

Conflict between the legislature and the executive presents perhaps the most critical issue facing constitutional democracy in an age of terror. The Bush administration asserted nonderogable preeminence over Congress on a remarkable range of issues.⁵⁷ Yoo is equally unequivocal here: history shows, he says, that statutory law cannot restrict presidential actions in defense of national security, except at the

Hamilton himself apparently took the lesson, later writing in Federalist 67 of the American people’s “aversion . . . to monarchy” and strenuously disputing Anti-Federalists’ description of the President as “not merely as the embryo but as the full-grown progeny of that detested parent,” the king. Federalist 67 (Hamilton), in *The Federalist* 452, 452 (cited in note 43). Hamilton viewed these reassurances as necessary even in a document aimed at the citizens of New York State, who had voted for a state constitution creating one of the most vigorous chief executives in America (III, pp 13–15). See also Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv L Rev 1153, 1197 (1992) (“The Framers [] definitely did *not* wish to make the President of our federal republic even remotely as powerful as the English King.”).

⁵⁷ Such preeminence was asserted on too many occasions to cite here. For but a few examples, see *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations* (Apr 4, 2003), in Karen J. Greenberg and Joshua L. Dratel, eds, *The Torture Papers: The Road to Abu Ghraib* 286, 307 (Cambridge 2005) (“[L]aws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States [are unconstitutional.]”); Memorandum from Deputy Assistant Attorney General John C. Yoo to William J. Haynes II, Department of Defense General Counsel, *Military Interrogation of Alien Unlawful Combatants Held outside the United States* 18–19 (Mar 14, 2003), online at <http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf> (visited Nov 21, 2010) (advising that “if an interrogation method arguably were to violate” federal statutes criminalizing assault, maiming, and war crimes, those statutes “would be unconstitutional as applied in this context”); Memorandum from Deputy Assistant Attorney General Patrick Philbin to Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, *Swift Justice Authorization Act 2* (Apr 8, 2002), online at <http://www.justice.gov/olc/docs/memojusticeauthorizationact0482002.pdf> (visited Nov 21, 2010) (“Congress cannot constitutionally restrict the President’s authority to detain enemy combatants or to establish military commissions to enforce the laws of war.”).

President's own discretion. "If the circumstances demand, the executive can [] go beyond the standing laws in order to meet a greater threat to the nation's security" (III, p 424). Congress simply has no power to impose any legally binding obligation that Presidents believe to be incompatible with their obligation to protect the country during a crisis. Accordingly, "our greatest Presidents have, at times, acted contrary to Congress to protect the nation" (III, p 405). While "other branches [can] stop [the President by] using their own constitutional powers," for Congress this is basically a choice between blunderbusses: canceling the President's budget⁵⁸ or impeaching recalcitrant officers (III, pp 49–50).⁵⁹

The boldness of this argument is matched by the lack of historical evidence for it. I will focus on four categories of error: (1) ignoring or dismissing the many examples of Presidents obeying statutory law in severely option-constraining ways; (2) failing to appreciate how many instances of "Article II" power are actually examples of the President and Congress working in concert; (3) misunderstanding the significance of congressional delegations of authority; and (4) imagining acquiescence by other political actors.

1. Ignoring presidential deference to governing law.

At least two of Yoo's main examples of presidential power are actually instances of presidential *deference* to statutory restrictions during times of great national peril.

The earliest is Washington's military suppression of the Whiskey Rebellion (III, pp 66–72), a domestic disturbance that Americans viewed as implicating adventurism by European powers and threatening to dismember the new nation.⁶⁰ The Calling Forth Act of 1792⁶¹ allowed the President to mobilize state militias under federal control, but included a series of mandatory procedural checks—including judicial

⁵⁸ For a discussion of the legal difficulties with relying on targeted funding restrictions to restrain the President, see note 149.

⁵⁹ That such political tugs-of-war are an important check on presidential overreach is an ordinary assumption in separation of powers analysis. See, for example, Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 *Mich L Rev* 2706, 2728–29, 2737–39 (2003); Frank H. Easterbrook, *Presidential Review*, 40 *Case W Res L Rev* 905, 910–13 (1989). That they provide the sole barrier is a far stronger claim.

⁶⁰ See, for example, Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* 155–57, 190–92, 198–200 (Oxford 1986). Thomas Slaughter's book is probably the most thorough treatment of the subject. See also Leland D. Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* 69, 104–09 (Pittsburgh 1939) (focusing on events in Pennsylvania).

⁶¹ 1 Stat 264, codified as amended at 10 USC § 334.

approval—that restricted his ability to do so.⁶² Far from defying these comprehensive restrictions at a moment of grave crisis, Washington satisfied their every requirement in scrupulous detail. He issued a proclamation ordering the Whiskey Rebels to disperse.⁶³ When they refused to do so, he submitted a statement to Justice James Wilson of the Supreme Court describing the situation in Pennsylvania and requesting statutory certification.⁶⁴ Only when Wilson issued a letter precisely reciting the requisite statutory language (after first requiring the President to come back with authentication of underlying reports and verification of their handwriting⁶⁵) did Washington muster the troops.⁶⁶

Washington's compliance with statutory restrictions on his use of force continued even after his forces were in the field. Because Congress was not in session when he issued the call-up order, Washington was authorized by statute to mobilize militias from other states besides Pennsylvania—but only “until the expiration of thirty days after the commencement of the ensuing [congressional] session.”⁶⁷ When it became clear that the Pennsylvania campaign would take longer than that, Washington went back to Congress to petition for extension of the statutory time limit that would otherwise have required him to

⁶² The intricacy of these checks was no accident. The proposal to allow the President to call out the militia to execute federal law was controversial and much debated. It passed only after the initial bill was amended to add precisely the procedural checks that Washington later followed so carefully. Even then it was limited by a three-year sunset provision. See David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L Rev 1, 44–48 (1971). Washington's compliance with the laws was thus no empty formality; it was both politically salient and of deeply substantive significance.

⁶³ See Calling Forth Act of 1792 § 3, 1 Stat at 264 (requiring the President to issue a proclamation ordering insurgents to “disperse, and retire peaceably to their respective abodes”); George Washington, *A Proclamation* (Aug 7, 1794), reprinted in James D. Richardson, ed, 1 *A Compilation of the Messages and Papers of the Presidents, 1789–1897* 158, 158–60 (GPO 1896) (making the required proclamation). See also Phelps, *Washington and American Constitutionalism* at 134 (cited in note 53) (explaining that Washington resisted calls to summon the militia without congressional support); Baldwin, *Whiskey Rebels* at 183–85 (cited in note 60) (discussing Washington's cooperation with Congress).

⁶⁴ See Calling Forth Act of 1792 § 2, 1 Stat at 264 (permitting the President to mobilize state militias if a federal judge found that the civil unrest presented “combinations too powerful to be suppressed by the ordinary course of judicial proceedings”).

⁶⁵ See Stanley Elkins and Eric McKittrick, *The Age of Federalism* 478 (Oxford 1993).

⁶⁶ See Letter from James Wilson to George Washington (Aug 4, 1794), reprinted in Walter Lowrie and Walter S. Franklin, eds, 1 *American State Papers: Documents, Legislative and Executive, of the Congress of the United States, from the First Session of the First to the Second Session of the Tenth Congress, Inclusive* 85 (Gales and Seaton 1834). Yoo incorrectly implies that Washington violated this judicial approval requirement, because he “had not waited for federal judges to trigger the Militia Act, but instead went directly to Justice Wilson” (III, p 70).

⁶⁷ Calling Forth Act of 1792 § 2, 1 Stat at 264.

disband his troops.⁶⁸ Far from serving as an archetypal example of presidential defiance, the Whiskey Rebellion demonstrates exactly the opposite.

FDR's efforts to supply the United Kingdom's war effort before Pearl Harbor teach a similar lesson. During the run-up to America's entry into the war, Congress passed a series of Neutrality Acts that supplemented longstanding statutory restrictions on providing assistance to foreign belligerents. Despite these restrictions, FDR sent a range of military assistance to the future Allies.⁶⁹ Yoo makes two important claims about the administration's actions during this period. First, he claims the administration asserted that "[a]ny statutory effort by Congress to prevent the President from transferring military equipment to help American national security would be of 'questionable constitutionality'" (III, p 300). Second, he suggests that American military assistance in fact violated the neutrality statutes (III, pp 295–301, 310, 327–28).

Yoo's first claim misstates the content of a crucial primary source that actually stands for the opposite proposition.⁷⁰ So far as the historical

⁶⁸ See William C. Banks, *Providing "Supplemental Security": The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J Natl Sec L & Pol 39, 59 (2009); Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L J 149, 161 (2004).

⁶⁹ See, for example, Robert A. Divine, *The Illusion of Neutrality* 102–03 (Chicago 1962); Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932–1945* 101–299 (Oxford 1979); David Reynolds, *The Creation of the Anglo-American Alliance 1937–41: A Study in Competitive Co-operation* 16–33 (North Carolina 1981).

⁷⁰ The reference to "questionable constitutionality" is a quotation from Attorney General Robert Jackson's memorandum assessing the legality of a destroyers-for-bases exchange with Great Britain. See *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op Atty Gen 484, 490 (Aug 27, 1940) (Robert H. Jackson). Yoo's sentence profoundly misrepresents what the memo actually says. Jackson did state that one narrow aspect of the neutrality laws was of "questionable constitutionality": the *procedural* requirement that a subordinate officer, the chief of naval operations, certify that naval material intended for transfer was "not essential to the defense of the United States." The sentence containing the quoted phrase reads, in full:

Thus to prohibit action by the constitutionally created Commander in Chief *except upon authorization of a statutory officer subordinate in rank* is of questionable constitutionality. However, since the statute requires certification only of matters as to which you would wish, irrespective of the statute, to be satisfied . . . it seems unnecessary to raise the question of constitutionality which such a provision would otherwise invite.

Id (emphasis added). Jackson was flagging a garden-variety unitary executive claim about personnel, procedure, and the chain of command. He expressed no skepticism whatsoever about the constitutionality of *substantive* legal restrictions on the President's ability to make such overseas transfers.

When Jackson turned to precisely such substantive statutory restrictions, he did not even hint at the possibility of, let alone assert, a Commander-in-Chief Clause problem. Id at 491–92, 494–96. This is true even where—in an analytically distinct and separately numbered section of the memo—Jackson *conceded* the precise point that Yoo claims was in dispute: neutrality restrictions *did* prohibit Roosevelt from "transferring military equipment to help American national security" (III, p 300). See *Acquisition of Naval and Air Bases*, 39 Op Atty Gen at 494–96. Not only

record suggests, there appears to be no support for his assertion that the FDR administration challenged the constitutionality of any substantive restrictions on assistance to the future Allies.⁷¹

His second claim, at best, obscures deep ambiguity. It is certainly true that FDR “became more creative” in leveraging explicit exceptions contained in the Neutrality Acts and related statutes as his efforts to help the future Allies intensified (III, p 297). And the applicability of those exceptions has been sharply questioned, a complicated problem that space here does not suffice to address.⁷² But as David Barron and Martin Lederman have exhaustively detailed in well-known work that Yoo does not cite, this focused use of explicit statutory exceptions demonstrates a President perforce *acknowledging* the constraining effect of congressional restrictions—even in purely internal deliberations.⁷³ Indeed, FDR *rejected* advice from both the vice president and the secretary of the interior that he simply disregard the statutes (III, p 297).⁷⁴ Nor was this cheap talk: FDR’s choice to use exceptions rather

does the text that Yoo quotes thus bear literally no relation to the proposition he employs it to serve, but its absence from the memo’s parallel discussion of substantive restrictions suggests that Jackson actually rejected it. Worse still for Yoo’s claim, early drafts of Jackson’s opinion demonstrate that the Attorney General actually cut a section that had noted (without adopting) some commentators’ arguments that precisely such power existed. See William R. Casto, *Attorney General Robert Jackson’s Brief Encounter with the Notion of Preclusive Presidential Power*, 30 Pace L Rev 364, 375–78 (2010).

⁷¹ See Barron and Lederman, 121 Harv L Rev at 1043 (cited in note 19) (“We have not found any evidence that [FDR] ever invoked any substantive, preclusive constitutional power as Commander in Chief in the prewar period.”). Yoo provides no basis to conclude otherwise.

⁷² For the most extensive legal critique of the administration’s statutory arguments, see Aaron Xavier Fellmeth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935–1941*, 3 Buff J Intl L 413, 473–81 (1996). See also Robert Shogan, *Hard Bargain: How FDR Twisted Churchill’s Arm, Evaded the Law, and Changed the Role of the American Presidency 177–212* (Scribner 1995) (providing a critical historical account). Contemporaries had a range of views on the subject. Compare Quincy Wright, *The Transfer of Destroyers to Great Britain*, 34 Am J Intl L 680, 684 (1940) (concluding that the destroyers-for-bases transfer was legal), with Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 Am J Intl L 569, 587 (1940) (concluding that the destroyers-for-bases transfer was illegal). More recent discussions of national security problems often cite the destroyers-for-bases deal in passing as an instance of legal malfeasance. See, for example, Ely, *War and Responsibility* at 10 & n 55 (cited in note 48); Koh, *The National Security Constitution* at 41, 96 (cited in note 48). But on a close read of the materials, the point actually seems more equivocal than might be expected. Jackson’s opinion, for example, stands up surprisingly well to inspection. Compare *Acquisition of Naval and Air Bases*, 39 Op Atty Gen at 484 (cited in note 70), with *Youngstown*, 343 US at 647 (Jackson concurring) (distancing himself implicitly, and rather vaguely, from assertions made by the Roosevelt administration during his attorney generalship).

⁷³ Barron and Lederman, 121 Harv L Rev at 1042–55 (cited in note 19).

⁷⁴ Some of FDR’s interpretations clearly stretched the boundaries of plausibility. Yoo rightly suggests that the designation of fifty Hell Diver bombers as “temporarily in excess of requirements” (III, p 298) was an implausible description of planes that had just been introduced in 1938 (III, pp 298–99). See also Warren F. Kimball, *The Juggler: Franklin Roosevelt as Wartime Statesman* 14–16 (Princeton 1991) (noting some military leaders’ disagreement with FDR’s strategic decision to commit military aid to Great Britain even at some cost to America’s own forces).

than simply ignore the statute had real costs for his policies. He sent less weaponry, worse equipment, and fewer troops to assist the United Kingdom—and he did so through far more convoluted mechanisms—than would have been the case had he simply ignored the statutory framework.⁷⁵ These were serious consequences in a time of global cataclysm, yet Yoo views this entire episode as evidence of a constitutional power to override congressional restrictions.

These kinds of misunderstandings abound. At times, counterevidence is noted but essentially ignored;⁷⁶ at other points, it is minimized.⁷⁷ Yoo also overreads ordinary presidential efforts to push back on Congress through quotidian constitutional processes. For example, Washington's offer of amnesty for Whiskey Rebels is described as "reveal[ing his] power to stay a mechanical application of the law to yield more important national benefits" (III, p 72). This description of the Pardon Clause is strange, for it converts Washington's particular exercise of the explicit pardon power into evidence of a far broader right to disregard statutes more generally. In a similar vein, Yoo devotes much attention to the litigation postures of Ronald Reagan, George W. Bush, and Bill Clinton in challenges to the restrictions on presidential action imposed after Watergate (III, pp 110, 372, 376–81, 418). He fairly demonstrates that these Presidents shared similar perspectives on many

But again, the key point is that FDR's administration concluded even internally that it was bound by the Neutrality Acts. As then-Justice Jackson put it when describing the administration's actions during his stint as attorney general, Roosevelt

did not presume to rely upon any claim of constitutional power as Commander in Chief. On the contrary, he was advised that such destroyers . . . could be "transferred, exchanged, sold, or otherwise disposed of," because Congress had so authorized him. Accordingly, the destroyers were exchanged for air bases. In the same opinion, he was advised that Congress had prohibited the release or transfer of the so-called "mosquito boats" then under construction, so those boats were not transferred.

Youngstown, 343 US at 645 n 14 (Jackson concurring). Consider also Dallek, *Roosevelt and American Foreign Policy* at 210 (cited in note 69) ("I may be a benevolent dictator and all powerful Santa Claus and though the spirit has moved me at times, I still operate under the laws which the all-wise Congress passes.") (quoting FDR's wry reflection on the legal constraints of neutrality).

⁷⁵ Along with other statutory restrictions, the acts cumulatively forced FDR to send overage World War I destroyers to Britain instead of a flotilla of brand-new mosquito boats (III, pp 299–300); to cancel completely a planned sale of PT boats, see Fellmeth, 3 Buff J Intl L at 467–69 (cited in note 72); to station a small group of four thousand Marines in Iceland rather than the far larger force he desired (III, p 305); and to use complex schemes of loophole intermediaries to transfer weapons to the British and French throughout this period (III, p 297).

⁷⁶ Yoo observes without much comment that "Lincoln did not refuse to obey any congressional laws" (III, p 203).

⁷⁷ Yoo notes that the Reagan administration complied with a congressional mandate requiring the withdrawal of US troops from Beirut within eighteen months. But he suggests, without providing evidence, that the troop withdrawal had nothing to do with Congress and was instead the result of Reagan independently changing his own mind after the Marine Corps barracks bombing in Lebanon (III, pp 356–57).

separation of powers questions. But he does not show them ignoring statutory restrictions without recourse. Rather, these episodes show precisely the theory of Federalist 51 in action:⁷⁸ vigorously self-interested power centers pursuing their various interests through the ordinary constitutional process of negotiation, enactment, veto, and judicial challenge—not simply ignoring the law or the legal process designed to enforce it.

2. Ignoring presidential cooperation with Congress.

A number of other central episodes in Yoo's account turn out, on closer inspection, to be examples of the political branches combining their power, not stories of executive preeminence at all. They are instances, in other words, of the *Youngstown* zenith: Presidents acting with the explicit approval and blessing of Congress. Perhaps the best example is the nullification controversy during Andrew Jackson's administration. South Carolina's political class worked itself into a frenzy over the protectionist Tariff of 1828 and "rallied around the idea of 'nullification,'" or the principle that "the states possessed the sovereignty to veto actions of the federal government" (III, pp 180–81). Shortly after Jackson was reelected, the controversy hit crisis levels when a statewide South Carolina convention declared a revised federal tariff void and went so far as to threaten secession (III, p 182). True to form, Jackson responded by condemning South Carolina's threats in thundering terms (III, pp 183–86). After a months-long war of words, the controversy was finally resolved when South Carolina retreated in the face of a carrot-and-stick package of reduced tariff levels backed by the threat of federal military action (III, pp 185–88).

This much is uncontroversial. What Yoo's account minimizes to the point of elimination is the central role played by Congress in both elements of the negotiated solution. It was Congress, of course, that passed the package of reduced tariff rates (III, p 188). And this is not just an institutional formalism; Congress was the policy engine behind the solution as well. Henry Clay's nickname as "the Great Compromiser" came in part from his lead role in negotiating—as a senator—the gradual reduction of tariff rates that brought South Carolina back into the fold of the Union.⁷⁹ More unfortunate for Yoo's national security

⁷⁸ See Federalist 51 (Madison) at 348–49 (cited in note 43).

⁷⁹ For a concise summary of the compromise, in which "Jackson play[ed] a lesser role than Webster, Clay, Calhoun, and the leaders of the nullifiers," see Donald B. Cole, *The Presidency of Andrew Jackson* 169–77 (Kansas 1993). See also Robert V. Remini, *At the Edge of the Precipice: Henry Clay and the Compromise That Saved the Union* 10–28 (Perseus 2010) ("All anyone could think of was that the Union had been saved, thanks to the Great Compromiser."); David S. Heidler and Jeanne T. Heidler, *Henry Clay: The Essential American* 251–58 (Random House

thesis is that Congress was equally central in authorizing Jackson's threat of force. Yoo asserts without evidence that the Force Bill of 1833⁸⁰—which gave Jackson permission to relocate Charleston's federal facilities to a more defensible location and mobilize federal forces if South Carolinians interfered with federal customs operations—simply “called for political support” and “conveyed no new [legal] authority” (III, pp 187–88). The Force Bill was certainly a clearer source of authority than Jackson's proclamation, which did not even purport to have legal effect and which Yoo nonetheless describes, somewhat mysteriously, as “dr[awing] on [Jackson's] constitutional powers” (III, p 183). Whatever power the President possesses in the face of congressional silence, let alone congressional opposition, the nullification battle is no evidence of it.

The same error reverses the implications of another important example in the national security context proper: a series of covert actions ordered by Thomas Jefferson after the United States commenced war with the Barbary pirates (III, pp 111–15). Yoo sees Jefferson's failure to specifically notify Congress in advance of these particular maneuvers as further evidence that “Congress's main check” on such maneuvers “remain[ed] the power of the purse,” as opposed to the force of compulsory statutes (III, p 115). It is hard to understand how Yoo comes to this conclusion, as in fact the covert actions were fully authorized by congressional enactment. Congress had not only recognized a state of war with Tripoli, but in specific terms had authorized Jefferson to “cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in [the President's] opinion, require” (III, p 114). It would be hard to imagine a broader congressional delegation of wartime authority to the President. Covert action during the war with Tripoli was thus precisely the opposite of a FISA-style clash between statute and executive action: Jefferson was acting with his delegated powers at their apex.

Jefferson's actions before the congressional declaration of war at least provide evidence of aggressive presidential action during legislative silence. But they only further damage Yoo's constitutional argument about presidential preeminence. Jefferson sent a squadron to the Mediterranean with orders to attack Barbary ships if the commanding officer discovered that pirate states had declared war on the United States (III, pp 111–14). This led to a significant naval victory

2010) (“Clay's overall triumph was spectacular. . . . [H]e was being hailed as the nation's savior.”); Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* 408 (Oxford 2007) (noting that “Clay had driven a successful bargain” with South Carolina on the strength of his “olive branch and sword” partnership with Jackson).

⁸⁰ Act of Mar 2, 1833 §§ 1, 5, 4 Stat 632, 632, 634.

for the United States when the American ships learned on arrival that one of the pirate states had formally declared war. So far, this is excellent evidence of a President authorizing a vigorous response to declared foreign aggression.⁸¹ But the facts as the President publicly presented them took an even more defensive cast. Emphasizing his “sincere desire to remain in peace,” Jefferson made the apparently false claim that no tactically offensive operations had been authorized, and that shots had only been fired in defensive response to an attack by a Tripolitan vessel that had “engaged [a] small schooner . . . which had gone as a tender to our larger vessels.”⁸² It was all defensive action, in other words—not just in the grand strategic scheme of a response to declared war, but even within the scope of the particular engagement itself, where the pirate ship had launched a dastardly attack on one of the weakest links in the American squadron. Jefferson went on to make the remarkable (and for Yoo’s purpose devastating) concession that American forces *could not* have seized the defeated enemy ship legally, because the US commander was “[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defence.”⁸³ In other words, not only did Jefferson fail to claim preeminence over contrary congressional policy, but he explicitly conceded substantial limitations on his war powers even in the face of complete congressional silence.

This pattern of ignoring or minimizing the role of Congress persists throughout Yoo’s work, undercutting the string of examples offered for presidential primacy and in many cases distorting episodes that actually support the precise opposite of Yoo’s position. He suggests that George Washington rejected pre-nomination participation by the Senate as part of its “advice and consent” role, just before acknowledging—as if it were puzzling—that from the very beginning of the republic, Presidents have always consulted with the Senate about nominations before making decisions (III, p 62). He devotes pages to a discussion of the increasingly dictatorial policies that Jefferson

⁸¹ It also shows a President raising the risk of hostilities without explicit congressional approval to do so, a category of action that has sometimes been treated as constitutionally questionable. Consider War Powers Resolution of 1973 §§ 3–4, Pub L No 93-148, 87 Stat 555, 555–56 (1973) (mandating prior consultation with Congress where possible before US forces are “introduced . . . into situations where imminent involvement in hostilities is clearly indicated by the circumstances”). Jefferson’s orders would have had this “raise the risk” quality even if Tripoli had not already declared war, as the presence of federal ships might well have triggered a hostile response.

⁸² 10 Annals of Cong 11, 12 (Dec 8, 1801). See also Montgomery N. Kosma, *Our First Real War*, 2 Green Bag 2d 169, 174 (1999); Frank Lambert, *The Barbary Wars: American Independence in the Atlantic World* 127–33 (Hill and Wang 2005). For a broader discussion of the way Yoo transforms presidential prevarication into evidence of Article II authority, see text accompanying notes 156–59.

⁸³ 10 Annals of Cong at 12 (cited in note 82).

“chose” to employ in “his attempt to prevent all exports of American goods” during the 1807 to 1809 embargo—which was imposed pursuant to statutory authority enacted for that very purpose (III, pp 130–36). He discusses at length James Polk’s aggressive actions once declared war with Mexico was underway—as part of a conflict that Congress had both authorized and funded (III, pp 194–97). He emphasizes a whole series of FDR’s national security initiatives, from repeated revisions of the Neutrality Acts (III, pp 296–97), to the passage of Lend-Lease (III, pp 303–04), to the Japanese internment policy (III, p 317)—all of which were pursued in close coordination with Congress. And he fails entirely to deal with recent scholarship concluding that the office of “Commander in Chief,” on the original understanding, was fully subject to legislative control even on narrow questions of tactics.⁸⁴

Perhaps most tellingly, Yoo has to minimize congressional-executive cooperation even in one of the core elements of his case-in-chief: the Civil War. He downplays the invasive congressional oversight to which Lincoln submitted throughout the Civil War, with congressional committees calling on generals to defend their progress and strategies (III, p 216).⁸⁵ And he only lightly touches on the fact that Lincoln sought retrospective blessing of his unauthorized actions at the beginning of the Civil War—the crucial starting point for any discussion of this area.⁸⁶ That decision appears on its face to be a concession by Lincoln that, even in the face of an existential emergency, he had only a provisional extralegal authority that lasted no longer than the congressional recess. In Lincoln’s own words, “[t]hese measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.”⁸⁷ But

⁸⁴ See Prakash, 87 *Tex L Rev* at 368–72 (cited in note 48); Barron and Lederman, 121 *Harv L Rev* at 772–86 (cited in note 19).

⁸⁵ For more on the famous Joint Committee on the Conduct of the War in particular, see generally Bruce Tap, *Over Lincoln’s Shoulder: The Committee on the Conduct of the War* (Kansas 1998). See also Harold Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* 181–87 (Knopf 1973).

⁸⁶ Similarly, FDR’s strained application of the Trading with the Enemy Act, Pub L No 65-91, 40 Stat 411 (1917), to justify imposing a national banking holiday and prohibit gold transactions was effectively ratified days later by Congress’s Emergency Banking Act, Pub L No 73-1, 48 Stat 1 (1933) (III, p 263).

⁸⁷ Abraham Lincoln, *Special Session Message* (July 4, 1861), reprinted in James D. Richardson, ed, 6 *A Compilation of the Messages and Papers of the Presidents, 1789–1897* 20, 24 (GPO 1897) (emphasis added). Lincoln correctly argued that some of his actions were taken pursuant to preexisting statutory authorization. *Id.* See also *The Prize Cases*, 67 US (2 Black) 635, 668 (1863) (“[B]y the [Insurrection Act of 1795 and the Militia Act of 1807, the President] is authorized to . . . suppress insurrection against the government . . . of the United States.”). But Lincoln effectively conceded in the same paragraph that some of his other actions were not

Yoo scarcely acknowledges the problem, briefly noting that Lincoln “spoke in the language of deference to Congress and sought its ex post approval of his actions at the start of the war” before quickly shifting to a long discussion of how Lincoln maneuvered Congress into a position where its conferral of support became a political necessity (III, pp 203, 211).⁸⁸

The same problem plays out with the Emancipation Proclamation. Yoo repeatedly suggests that the Proclamation contradicted Congress’s more conservative slavery policy, describing it as a decision made “without input from the legislature” (III, p 200) that was “inconsistent with Congress’s preferences” (III, p 413) and “bypassed” both the letter and spirit of recently enacted statutes (III, pp 218, 220–21). That account misunderstands both history and law. The Civil War has long been read as a story of increasing pressure from Congress, the Union military, and slaves themselves⁸⁹ in the face of *Lincoln’s*

“strictly legal.” Lincoln, *Special Session Message* at 24. For a good, brief description of these initially unauthorized actions, see Hyman, *A More Perfect Union* at 61–64 (cited in note 85).

⁸⁸ It might be argued that the retroactive ratification of Lincoln’s war measures was analogous to Bush’s various efforts to secure ex post legislative approval. But the analogy does not work. Lincoln “threw himself on [Congress’s] mercy,” seeking its retrospective approval of his actions, “whether strictly legal or not.” David P. Currie, *The Civil War Congress*, 73 U Chi L Rev 1131, 1136 (2006), quoting Lincoln, *Special Session Message* at 24 (cited in note 87). And Lincoln’s effort to get blanket ratification was successful on all counts, except perhaps as regards the suspension of habeas corpus. Act of Aug 6, 1861 § 3, 12 Stat 326, 326 (stating that Lincoln’s military “acts, proclamations, and orders” are “hereby approved and in all respects legalized and made valid”). See also Barron and Lederman, 121 Harv L Rev at 998–1008 (cited in note 19).

Bush’s assertions of authority, by contrast, were substantially checked by the other branches. As Jack Goldsmith put it, “[a]lmost every aspect of the early unilateral Bush counterterrorism program has been pushed back against or modified, and ultimately blessed, with accountability strings attached by Congress or the courts or both.” Goldsmith, *The Accountable Presidency*, New Republic at 39 (cited in note 10). Moreover, Congress remained in recess for almost three months after Confederate cannon opened fire on Fort Sumter, because Lincoln did not summon an emergency session until July 4 (III, pp 208–09). See also Daniel Farber, *Lincoln’s Constitution* 117 (Chicago 2003) (discussing symbolic, political, and practical reasons for this decision). Congress was very much in session when Flight 11 hit the North Tower.

⁸⁹ See, for example, Edna Greene Medford, *Imagined Promises, Bitter Realities: African Americans and the Meaning of the Emancipation Proclamation*, in Harold Holzer, Edna Greene Medford, and Frank J. Williams, eds, *The Emancipation Proclamation: Three Views* 1, 4–21 (Louisiana State 2006); Frank J. Williams, “*Doing Less*” and “*Doing More*”: *The President and the Proclamation—Legally, Militarily, and Politically*,” in Holzer, Medford, and Williams, eds, *The Emancipation Proclamation* 48, 54–62; Michael Vorenberg, *Final Freedom* 23–28 (Cambridge 2001); Ira Berlin, et al, *Slaves No More: Three Essays on Emancipation and the Civil War* 3–6, 27–30, 74–76 (Cambridge 1993); James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 494–500 (Oxford 1988); Vincent Harding, *There Is a River* 219–41 (Harcourt Brace Jovanovich 1981); Herman Belz, *Reconstructing the Union: Theory and Policy during the Civil War* 101 (Cornell 1969). Compare Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era* 101–18 (Fordham 1998) (criticizing certain aspects of this “general[]” understanding); Allan C. Guelzo, *Restoring the Proclamation: Abraham Lincoln, Confiscation, and Emancipation in the Civil War Era*, 50 Howard L J 397, 397–401 (2007) (criticizing the “new consensus” that Lincoln was personally “a half-hearted emancipator”).

cautious reluctance both to pass emancipation legislation in the first place⁹⁰ and to enforce it once on the books.⁹¹ Indeed, when Lincoln announced his plans for emancipation, he explicitly pitched them as rooted in congressional policy—particularly the Second Confiscation Act of 1862,⁹² which freed all slaves behind Union lines who belonged to disloyal slave owners.⁹³ Far from being in tension with one another, the Confiscation Act and the Emancipation Proclamation had the all-but-identical practical effect of freeing slaves throughout the Confederacy as the Union lines moved forward.⁹⁴

Yoo's claim that the Proclamation was a presidential end run around the Confiscation Act's "painstaking judicial procedures" is especially off the mark (III, p 221). The procedures Yoo references—

⁹⁰ See, for example, Allen C. Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery in America* 40, 54 (Simon & Schuster 2004) (explaining Lincoln's reluctance to sign the First Confiscation Act because of his strategic concern about the problems a successful court challenge might cause for other forms of emancipation); *id.* at 114–15 ("Lincoln . . . had no more enthusiasm for the Second Confiscation Act than he had for the first.").

⁹¹ See, for example, Mark M. Krug, *Lyman Trumbull: Conservative Radical* 200 (Barnes 1965) (describing "the refusal of the administration and of the commanding Union generals to enforce [the First] Confiscation Bill"); Hyman, *A More Perfect Union* at 178–79 (cited in note 85) (attributing underenforcement of the confiscation laws to "overburdened work loads of government lawyers"); Guelzo, *Lincoln's Emancipation Proclamation* at 41–42 (cited in note 90) ("Lincoln showed little energy in enforcing the [First Confiscation Act]."); Barron and Lederman, 121 *Harv L Rev* at 1009–10, 1016 (cited in note 19) ("[The Second Confiscation Act] imposed . . . an affirmative obligation on the President, because Congress perceived him as being insufficiently aggressive.").

⁹² 12 Stat 589.

⁹³ Abraham Lincoln, *A Proclamation* (Sept 22, 1862), reprinted in Richardson, ed, 6 *Messages and Papers of the Presidents* 96, 96–98 (cited in note 87).

⁹⁴ The Emancipation Proclamation was narrower than the Second Confiscation Act in some ways and broader in others. On one hand, the Proclamation's failure to reach *any* slaves in designated Union regions was less liberationist than the Act, which applied to all slaves belonging to disloyal owners anywhere. See note 95. On the other hand, the Proclamation's emancipation of *all* slaves in designated Confederate regions was more liberationist than the Act. This latter point is true in two ways. First, the Act did not formally trigger emancipation unless and until a slave found himself within an area of federal control, while as a theoretical matter the Proclamation instantly emancipated all slaves within the designated areas even if held by Confederate forces. This was obviously a difference in theory only; whatever the Proclamation's theoretical reach, it had no more practical effect than the Act did until a slave found himself in an area of Union control. Consider Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 *U Ill L Rev* 1135, 1139. Second, the Act essentially applied only to slaves owned by rebels and their collaborators. That is, it did not apply to slaves belonging to loyalist owners, even in the Confederacy. This was potentially a more significant distinction, although the difference seems unlikely to have been important in practice. Yoo—appropriately, in my view—does not rely on it. For a more in-depth discussion of this point, see Robert Fabrikant, *Emancipation and the Proclamation: Of Contrabands, Congress, and Lincoln*, 49 *Howard L J* 313, 370 & nn 217–18 (2006). For book-length treatments of the strengths, weaknesses, and backgrounds of the Confiscation Acts, see Silvana R. Siddali, *From Property to Person: Slavery and the Confiscation Acts, 1861–1862* 233–34 (Louisiana State 2005); John Syrett, *The Civil War Confiscation Acts: Failing to Reconstruct the South* 1–119 (Fordham 2005).

which were not particularly painstaking—applied to a different section of the Act; the Act’s emancipation provisions were specifically couched as an *immediately* effective alteration in legal status.⁹⁵ On this background, it is not surprising that the legislature’s response to the Emancipation Proclamation was enthusiastic; the House of Representatives actually passed a resolution—which Yoo does not mention—approving Lincoln’s proposal before he issued the Proclamation in operative form.⁹⁶ Far from being “inconsistent with Congress’s preferences” (III, p 413), the Emancipation Proclamation thus looks, at a minimum, like *Dames & Moore*–style action furthering an enthusiastically approved congressional policy by extending long-sought

⁹⁵ The Second Confiscation Act contained three distinct sets of provisions that are relevant here. The first defined crimes of disloyalty and their punishments. Second Confiscation Act §§ 1–4, 12 Stat at 589–90. The second dealt with property seizure generally, ordering the President “to cause the seizure” of “all the state and property, money, stocks, credits, and effects” of various categories of disloyal individuals. Second Confiscation Act §§ 5–7, 12 Stat at 589–90. The third dealt specifically with the emancipation of slaves. Second Confiscation Act §§ 9–10, 12, 12 Stat at 591–92. Section 9 immediately emancipated all slaves of disloyal owners who escaped behind Union lines or otherwise came within the control of Union officials. Second Confiscation Act § 9, 12 Stat at 591. Consider also Second Confiscation Act §§ 1–2, 12 Stat at 589–90 (imposing emancipation of slaves as a penalty for crimes of disloyalty).

Crucially for Yoo’s purpose, § 9 effectuated an *immediately effective change in legal status*: it said that all the slaves within its ambit “shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves.” Second Confiscation Act § 9, 12 Stat at 591. As a straightforward matter of statutory interpretation, the Act’s provisions on judicial procedure did not apply to the emancipation provision at all. (They would have applied to residual efforts under the “property” provisions of § 5 and § 6 to “seize” slaves not otherwise covered by the terms of § 9. But they had no application whatsoever to the principal emancipation provisions of the Act.)

Drafting history confirms that this was no accident. Section 9 was inserted by a conference committee in response to angry Radical Republican objections to an earlier Senate draft that *would* have required judicial process for effective emancipation. See Daniel W. Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* 73–74 (Chicago 2007) (noting that conservatives sought to obscure this feature after the bill was passed). See also *id.* at 68–69 (describing a prior version of bill). In fairness, Yoo shares illustrious company in incorrectly interpreting this long, dense, and archaic statute. See, for example, Akhil Reed Amar, *America’s Constitution: A Biography* 356 (Random House 2005); McPherson, *Battle Cry of Freedom* at 500 (cited in note 89). Consider Siddali, *From Property to Person* at 233–34 (cited in note 94) (discussing this reading of the Confiscation Acts); J.G. Randall, *Constitutional Problems under Lincoln* 279 n 10, 357–63 (Illinois 1951) (noting the absence of process for slaves to legally establish emancipation under the Act, although misconstruing the significance of that absence). But for Yoo, these distinctions are not just an aside; they are central to his separation of powers claims.

⁹⁶ See Cong Globe, 37th Cong, 3d Sess 92 (Dec 15, 1862). See also Guelzo, *Lincoln’s Emancipation Proclamation* at 169–78 (cited in note 90) (describing congressional reaction to the preliminary Proclamation); Mark M. Krug, *The Republican Party and the Emancipation Proclamation*, 48 J Negro Hist 98, 106–07 (1963) (“There seems to be overwhelming evidence that the Emancipation Proclamation met with approval of all the factions in the Republican Party.”). Consider also Harry S. Blackiston, *Lincoln’s Emancipation Plan*, 7 J Negro Hist 257, 271 (1922) (“The new Confiscation Act of 1862 proved to be a law to destroy slavery under the powers of war.”).

presidential cooperation. To frame it as presidential defiance gets things exactly backward.

3. Misunderstanding delegation of congressional authority.

Yoo also views the modern administrative state as itself evidence of inherent presidential power. Focusing on the “sweeping legislative powers” that Congress has delegated to the executive branch over time, he devotes extensive attention to the way that New Deal legislation was instrumental in shifting “the locus of regulation” to the executive branch, with laws increasingly “issued through agency rule-making, rather than acts of Congress” (III, p 275). This certainly shows a dramatic increase in the practical scope of executive branch responsibilities. But it is inapposite to questions about the presidency’s inherent powers, much less any infeasible Article II authority.⁹⁷

In the New Deal paradigm, the President is acting as the representative of a combined political will: Congress identifies a problem and delegates *its* authority to the President to create and execute regulations in pursuit of a solution to that problem. In the core separation of powers problems presented by the war on terror, by contrast, what is at stake is the President’s ability to ignore everyone else in the process: ignore statutes, ignore treaties, perhaps even ignore judicial rulings. These two things have nothing to do with each other, leaving the administrative state’s indubitably muscular implementation of delegated *congressional* authority completely off-point.⁹⁸

4. Imagining acquiescence by other political actors.

Finally, Yoo places erroneous emphasis on what he describes as the acquiescence of other political actors in the face of transgressive

⁹⁷ Yoo argues for the relevance of this lengthy section by suggesting that “scholars” who think “that the New Deal did not go far enough” are usually also “those most likely to criticize the President in foreign affairs” (III, p 286). See also III, p 418; II, p 150. This is not convincing. Questions of federalism have nothing seriously to do with the problem of executive power in the war on terror, and the New Deal’s delegations of legislative authority to administrative agencies are simply inapposite to the core national security problems facing us now. Pro-New Deal commentators have no inconsistency to defend when they insist that statutory limitations on the President ought to be binding.

⁹⁸ Stranger still is the point at which, in the midst of reviewing FDR’s domestic muscle flexing (III, pp 257–88), Yoo stops short to deliver a detailed disquisition insisting that the New Deal was a failure (III, pp 286–88). There is no equivocation: we now “*know* that the New Deal, combined with the Federal Reserve’s tight monetary policy and the government’s restrictive fiscal policies, made the Great Depression worse” (III, p 327) (emphasis added). The first problem with Yoo’s lengthy excursion into depression economics is that it is wrong. More striking than his misunderstanding of professional consensus (which space in this Review does not suffice to elaborate) is its irrelevance. Whether the New Deal actually worked has little if anything to do with Yoo’s larger effort to demonstrate a legal tradition of presidential preeminence.

presidential action. Congressional inactivity during the early Civil War, for example, is described as “implicit approval” not just of Lincoln’s substantive war policies but of the President’s constitutional primacy over such policies in the first place (III, pp 232, 247). But in fact it is not at all clear what congressional silence meant. Approval of the President’s constitutional powers to act alone so long as Congress has not spoken? Concession that the President could act freely even in the face of active congressional opposition? Approval of the substantive policy goal that the President’s measures aimed to achieve? Or simply the evasion of responsibility on difficult issues?

The difficulty of synthesizing the legal stance of a multimember legislature on questions like these is famously epitomized by the “Decision of 1789,” in which Congress passed a statute allowing the President to remove executive officers without Senate approval.⁹⁹ Similar indeterminacy plagues Yoo’s treatment of the tension between Lincoln and Congress on the readmission of Southern states during Reconstruction,¹⁰⁰ and Yoo sharply overstates the significance of state cooperation with George Washington’s requests for assistance during the Whiskey Rebellion.¹⁰¹ Other instances of Presidents commanding deference from

⁹⁹ Compare Edward S. Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 Colum L Rev 353, 362 (1927) (“[A] mere fraction of a fraction, a minority of a minority, of the House, can be shown to have attributed the removal power to the President on the grounds of executive prerogative.”), with Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L Rev 1021, 1045–46 (2005) (arguing that the legislative record demonstrates a majority understanding that the President had a constitutional removal power).

¹⁰⁰ Yoo notes quite rightly that Lincoln sought to use his tactical authority to create facts on the ground in occupied territory that would push Congress toward his preferred settlement (III, pp 238–43, 247). This is good evidence of a canny and sharp-elbowed politician, and perhaps even of certain powers to act absent congressional disapproval. But it is not evidence of a President ignoring or overriding statutory law, much less of Congress acquiescing to such violations. See Michael Les Benedict, *The Constitution of the Lincoln Presidency and the Republican Era*, in Martin L. Fausold and Alan Shank, eds, *The Constitution and the American Presidency* 45, 57 (SUNY 1991) (“It was Lincoln’s political success at preventing . . . [legislative] consensus, rather than any claim of exclusive constitutional power over Reconstruction, that led [to his control of events].”). Indeed, there was an ongoing tussle between Lincoln and Congress on exactly these issues, with Lincoln vetoing congressional legislation that would have set more stringent terms for Reconstruction than he wanted (III, p 240) and congressional Republicans defeating Lincoln’s proposal to readmit Louisiana without first securing guarantees for the black population (III, p 243).

¹⁰¹ In correspondence with state governors about the Whiskey Rebellion, Washington expressed his “entire confidence” that the governors would “‘cheerfully’ promote ‘a due obedience to the Constitutional Laws of the Union’” (III, p 69). Yoo claims that this demonstrates Washington’s belief not only that “when state governors enforced federal law, they were subordinate to him,” but also that “he could command them to enforce the law” in the first place (III, pp 69–70). The problem is that Washington did not actually say that, and the fact that states cooperated with the federal government in addressing a pressing problem is weak evidence of it. See Slaughter, *The Whiskey Rebellion* at 196–97 (cited in note 60) (describing concessions Washington had to make to secure the Pennsylvania governor’s cooperation). Washington actually jawboned state governors into cooperating with him on some other occasions that are not cited by Yoo. None of those examples appears to be any more compelling than the one on which Yoo focuses.

other political actors turn out to be irrelevant to the question of conflict with Congress¹⁰² or nonexistent on closer inspection.¹⁰³

The common denominator in Yoo's account of each instance is a lack of attention to the practical dynamics of institutional interaction, both vertical and horizontal. Particularly when Congress is doing the acquiescing, silence often tells us little about that institution's considered judgment (to the extent such a thing exists) about the scope of presidential power.¹⁰⁴ In the first place, legislative cooperation often involves periods when the President's party controls Congress. Regardless of their views on the ultimate constitutional merits, legislators from the President's party may often support his actions either out of simple party loyalty or because they tend to agree on substantive policy outcomes. While it is certainly not impossible that a President's party might oppose him on principle,¹⁰⁵ waving generally at examples of congressional silence is insufficient for serious analysis. This is particularly true given the need for a two-thirds majority to override any veto, not to mention the internal vetogates that bias Congress toward inaction more generally. Inherent congressional inertia tends to give the President final say on these questions, simply because it is far more difficult for Congress to make its aggregate opinion known, let alone give that

See, for example, Prakash and Ramsey, 111 Yale L J at 341 n 482 (cited in note 42); Phelps, *Washington and American Constitutionalism* at 127–33 (cited in note 53); Forrest McDonald, *The Presidency of George Washington* 127–28 (Kansas 1974).

¹⁰² Lincoln's decision to increase the size of the army and pay the troops from the Treasury before Congress had convened to pass an Article I, § 8 appropriation (III, p 208), for example, appears as a pure constitutional violation—perhaps defensible under the extraconstitutional theory of presidential prerogative discussed below but otherwise simply unrelated to the intra-constitutional question of whether Presidents can ignore statutory constraints. The Louisiana Purchase is a comparable example. Jefferson thought that he had no power to execute the purchase, as the Constitution did not explicitly provide for the addition of new territories (III, p 118). He nonetheless decided to “openly . . . violat[e] [] the Constitution and seek popular support” for that decision (III, p 120).

¹⁰³ Yoo emphasizes, for example, that FDR ordered American naval vessels to run escort for British ships “[w]ithout input from Congress” and that he did not seek approval from Congress for individual deployments of American forces once World War II began (III, p 307). He does not suggest that either policy ran afoul of federal law, and I am not aware of any statute with applicable prohibitions. See, for example, Barron and Lederman, 121 Harv L Rev at 1047–48 n 436 (cited in note 19) (describing congressional *rejection* of efforts to ban such escorts in 1941).

¹⁰⁴ For classic critiques of the perils of inferring significance from congressional silence, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich L Rev 67, 95–108 (1988); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 BU L Rev 109, 148 (1984). See also Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 Intl Rev L & Econ 239, 241–49 (1992).

¹⁰⁵ See generally Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev 2311 (2006). One striking example of this was FDR's inability to push through a bill that would have massively centralized control over the administrative state within the White House, even when the Democrats had two-thirds majorities in both the House and Senate (III, p 284). More famously, FDR's court-packing plan was defeated during the same congressional session.

opinion legal effect. The point is not that acquiescence analysis is categorically unworkable. But it is hard to do accurately, and it deserves a care that is absent from Yoo's work.

There are two significant instances in which Yoo maintains that a President directly violated the law without triggering an effective congressional response. Neither case shows American politicians working out a new constitutional balance.

The most relevant for Yoo's particular concerns was FDR's decision to authorize wiretaps of suspected Axis agents and collaborators. The Communications Act of 1934¹⁰⁶ provided that "no person" could "divulge or publish" any interstate or foreign wire communication except through "authorized channels."¹⁰⁷ In 1940, despite the Supreme Court's recent decision that this language prohibited the introduction of wiretap evidence in federal criminal trials,¹⁰⁸ FDR authorized electronic surveillance of "persons suspected of subversive activities . . . , including suspected spies."¹⁰⁹ While the administration's statutory arguments for the program's legality were at least plausible, it seems unlikely that they would have convinced the Supreme Court.¹¹⁰ But the

¹⁰⁶ 47 USC § 151 et seq.

¹⁰⁷ Communications Act of 1934 § 605, 47 USC § 605.

¹⁰⁸ See *Nardone v United States*, 302 US 379, 382–84 (1937) ("*Nardone I*").

¹⁰⁹ Franklin Delano Roosevelt, *Memorandum for the Attorney General* (May 21, 1940) ("FDR Memorandum"), reprinted in *Electronic Surveillance for National Security Purposes, Hearings on S 2820, S 3440, and S 4062 before the Subcommittees on Criminal Laws and Procedures and Constitutional Rights of the Committee on the Judiciary, 93d Cong, 2d Sess 346–47 (1974)* ("Church Committee Hearings"). For a survey of the twentieth-century history of wiretapping, see *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, U.S. Senate, bk II at 21–38, bk III at 279–92 (Apr 26, 1976)* ("Final Church Report").

¹¹⁰ Whether or not they were ultimately convincing on the merits, FDR's statutory arguments drew on longstanding sources of authority. See *Church Committee Hearings, 93d Cong, 2d Sess at 338 (cited in note 109)* (statement of Athan G. Theoharis, Associate Professor of History, Marquette University) (summarizing these arguments).

First, the Communications Act's restrictions on interception and divulgence were couched in general language broadly applicable to "person[s]"; they had nothing like FISA's explicit application to the federal government's military and foreign intelligence activities. Compare Communications Act of 1934 § 605, 47 USC § 605, with 50 USC §§ 1802, 1811. FDR explicitly relied on this failure to account for national security exceptionalism, describing himself as "convinced that the Supreme Court never intended any dictum in [*Nardone I*'s interpretation of the Federal Communications Act] to apply to grave matters involving the defense of the nation." *FDR Memorandum* at 346 (cited in note 109).

Second, long before FDR wrote his memorandum, the Justice Department had consistently asserted in ordinary criminal cases that *Nardone I* did not prohibit government wiretapping simpliciter. Government lawyers pointed out that the statute prohibited the "interception and disclosure" of electronic communications, Communications Act of 1934 § 605, 47 USC § 605 (emphasis added), a phrase that Justice consistently read as conjunctive, thereby preventing federal officials only from disclosing information to people outside the executive branch. See Neal Katyal and Richard Caplan, *The Surprisingly Stronger Case for the Legality of the Terrorist Surveillance Program*, 60 *Stan L Rev* 1023, 1042, 1056 (2007); Joseph E. Persico, *Roosevelt's*

analytically crucial point is that FDR forswore any right simply to ignore the law, contradicting Yoo's legal claims even in a classified memo directed to a high-level internal audience.¹¹¹ Equally important for acquiescence analysis under *Youngstown*, FDR's wiretap order was issued in secret and remained out of the public eye for years after World War II.¹¹² So even if we were to conflate incorrect interpretation with open defiance, the World War II wiretapping program is still not a true tale of legislative acquiescence.¹¹³ Quite the contrary: Congress *rejected* FDR's efforts to amend the statute in a way that would have permitted his surveillance activity (III, p 324). And when Congress went on to pass FISA decades later, it had FDR's by-then-public wiretapping program very much in mind as a core example of the kind of activity it sought to prohibit.¹¹⁴ At most, in other words, this episode shows covert illegal action that was rejected by Congress, in theory before legislators knew about it and in concrete detail after they found out.

A less directly relevant—although historically far more significant—example of presidential defiance came with Andrew Johnson's resistance to Reconstruction.¹¹⁵ After taking office in the wake of

Secret War 35 (Random House 2001); Athan G. Theoharis and Elizabeth Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 Wayne L Rev 749, 756 (1967). See also *Nardone I*, 302 US at 384 ("To recite the contents of the message in testimony before a court is to divulge the message.") (emphasis added). Consider also *Nardone v United States*, 308 US 338, 340–42 (1939) ("*Nardone II*") (prohibiting use of the fruits of wiretap surveillance in criminal trials).

Neal Katyal and Richard Caplan say that these claims were, "to put it mildly, weak." Katyal and Caplan, 60 Stan L Rev at 1050–52. That assessment is too harsh. See *United States v Coplton*, 91 F Supp 867, 871 (DDC 1950) (adopting the administration's interpretation of "disclosure"), *revd* on other grounds, 191 F2d 749, 760 (DC Cir 1951) (also adopting the administration's interpretation of "disclosure"). Consider also William P. Rogers, *The Case for Wire Tapping*, 63 Yale L J 792, 793 (1954) ("It has long been the position of the Department of Justice that the mere interception of telephone communications is not prohibited by federal law."). That said, it is reasonable to conclude that the administration's argument would have been a loser before the Supreme Court. After all, even then-Attorney General Robert Jackson initially concluded that the *Nardone* decisions barred federal agents from using wiretaps (III, pp 322, 324).

¹¹¹ Even Katyal and Caplan, who are skeptical of FDR's statutory arguments, acknowledge that he "mightily strove to avoid characterizing his directive as conflicting" with the *Nardone* decisions. Katyal and Caplan, 60 Stan L Rev at 1050 (cited in note 110).

¹¹² See Theoharis and Meyer, 14 Wayne L Rev at 757 (cited in note 110); Katyal and Caplan, 60 Stan L Rev at 1052–58, 1067–68 (cited in note 110). The story of how the FDR administration's activities were eventually disclosed is a complicated one, only partially summarized in Theoharis and Meyer, 14 Wayne L Rev at 760–68 (cited in note 110). The fact of the memorandum's existence was in the public domain at least by 1954. See Rogers, 63 Yale L J at 795 n 14 (cited in note 110) (citing the memorandum directly). See also J. Edgar Hoover, *Rejoinder by Mr. Hoover*, 58 Yale L J 422, 423 (1949) (describing the existence of authorization).

¹¹³ See note 15.

¹¹⁴ See Katyal and Caplan, 60 Stan L Rev at 1049–52, 1061 (cited in note 110).

¹¹⁵ For general background on this extended standoff between Congress and the President, see Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* 176–216, 239–61,

Lincoln's assassination, Andrew Johnson declared the Reconstruction Acts to be "without precedent and without authority, in palpable conflict with the plainest provisions of the Constitution" (III, p 252). He proceeded to prohibit army commanders in the South from enforcing the new civil rights statutes and from removing disloyal Southern politicians from office (III, pp 252–54). Congress attempted to overcome Johnson's resistance by passing a series of statutes over his veto, which the President nonetheless managed to obstruct in practice. His ability to stymie Congress extended beyond declining to enforce Reconstruction in the South: most famously, he also replaced his secretary of war in arguable violation of the just-passed Tenure of Office Act (III, p 252). But even if his behavior did rise to the level of illegality (a proposition that is not actually clear¹¹⁶), Johnson's obstructionism was punished with cataclysmic constitutional consequences. Large congressional majorities voted to impeach and convict Johnson; he was saved from the two-thirds margin necessary for conviction and removal by only a single vote in the Senate. While Johnson served out the rest of his term, he thereafter abandoned all efforts to block military enforcement of statutory Reconstruction (III, p 253). Indeed, historians suggest that wavering senators were convinced to acquit Johnson by his private promises of future good behavior.¹¹⁷

Yoo describes the Johnson impeachment and its aftermath as evidence in favor of his position: an instance where "[b]oth the President and Congress had exercised their legitimate constitutional powers"—the President to disregard congressional laws he believed to be unconstitutional and Congress to respond by launching a frontal assault on the President's tenure in office (III, p 253). If that is so, then he has constructed an exquisitely impregnable defense of his position. If the President defies Congress and Congress acquiesces, then this shows that the assertion of presidential power was constitutional. And if presidential defiance is met instead with congressional backlash, then that too becomes evidence that the President's actions were a

271–80, 307–45 (Harper & Row 1988); Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction 1863–1869* 210–314 (Norton 1974).

¹¹⁶ The first effort to impeach Johnson was sunk in part by the belief of some congressmen that the President had *not* violated any specific legal obligation. And Johnson was acquitted in the eventual Senate trial because some senators believed that he had not technically violated the Tenure in Office Act, a point that Yoo appears to miss. See Benedict, *A Compromise of Principle* at 282, 298, 309 (cited in note 115); Foner, *Reconstruction* at 333 (cited in note 115). See also Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* 36–60, 89–95, 143–44 (Norton 1973) (summarizing the clearest instances of Johnson's obstructionism); May, *Presidential Defiance of "Unconstitutional" Laws* at 56–64 (cited in note 50) (arguing that while Johnson "did everything he could to frustrate Congress's Reconstruction program," he "did so by exercising discretionary powers in ways that in a 'strained and nominal sense' adhered to the letter of the law").

¹¹⁷ See, for example, Benedict, *A Compromise of Principle* at 310–11 (cited in note 115).

legitimate part of an appropriate back-and-forth. Even concrete examples of Congress rejecting presidential preeminence become evidence that the President is preeminent.

B. Immunity from Effective Judicial Supervision

The Bush administration raised an array of challenges to the judiciary's power to interfere with the executive branch on national security questions. These claims parsed out at various levels of aggression. At a minimum, the administration argued for essentially conclusive deference to factual determinations made by the executive branch. It also asserted a right to deference in the legal process of balancing asserted interests, and sometimes even in determining the appropriate rule of law. Most strikingly, the administration took some positions that were so categorical as to push the boundaries of judicial review, suggesting (even in concededly justiciable cases) that the courts ought to be sidelined altogether on questions of national security.

Yoo's own treatment of these issues is strangely difficult to pin down.¹¹⁸ But it often pushes toward the last reading, which is to say skepticism not just of the propriety of judicial interference on questions of national security, but of the courts' power to interfere in the first place. He verges at times on rejecting even a moderate departmentalist reading of *Marbury v Madison*,¹¹⁹ suggesting that history shows presidential power to "challenge[] the Court to the point of ignoring its judgments or opinions" (III, p 389) and that the President therefore has "control over . . . interpretation" of any "unclear" provisions of the Constitution, regardless of what the courts might say (III,

¹¹⁸ Yoo's distrust of the judiciary is palpable. See, for example, his description of the judiciary as characterized by "20/20 hindsight, courtroom posturing, media circuses, lack of secrecy, exposure of sources and methods of intelligence-gathering and uninformed, unpredictable juries" (II, p 202). But his earlier work suggests greater moderation about the conclusions to be drawn from that instinct. See Saikrishna Prakash and John Yoo, *Against Interpretive Supremacy*, 103 Mich L Rev 1539, 1553–59 (2005) (arguing "in favor of judgment supremacy, but against interpretive supremacy").

Assuming that Yoo's earlier views remain in play, it is possible to take a more measured understanding of some of his comments here—although in ways that are unlikely to be obvious on their face to the nonspecialist, let alone the nonlawyers at whom this work is partly aimed. He says, for example, that "[t]he judiciary has an equal right to interpret the Constitution, but its opinions are no more binding on the other branches than the decisions of the President and Congress bind the courts" (III, p 396), and that "[w]hile the constitutional structure allows the courts the power of judicial review, nothing gives their decisions supremacy over the other branches" (III, p 388). For an important modern exchange on these questions and this vocabulary, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217, 241–62 (1994); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 Georgetown L J 373, 384 (1994).

¹¹⁹ 5 US (1 Cranch) 137 (1803).

p xix). On this understanding, court judgments about individual rights in wartime amount to “judicial supremacy” that “attack[s] . . . the President’s right to interpret the Constitution” (III, p 210) and apparently might justify presidential refusal to comply. Yoo’s coauthored work suggests significantly more nuance than these suggestions, which go well beyond any understanding ever officially enunciated by the Bush administration. He has not, for example, previously implied that the political branches might sometimes decline to comply with judicial judgments. But the implications left here are far more radical.

The reasons for leaving such broad implications hanging before this audience are not clear. What is certain is that the Bush administration made extraordinary assertions of executive supremacy during the litigation of the first detainee cases. Justice Department briefs claimed that, even for a United States citizen held on United States soil, courts categorically “*may not* second-guess the military’s determination that an individual is an enemy combatant and should be detained as such.”¹²⁰ At most, any judicial inquiry “should come to an end once the military has shown in the return that *it* has determined that the detainee is an enemy combatant.”¹²¹ As the Fourth Circuit put it, “[t]he government [] submits that we may not review *at all* its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word.”¹²²

It is important to separate two claims that Yoo’s discussion appears to entail. The first is basically about legal substance: the assertion that courts must categorically defer to the executive branch on substantive questions of law and fact. The second wanders between judicial jurisdiction and the executive obligation to comply with judicial judgments: the suggestion that courts have literally no cognizable authority to interfere in these areas. The evidence offered in Yoo’s work is thin

¹²⁰ Brief for Respondents-Appellants, *Hamdi v Rumsfeld*, No 02-6895, *28 (US filed June 19, 2002) (available on Westlaw at 2002 WL 32728567) (“DOJ *Hamdi* Brief”) (emphasis added) (concluding on this basis that “no evidentiary proceedings are required to resolve a habeas petition filed on behalf of such a detainee”). Consider also Opening Brief of Respondent-Appellant, *Padilla v Rumsfeld*, No 03-2235, *37 (US filed July 22, 2003) (available on Westlaw at 2003 WL 23622382) (denying that Padilla was “entitled to present facts disputing the President’s determination”).

¹²¹ *DOJ Hamdi Brief* at *11 (cited in note 120) (emphasis added). See also Reply Brief for the Petitioners, *Rumsfeld v Padilla*, No 03-1027, *14 (US filed Apr 21, 2004) (available on Westlaw at 2004 WL 871163) (“The issue thus is not whether the President’s determination in the abstract falls within Congress’s Authorization, but whether the President permissibly concluded that it does.”).

¹²² *Hamdi v Rumsfeld*, 296 F3d 278, 283 (4th Cir 2002) (emphasis added) (describing the United States as asserting the “sweeping proposition” that “any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so”), *vacd and remd*, 542 US 507 (2004).

on both counts.¹²³ There is, of course, the important example of the Lincoln administration's refusing either to obey Chief Justice Roger Taney's particular judgment in *Ex parte Merryman*¹²⁴ or to respect the broader implications of Taney's holding that the President had no power to suspend the writ of habeas corpus¹²⁵ (II, p 265 n 50; III, pp 209–11, 227–29). But beyond that genuinely significant example (which is complicated by Lincoln's public admission that his actions before the emergency congressional session might not have been "strictly legal"¹²⁶), Yoo fails to show that a presidential prerogative to command obeisance from the courts, let alone any executive power to ignore judicial rulings, has ever been asserted, much less accepted.

1. Inflating the significance of legal assessments by the President.

Yoo's books emphasize a series of examples of "executive independence" in legal interpretation. But these generally turn out to be little more than the President's anticipatory assessment of constitutional, statutory, or treaty text in the ordinary course of business. It would be a poor private sector lawyer who let her client launch a project without considering whether it is legal. Yoo never explains why we should view the executive branch any differently.

Perhaps the central instance is Yoo's lengthy discussion of the Neutrality Proclamation issued by George Washington in 1793.¹²⁷ The Proclamation arose out of a dispute over whether treaties signed with France in 1778 required the United States to defend French interests during the wars that followed the French Revolution (I, pp 199–204; III, pp 81–91). After detailed consultations with his cabinet, Washington announced that America would pursue a course of "impartial" conduct as between France and other European nations, vowing to prosecute anyone who did otherwise (III, p 86). The key point from Yoo's perspective is the administration's conclusion—implicit in the Proclamation and quite explicit in the internal deliberations—that the 1778 treaties did not require the United States to assist France. He

¹²³ To be sure, as a practical matter, judicial deference in crisis situations has long been an observed fact, certainly in terms of decisional outcomes. See, for example, *Korematsu v United States*, 323 US 214, 219 (1944); *Ex parte Quirin*, 317 US 1, 2 (1942); *Ex parte McCardle*, 74 US (7 Wall) 506, 513–14 (1868); William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* 11–25, 173–202 (Vintage 1988); Michael Linfield, *Freedom under Fire: U.S. Civil Liberties in Times of War* 17–19 (South End 1990).

¹²⁴ 17 F Cases 144 (CC D Md 1861).

¹²⁵ *Id.* at 148 (holding that habeas corpus may not be suspended except by an act of Congress).

¹²⁶ See notes 87–88.

¹²⁷ For an excellent short treatment of how the Neutrality Proclamation was drafted, see Elkins and McKittrick, *The Age of Federalism* at 336–41 (cited in note 65).

further asserts, without providing evidence, that Washington's cabinet shared a "unanimous" assumption that this power to interpret was "solely within presidential authority" (I, pp 200–01; III, pp 85–91) (emphasis added).¹²⁸ But all that their discussion actually demonstrated was a President taking his obligations under international law seriously. Indeed, those obligations were precisely the basis for Hamilton's argument that Washington had not just a right but a duty to engage in scrupulous interpretation: "He, who is to execute the laws, must first judge for himself of their meaning."¹²⁹

Worse yet, Yoo omits the crucial denouement.¹³⁰ As soon as Congress next convened, Washington appeared before a joint session to describe what he had done and to declare forthrightly that Congress could *overrule* him. In the President's words, because Congress had not been in session at the time of his decision, "[i]t seemed . . . to be my duty to admonish our citizens of the consequences of a contraband trade, and of hostile acts to any of the parties"; "[u]nder these impressions, the [Neutrality] Proclamation . . . was issued." But there was no equivocation in Washington's recognition of legislative supremacy on

¹²⁸ The evidence for this assertion is equivocal at best. Compare Bradley and Flaherty, 102 Mich L Rev at 669 n 603 (cited in note 42) (citing the lack of cabinet discussion about the existence of an exclusive constitutional authority), with Prakash and Ramsey, 111 Yale L J at 324–27 (cited in note 42) (arguing that this belief was implicit in the discussions). Washington's failure to consult Congress seems of little more legal significance, standing alone, than any executive officer's failure to consult Congress or the courts about the proper interpretation of an important statute. We would hardly conclude from the latter scenario that the President was asserting the "sole" power to interpret statutes.

¹²⁹ Alexander Hamilton, *Pacificus No 1* (June 29, 1793), in J. Gideon and G.S. Gideon, *Letters of Pacificus and Helvidius (1845) with the Letters of Americanus* 5, 14–15 (Scholars' Facsimiles & Reprints 1976):

In order to the observance of that conduct which the laws of nations, combined with our treaties, prescribed to this country, in reference to the present war in Europe, it was necessary for the president to judge for himself, whether there was any thing in our treaties, incompatible with an adherence to neutrality.

See also id at 8 ("[T]he judiciary department . . . is indeed charged with the interpretation of treaties, but it exercises this function only where contending parties bring before it a specific controversy.").

¹³⁰ Yoo also omits an important episode that came shortly after the Neutrality Proclamation was issued: Washington's request that the Supreme Court definitively resolve the treaty questions for him. The Court declined to do so, refusing to issue an advisory opinion when it was not presented with a live controversy between actual parties. See Phelps, *Washington and American Constitutionalism* at 164–67 (cited in note 53); Neal Kumar Katyal, *Judges as Advicegivers*, 50 Stan L Rev 1709, 1742–46 (1998). But the fact that Washington sought the Court's approval at all—on a national security question to boot—presents a real problem for historical claims about the President's independent authority to determine legal questions conclusively. With that said, the Proclamation is good evidence for presidential initiative at least in defining the substance of external communications, which has been contested by some scholars. See, for example, Louis Henkin, *Foreign Affairs and the United States Constitution* 42–45 (Clarendon 2d ed 1996). Compare Michael J. Glennon, *Constitutional Diplomacy* 24 (Princeton 1990).

the underlying question: “It rests with the wisdom of Congress to correct, improve, or enforce this plan of procedure.”¹³¹

This mistake of classification persists throughout the work. President Jackson’s speeches declaring that the Constitution does not permit states to nullify a federal law are described as “dr[awing] on his constitutional powers” and enunciating an independent “theory of the Constitution” (III, pp 183–85). Jackson’s statement that the Indian tribes had no right to self-governance becomes evidence that he had “little hesitation in announcing an independent opinion on the Constitution’s meaning” and believed “that the executive had an equal right to interpret and enforce his own vision of the Constitution” (III, pp 154, 156).¹³² Lincoln’s argument that secession was unconstitutional proves “that constitutional questions are [not only] for the Supreme Court to decide” (III, p 205). FDR’s signature of the legislation enacting the First New Deal “follow[ed] in the footsteps of Presidents who dared to interpret the Constitution at odds with the other branches” (III, p 266), despite Yoo’s own concession that FDR had reason to hope that the Court might grant more constitutional leeway in the context of national crisis (III, p 267) and despite our new understanding that the “switch in time” was less of a revolution in strictly doctrinal terms than has traditionally been thought.¹³³

All of these examples are simply beside the point. Of course Presidents engage in legal interpretation, both explicitly and implicitly, all the time. It would be irresponsible for them to ignore such considerations. But that does not suggest any settled understanding that the judiciary must accept such presidential interpretations, much less any disinclination of those Presidents to comply with orders duly issued by a federal court.

¹³¹ *Address of George Washington*, 4 *Annals of Cong* 11 (Dec 3, 1793) (emphasis added). Note the disjunctive nature of his last sentence: this was not merely a request that Congress provide for the enforcement of Washington’s announced policy; it was a recognition that Congress might instead choose to change it.

¹³² Particularly mysterious is the suggestion that Jackson’s veto “claimed almost the same power” as South Carolina’s efforts to nullify state law (III, p 184). Yoo finds slightly better evidence for presidential defiance with Jackson’s perhaps apocryphal comment after *Worcester v Georgia*, 31 US (6 Pet) 515, 560–62 (1832), which struck down a Georgia law forbidding white people to offer assistance to the Indian tribes (III, pp 155–56). Jackson supposedly said, “Well, John Marshall has made his decision, now let him enforce it” (III, p 156). Even if this comment were accurately reported, the federal government was not a party to the case, and no concrete question of federal enforcement was ever presented, because Jackson convinced the Georgia governor to settle with his opponents out of court. See Cole, *The Presidency of Andrew Jackson* at 165 (cited in note 79).

¹³³ See Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 104–05 (Oxford 1998); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 *U Pa L Rev* 1891, 1974–84 (1994).

2. Confusing inaction with defiance.

Yoo also ascribes far too much significance to presidential inaction—executive decisions *not* to pursue policies that contemporary Supreme Courts viewed as constitutionally permissible. The pattern is the same in several instances. The Supreme Court blesses some course of government conduct. The President either declines to pursue that conduct or actively seeks to restrain it. And Yoo concludes that this shows the President’s “right to interpret the Constitution differently from the judiciary” (III, p 426). There is something to this: it is quite plausible that Presidents can rely on their own interpretations of the Constitution when declining to take action that the judiciary thinks permissible or, somewhat more controversially, when refusing to enforce laws that Congress seeks to impose. But those principles do not of themselves suggest any obligation of the judiciary to defer to the executive’s legal arguments in litigation, much less any doubt about the courts’ legal power to constrain the President at all.

Especially central to the antijudicial narrative is Andrew Jackson’s conduct during his fight with Congress about whether to authorize a new charter for the Second Bank of the United States. Despite the Supreme Court’s conclusion in *McCulloch v Maryland*¹³⁴ that the federal government was entitled to create a national bank, Jackson stated “an independent opinion on the Constitution’s meaning,” arguing that no enumerated congressional power permitted the creation of a national bank in the form proposed by Congress (III, p 154). For separation of powers purposes, the heavy emphasis on Jackson’s “independent reasoning” is odd. Because of course the Supreme Court had not said that the federal government was *required* to institute a bank. Rather, it had merely acknowledged that Congress and the President could reasonably conclude that a bank would be constitutionally “convenient” for the federal government’s pursuit of its other enumerated powers.¹³⁵ In fact, Yoo himself elsewhere asserts precisely this interpretation. To make an unrelated argument in a different book, he contends forcefully that *McCulloch* did not say that a bank *was* necessary and proper as a matter of immutable constitutional meaning, but only that the courts should defer to that assessment if the political branches so determined.¹³⁶ On Yoo’s own earlier reading,

¹³⁴ 17 US (4 Wheat) 316, 406–12 (1819).

¹³⁵ See *id.* at 422–23. On the Bank War more generally, see, for example, Arthur M. Schlesinger, Jr., *The Age of Jackson* 74–114 (Little, Brown 1945); Robert V. Remini, *Andrew Jackson* 141–68 (Twayne 1966).

¹³⁶ See I, p 255 (emphasis added):

[The contrary view] confuses constitutional meaning with Supreme Court decisions that limit the Court’s own discretion in reviewing the constitutionality of legislation. *McCulloch*] . . .

far from defying the Supreme Court's contradictory reading, Jackson's veto simply took the Court up on its offer of discretion.¹³⁷

Yoo does a nice job of summarizing the larger Bank War and emphasizing the enraged reaction from people who viewed Jackson's veto as motivated by policy considerations (III, pp 168–69). But he never successfully connects the episode to his larger claims about the President's constitutional preeminence over the judiciary in litigated cases. Jackson's fight was about the structural process of law generation and the President's constitutionally explicit ability to block congressional enactment of new positive law (III, p 189). That is certainly a crucial aspect of the presidential role in both traditional and modern-day American politics, but it has next to nothing to do with interactions between the executive and the judiciary in the war on terror.

Episode after episode of Presidents justifying policy decisions on constitutional grounds shares this gap: in none does the President unilaterally refuse to obey a court-enunciated rule of law. Jefferson's refusal to prosecute people suspected of violating the Alien and Sedition Acts—and his pardons of those who had already been convicted under them—are glossed as the President's refusal to concede “that the

does not relieve the president or Congress from determining whether certain means actually *are* constitutional, and it was precisely on this ground that President Jackson vetoed the bill chartering the Second Bank of the United States.

See also Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 Colum L Rev 1533, 1581–82 n 235 (2007) (suggesting a similar reading). This interpretation may go a good way toward explaining why the angry reaction to Jackson's veto focused on his rejection of the force of *legislative* precedent for the bank's constitutionality, not on its arguable inconsistency with *McCulloch*. See Gerard N. Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* 54–56 (Kansas 2007).

¹³⁷ In fact, while this point is often missed, Jackson emphatically denied that he was flouting *McCulloch*. To the contrary, Jackson spent the vast bulk of his constitutional discussion (nineteen of twenty paragraphs) arguing *within* the framework established by *McCulloch*. He made the following two points: (1) while *McCulloch* approved the notion of a bank in principle, it did not hold that all such banks were automatically “necessary and proper” regardless of the background facts or the details of their corporate structure; and (2) this particular bank act in these particular circumstances did not pass muster under *McCulloch*'s own enunciated test. Jackson's aggressive comments about independent presidential interpretation were a single paragraph added as an *arguendo* alternative to these nineteen paragraphs of argumentation within the *McCulloch* framework. See Andrew Jackson, *Veto Message* (July 10, 1832), reprinted in Richardson, ed, *2 Messages and Papers of the Presidents* 576, 582–89 (cited in note 63) (emphasis added):

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate activities of this Government. . . . *But* in [*McCulloch*] the Supreme Court have *not* decided that all the features of *this* corporation are compatible with the Constitution.

...

That a bank of the United States . . . *might* be so organized as not to infringe on [the Constitution] I do not entertain a doubt.

judiciary's conclusions bound him" (III, pp 106–07).¹³⁸ Lincoln's affinity for some abolitionist goals is pitched as "la[ying] the foundations of his Presidency on a vigorous and dynamic view of his right to advance an alternative vision of the Constitution" from *Dred Scott v Sandford*¹³⁹ (III, p 204).¹⁴⁰ While some of these observations are true enough as standalone statements, Yoo needs them to bear far more analytical weight than they can support. At most, these Presidents relied on constitutional considerations as guidance for exercising their own explicitly enumerated powers. It is one thing to fail to prosecute private actors for behavior that the Supreme Court says may be criminalized or to veto a bill that the Supreme Court would view as constitutional. It is something else entirely to deny the Supreme Court's power to reach a different conclusion in litigated cases or to impose a particularized obligation on the President.

3. Confusing structural control mechanisms with defiance.

Yoo's work also relies heavily on examples of the political branches leveraging mechanisms for structural control of the judiciary, either by exerting pressure on sitting judges or by changing the makeup of the court system.

The first difficulty is that these are examples of legislative action. However much presidential encouragement lay behind (or not so far behind) the scenes, these episodes do not direct themselves to the question of inherent executive power. Setting aside this irrelevance, the examples that Yoo cites are less than compelling even as instances of the political branches successfully controlling the judiciary. A first instance is the Jeffersonian response to the lame-duck Federalist effort to stack the judiciary in the wake of the electoral earthquake of 1800. The Jeffersonian initiatives added up to the successful impeachment of a mentally unstable and alcoholic district judge, the failed

¹³⁸ To be clear, Jefferson's refusal to prosecute what he viewed as constitutionally protected activity is good historical evidence for an understanding that Presidents should refrain from violating what they understand to be the constitutional rights of private citizens. See, for example, Easterbrook, 40 Case W Res L Rev at 922–23 (cited in note 59); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op OLC 199, 200–02 (1994). The assertion of power to ignore statutes that restrain positive action by the President in a separation of powers context, however, is a very different question, and that distinction deserves far more sensitivity than Yoo accords it.

¹³⁹ 60 US (19 How) 393 (1856).

¹⁴⁰ It is quite true that Lincoln argued that *Dred Scott's* holding applied only to the specific parties in that case (III, p 204). But as President, Lincoln did not approach the problem of slavery by pretending that *Dred Scott* never happened. Instead, he sought emancipation first through the Emancipation Proclamation's assertion of war powers not precluded by *Dred Scott* (III, pp 217–21) and then by a formal Article V amendment to the Constitution itself. See US Const Amend XIII.

impeachment of a Supreme Court justice, and the legislative repeal of judicial offices that had only just been created in a rearguard rush job (III, pp 108–10). Yoo suggests that these efforts met “defeat [] in terms of constitutional principle”—presumably he means to exclude *Stuart v Laird*¹⁴¹ and the cancellation of the 1802 Supreme Court term¹⁴²—but argues that the Republicans nonetheless won victory “in terms of immediate politics” (III, p 109). How so? Because the Marshall Court thereafter “devoted itself to . . . vindicating the powers of the national government against those of the states,” expanding “the rights of the President and Congress” (III, p 109). This suggestion that John Marshall’s devotion to a strong central government was a reactive development that amounted to political spoils for a crafty Thomas Jefferson is implausible twice over.

The second main example is not much better. After a hostile Supreme Court left his First New Deal in ruins, FDR responded by reasserting “his own understanding of the Constitution” (III, pp 274–75). What did this mean in practice? Proposing laws that seemed unlikely to pass muster with the sitting Court, pressuring the judiciary in speeches and press conferences, and scheming to pack the Supreme Court with new justices who would guarantee more favorable outcomes (III, p 275). Here again, Yoo underplays the modern understanding that the second wave of New Deal cases were less of a doctrinal departure than has sometimes been thought.¹⁴³ But the most important thing is what FDR did *not* claim. He did not claim that his programs could continue to function notwithstanding their invalidation by the Court as applied to particular individuals, or that his independent interpretation superseded the rulings by the New Deal Court. Instead, he brought political pressure to bear and tried to ram through a bill that would have allowed him to nominate six new Supreme Court justices. This effort was famously turned back in what was widely perceived as an embarrassing defeat for the administration (I, pp 300–01).

Structural interference with sitting judges certainly has troubling implications for judicial independence. But congressional efforts in that direction provide no evidence for sole presidential power to command obedience from the court system, let alone to ignore obligations spelled out by an extant court ruling.

¹⁴¹ 5 US (1 Cranch) 299 (1803).

¹⁴² Act of April 29, 1802, 2 Stat 156.

¹⁴³ See note 133.

4. Minimizing the role played by courts in securing liberty.

Yoo periodically suggests that little would be lost if we eliminated judicial supervision over the executive branch, since the benefit of court supervision is not especially significant. It is one thing to raise standard charges about judicial activism “leaving the field of controversial issues to judges” (III, p 386) or to quarrel with the motives behind *Ex parte Milligan*’s¹⁴⁴ reassertion of Magna Carta liberties and *New York Times Co v United States*’s¹⁴⁵ release of the Pentagon Papers. Genuinely difficult to understand, however, is Yoo’s adamant refusal to concede that court interventions can *ever* be necessary or beneficial. “It was not the Watergate tapes case,” he suggests, “that ultimately drove Nixon from office.” It was “[i]mpeachment, rather than court tests” that protected the country (III, p 385). This is like saying that running water doesn’t come from pipes, it comes from the spigot. Yoo himself recognizes a page earlier that it was the release of tapes *compelled by judicial order* that gave the House the basis to commence the impeachment process (III, p 384). All three branches thus had a role to play in the Nixon case. The insulated prosecutor sought the evidence. The nondeferential court ordered the disclosure.¹⁴⁶ And Congress pursued impeachment as a sanction for the lawlessness that was disclosed thereby (III, pp 384–85). The Yoo view of privilege and the Yoo view of unitary executive control would have given Nixon—who is described by Yoo as the acme of constitutional malfeasance—a good shot at serving out his entire second term.

C. Supremacy in Starting Armed Hostilities

The Bush administration asserted the right to deal with foreign threats by initiating any military conflict that it deemed necessary.¹⁴⁷

¹⁴⁴ 71 US (4 Wall) 2 (1866).

¹⁴⁵ 403 US 713 (1971).

¹⁴⁶ See *United States v Nixon*, 418 US 683, 703–13 (1974).

¹⁴⁷ In its negotiations with Congress, the administration threatened to engage in hostilities against Iraq without legislative authorization. See Mike Allen and Juliet Eilperin, *Bush Aides Say White House Needs No Hill Vote*, Wash Post A1 (Aug 26, 2002). And it viewed the commander-in-chief power as an adequate and independent alternative to the September 14, 2001 Authorization for Use of Military Force (AUMF), Pub L No 107-40, 115 Stat 224 (2001). See Memorandum from Deputy Assistant Attorney General John C. Yoo to Deputy Counsel Timothy Flanigan, *The President’s Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them* (Sept 25, 2001), in Greenberg and Dratel, eds, *The Torture Papers* 2, 23 (cited in note 57). On virtually any account, September 11 constituted a use of force sufficient to trigger the President’s responsibility to respond to a sudden attack. Passing over any difficulties with al Qaeda’s status as a nonstate actor and its relationship to the Taliban government of Afghanistan, this means that the invasion of Afghanistan might be justified even on narrower understandings of the commander-in-chief power. The second Iraq war does not

Yoo's longstanding position, set forth most comprehensively in *The Powers of War and Peace*, goes even further: Presidents have the legal right to initiate essentially any form of hostilities, at any time, for essentially any reason—even in the face of express congressional opposition.¹⁴⁸ Furthermore, Congress has no legal authority to terminate military conflict. Congress can pursue that goal only indirectly, by defunding the executive branch (or perhaps particular military operations¹⁴⁹), by impeachment, or by general collateral obstructionism (I, pp 152–53; II, pp 122–23, 125–26; III, pp 357–78). Given how thoroughly his claims have elsewhere been discredited as a matter of Founding-era history,¹⁵⁰ this Review focuses on the way that Yoo's treatment of the question—particularly in *Crisis and Command*, whose treatment of post-ratification history has not previously been assessed—reflects systematic problems with his work as a whole.

Despite his isolated position on this question within academia, most scholars would agree that Yoo's advocacy of presidential preeminence in starting hostilities finds ample precedent in post-Truman executive practice (I, p 12; III, pp 345, 350, 352, 359). His thesis

enjoy similar status; at most it was a preemptive effort to forestall potential attacks on the United States that might have taken place at some point in the future.

¹⁴⁸ By the third book, Yoo appears to have abandoned his earlier, underspecified suggestion that the President might not be able to pursue a truly “total war” without congressional declaration. For examples of his earlier position, see I, pp 22, 42, 104, 151, 162 (“[F]ull-blown total wars [are] characterized by mobilization of the economy and full deployment of the U.S. armed forces.”).

¹⁴⁹ It is not obvious why, on Yoo's view of executive preeminence, Congress should be able to impose legally binding restrictions on specific military operations through the appropriations mechanism (I, p 160; III, pp 357–58, 409). To be clear, there is a strong consensus that appropriations restrictions are legally enforceable. US Const Art I, § 9, cl 7. But on any account, tricky questions arise over the use of funding restrictions to impose restrictions that Congress could not require directly. See Peter Raven-Hansen and William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 Va L Rev 833, 883–88 (1994); J. Gregory Sidak, *The President's Power of the Purse*, 1989 Duke L J 1162, 1183; Kate Stith, *Congress' Power of the Purse*, 97 Yale L J 1343, 1350–51 (1988). Unless Yoo rejects the idea of an unconstitutional conditions doctrine in the appropriations context, his views on presidential preeminence should imply even stricter limits—and perhaps even a categorical bar—on Congress's ability to restrict funds.

¹⁵⁰ See note 48. For a concisely devastating point-by-point refutation of Yoo's historical arguments on their own terms, see Ramsey, 106 Colum L Rev at 1453–73 (cited in note 6). More recent work on the original understanding of “Commander in Chief” and “declare War” shows Yoo's continued isolation on this question even among methodologically committed originalists. See, for example, Michael Stokes Paulsen, *The War Power*, 33 Harv J L & Pub Pol 113, 124–25 (2010); Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 Geo Wash L Rev 89, 93, 99 (2008); Ramsey, 69 U Chi L Rev at 1548–53 (cited in note 48). Given the constitutional allocation to Congress of control over the militia, originalists have a particularly difficult time claiming presidential preeminence over the use of force domestically. See generally Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 Cardozo L Rev 1091 (2008) (emphasizing the significance of the Article I, § 8 Militia Clause given the Founders' assumption that military power would center on the militia). See also *Youngstown*, 343 US at 644 (Jackson concurring) (making a similar point).

was thus empirically triumphant decades before he set academic pen to paper. But rather than relying only on a pattern of warmaking unilateralism established in the second half of the twentieth century, Yoo wants instead to assert two centuries' worth of uninterrupted historical support. His efforts in this direction omit extensive¹⁵¹ contradictory evidence¹⁵² and rely on highly implausible efforts to read away the contrary evidence that is discussed.

This tendency recurs throughout the work. Start with our first President. In the face of mounting hostilities between settlers and Creek Indians in South Carolina, Washington could scarcely have made his view on the question clearer: because “[t]he Constitution vests the power of declaring war with Congress . . . therefore no offensive expedition of importance can be undertaken until after they shall have deliberated on the subject, and authorized such a measure” (III, pp 74–75). Yoo asserts without evidence that Washington must have meant nothing more than that the funding for military activity would have to come from Congress (III, p 75)—a reading that requires reliance on a wholly separate congressional power never mentioned in Washington’s statement.

¹⁵¹ John Hart Ely once observed that

claims of general compliance with a stated norm are difficult to document with anything approaching elegance. Trudging across acres of lawful behavior is unbearably boring for both writer and reader, and placing the arguable counterexamples in perspective often serves only to convey the mistaken impression that the counterexamples represent the norm.

Ely, *War and Responsibility* at 147–48 (cited in note 48). For a nonexhaustive list of such evidence, see, for example, David P. Currie, *Foreign Affairs: Presidential Initiative and Congressional Control*, 101 Mich L Rev 1453, 1459–61 (2003) (summarizing actions by Presidents George Washington, James Madison, James Monroe, John Quincy Adams, John Tyler, James Polk, Millard Fillmore, Franklin Pierce, and James Buchanan showing their recognition of the constitutional requirement that Congress authorize warfare); Ely, *War and Responsibility* at 148–51 (cited in note 48) (discussing “[a]rrays of compliant statements (and behavior) by essentially all our Presidents pre-Truman (plus, emphatically, Eisenhower)—to the effect that the decision to authorize acts of war rests unequivocally with Congress”). But see, for example, Fisher, *Presidential War Powers* at 44–46, 57–65, 154–56 (cited in note 48) (discussing low-level “life and property” interventions to protect Americans overseas by Presidents William McKinley, Theodore Roosevelt, William Howard Taft, Calvin Coolidge, and Woodrow Wilson).

¹⁵² The work does not even mention two well-known Supreme Court cases from the Jeffersonian period that successfully enforced congressional limitations on the President’s war powers. See *Little v Barreme*, 6 US (2 Cranch) 170, 177–78 (1804) (recognizing an implicit congressional bar on the use of the navy); *Brown v United States*, 12 US (8 Cranch) 110, 126 (1814) (recognizing an implicit congressional bar on certain prize captures). And its failure to acknowledge, let alone deal with, the Founders’ statements about the President’s inability to initiate hostilities has been widely noted. See, for example, Ramsey, 69 U Chi L Rev at 1548–51, 1566 (cited in note 48) (citing acknowledgements of Congress’s exclusive power to commence hostilities by, for example, Thomas Jefferson, James Madison, Alexander Hamilton, John Marshall, George Washington, Henry Knox, John Jay, and James Wilson, and noting that “no prominent figure took the other side”).

This effort to explain away such explicit constitutional concessions crops up even in Yoo's treatment of the post-Truman era. He admits, for example, that President Dwight Eisenhower "deem[ed] it necessary to seek the cooperation of the Congress" before intervening militarily during the Suez Canal crisis. But Yoo immediately asserts that this view was adopted "more for political than constitutional reasons" (III, p 347). His gloss directly contradicts Eisenhower's internal statement to his own National Security Committee that any "offensive attack on China would require congressional authorization 'since it would be a war'" and would otherwise be "logical grounds for impeachment" (III, pp 345–46). On a review of the full record, Yoo's explanation of Eisenhower's perspective becomes even harder to credit. Eisenhower's views—expressed in statements both private and public—were consistent and clear: "[T]here is going to be no involvement of America in war unless it is a result of the Constitutional process that was placed upon Congress to declare it."¹⁵³ "Whatever we do must be done in a Constitutional manner," which required "Congressional authorization" for any attack on China.¹⁵⁴ "In the absence of . . . support of Congress, [US intervention at Dien Bien Phu] would be completely unconstitutional and indefensible."¹⁵⁵ While Eisenhower certainly emphasized the practical advantages of complying with the constitutional structure, he was equally clear that the legal strictures on his war powers were just that.

Perhaps most striking, however, is Yoo's treatment of Polk's ginned up case for war with Mexico. After provoking a shooting conflict by stationing troops in an area claimed by both the United States and Mexico, Polk went to Congress and "misrepresented the facts to guarantee the majorities for war" by asserting that our military was kept on undisputed US soil (it was not) and that US forces had taken a purely defensive posture (they had not) (III, p 193). In famous words that flew from his lips to the newspaper headlines, Polk claimed that "Mexico . . . has invaded our territory, and shed American blood on American soil." Roused to a patriotic fury, both houses of Congress

¹⁵³ *The President's News Conference of March 10, 1954*, in *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1954* 299, 306 (GPO 1960).

¹⁵⁴ James S. Lay, Jr, Executive Secretary of the National Security Council, *Memorandum of Discussion at the 214th Meeting of the National Security Council, Denver, September 12, 1954* (Sept 13, 1954), reprinted in John P. Glennon, David W. Mabon, and Harriet D. Schwar, eds, *14 Foreign Relations of the United States, 1952–1954* 613, 618 (GPO 1985) (quoting President Eisenhower's statement to the National Security Council).

¹⁵⁵ *Memorandum of Presidential Telephone Conversation, Monday, April 5, 1954, 8:27 a.m.*, reprinted in John P. Glennon and Neal H. Petersen, eds, *13 Foreign Relations of the United States, 1952–1954* 1241, 1242 (GPO 1982) (summarizing a private phone conversation between President Eisenhower and Secretary of State John Foster Dulles).

voted to declare and support the war, and the United States wound up annexing a massive swath of territory after it defeated the over-matched Mexican army (III, pp 193–96).¹⁵⁶

Polk’s decision to station US troops in disputed territory (however badly misrepresented to Congress) is certainly evidence of presidential action that seriously risked a hostile response—and in the war power debates the right to do so has not been undisputed.¹⁵⁷ But it is simply not evidence of executive power to unilaterally commence an attack. Indeed, while Yoo does not mention it, Polk’s instructions actually limited US forces to *responding* to any hostilities initiated by the other side: “It is not designed . . . that you should treat [Mexico] as an enemy; but should she assume that character by a declaration of war, or any open act of hostility toward us, you will not act merely on the defensive.”¹⁵⁸ The truly remarkable thing about Yoo’s treatment of this episode, though, is that he sees Polk’s prevarication as evidence not of an abuse of power but of the President’s appropriate and exclusive control over every relevant aspect of hostilities (III, p 198). Congressional approval of the Mexican-American War, in other words, becomes constitutionally valid evidence for plenary presidential control of the war power because Polk secured his listeners’ support *by lying to them*.

This last point relates to a particularly striking aspect of Yoo’s war power thesis: the implication that presidential lies are an authorized and even justifiable aspect of leading the nation to war. He seems at times to suggest that the President is authorized to lie not just to the public but even to Congress about the underlying facts surrounding a decision to resort to armed force. Instances of such crucial falsehoods are described almost admiringly as “manipulat[ing] events” and “maneuver[ing] Congress” (III, p 198). The contemporary relevance of this theme is not exactly a mystery. Yoo does not concede that the Bush administration’s intelligence reports were intentionally deceptive, but he comes close to suggesting that any such deceptions would have been historically justified. They were, after all, “nowhere as serious as President Polk’s” lies about Mexico (III, p 412), and they follow in an apparently illustrious presidential tradition of lying to Congress on crucial national security issues: Jefferson about whether a US naval vessel had opened fire on the Barbary pirates in 1801 (III, pp 112–13),

¹⁵⁶ For a range of views on the start of the Mexican-American War, see Paul H. Bergeron, *The Presidency of James Polk* 65–77 (Kansas 1987) (emphasizing Polk’s efforts to avoid resort to warfare); John S. D. Eisenhower, *So Far from God: The U.S. War with Mexico, 1846–1848* 48–68 (Random House 1989) (focusing on events in Texas and Mexico); Howe, *What Hath God Wrought* at 731–43 (cited in note 79) (emphasizing Polk’s intentionally provocative belligerence).

¹⁵⁷ See note 81.

¹⁵⁸ Eisenhower, *So Far from God* at 49–50 (cited in note 156).

FDR about whether US ships had fired first on German submarines as a justification for changing the naval rules of engagement in 1940 (III, pp 307–08), and Lyndon Johnson about which side was the aggressor in the Gulf of Tonkin (III, pp 351, 412). For some observers, this long history of Presidents deceiving Congress would be evidence that the other branches need tools for close supervision of rogue Presidents. For Yoo it is disproof positive of the same thing.

IV. SALVATION BY POLITICAL THEORY ALONE

Yoo's historical claims about the President's power to ignore Congress, to predominate over the judiciary, and to start wars all fail to convince, in both their most abstract and their most particularized forms. In case after case, the historical evidence is either irrelevant to his thesis or a direct refutation of it.¹⁵⁹ Yoo occasionally suggests something other than history, however, as an alternate ground for his legal arguments about the war on terror. It is worth confronting that alternative squarely.

A. Risk Tolerance in Crisis

The most interesting piece of Yoo's arguments about executive power is not his history, but his larger concern with institutional design. Drawing in part from political theory and in part from his own instincts about constitutional risk, he suggests the following: even if it is true that untrammelled executive power leads inevitably to abuse, and even if it is true that George W. Bush's behavior was an example of such abuse, the risks of presidential paralysis still outstrip the risks of aggressive presidential action. Offering an analogy to Type I and Type II errors in statistics (III, p 326; I, p x), he suggests that the costs of Herbert Hoover's inaction¹⁶⁰ might well have been worse than the

¹⁵⁹ There is no question that Yoo describes a presidency that has come to dominate the American political scene. But he offers no convincing historical evidence for the executive power claims discussed in this Review. Other scholars have noted instances of presidential defiance not discussed in Yoo's work, including a few episodes that might arguably implicate Yoo's legal claims. See, for example, May, *Presidential Defiance of "Unconstitutional" Laws* at 116–18, 127–35 (cited in note 50). Discussing those is beyond the scope of this Review. I would refer interested readers to May's conclusion that history shows at most a "desultory record of presidential noncompliance, involving twenty incidents [only a few of which involved the national security context] spread over a period of almost 200 years," *id.* at 131, and suggest that Yoo's lack of attention to the omitted incidents indicates their insignificance.

¹⁶⁰ Yoo's choice of Herbert Hoover as a primary example of the risks of inactivity is notable. Yoo critiques Hoover as a bad President because Hoover's view of the constitutional limits on both presidential and federal power led him to oppose the creation of new executive agencies and new welfare programs (III, p 261). It is as if Yoo forgets his lengthy argument that government action under FDR only made the Great Depression worse. See note 98.

costs of Nixon's lawlessness or Jackson's Trail of Tears—and that this risk tradeoff is even more compelling in the contemporary national security context.

In short, he argues, post-Watergate reforms “ignored the reasons for [creating a structurally] independent executive in the first place” (III, pp 373–75). Critics of his perspective, by contrast, “desire a risk-free Presidency” (III, p 410). While this is not a fair characterization of his opponents' viewpoint, the underlying argument is intellectually honest. Yoo acknowledges the cost of his view. He accepts the occasional cost of a wicked or foolish abuse of executive power (III, pp 383, 410) and says, given the alternatives, that it is worth it. Allowing judicial oversight would place national security policy in the hands of a “decentralized” institution with the “significant institutional disadvantages” of being staffed by generalists with little experience in foreign affairs (II, pp 162–63). Allowing congressional overrides “would slow down decisions, make sensitive policies and intelligence public, and encourage risk aversion” (II, pp 125, 234, 237–38; I, pp 20–21; III, pp 326–27, 361, 405–06, 419–20).

This kind of assertion is all but unverifiable except as a matter of speculation on either side, and Yoo is surely right to point out that “[n]aysayers can always claim we would have been just as safe without taking these precautionary actions” (II, p 232). But it is worth emphasizing just how broad the argument's implications are. The bully pulpit's political power to lead the nation by its nose is extraordinarily effective, even standing alone.¹⁶¹ President Bush not only obtained authorization for the initial invasion of Iraq, for example, but had no serious trouble getting money for Iraqi operations even after they had become extremely unpopular. Executives have long consolidated authority in just this way whenever foreign quarrels have busied giddy minds. But it would be a dramatic expansion of that political reality to grant our President the unilateral and unreviewable right to trigger unlimited emergency power as a *legal* matter.

It is, of course, possible that September 11 changed everything so completely that Yoo's assertions about risk tolerances may be correct. The One Percent Doctrine can justify just about anything,¹⁶² and in fact I am more sympathetic than many of Yoo's critics to the proposition that September 11 really did work a fundamental shift in the

¹⁶¹ See, for example, *Youngstown*, 343 US at 652–53 (Jackson concurring) (describing the presidency's political leverage during wartime).

¹⁶² See Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies since 9/11* 62, 65 (Simon & Schuster 2006) (referring to former Vice President Dick Cheney's advice that if there is a 1 percent chance of serious terrorist attack, it should be treated as a certainty).

constitutional landscape.¹⁶³ But these unfalsifiable assertions are not susceptible to serious public discussion in a world where the relevant evidence is all but categorically unavailable outside the government, which “know[s] far more than [it] can reveal publicly” (II, p 168). To the extent Yoo offers evidentiary support for his sketch of a risk-tolerance theory, therefore, it comes not in his vague predictions about future risk but in a series of claims about the historically demonstrable benefits of untrammelled executive power. Unfortunately, Yoo’s history does him no better service on this question than it did on the others.

B. History Redux: Looking for the Theory in Practice

Yoo emphasizes the limits of counterfactual history (III, p 363). But the lengths to which he stretches his own counterfactuals about the benefits of unconstrained power are revealing. As much as anything, the overstatements suggest a lack of confidence in the merits of his argument. This is true on at least four counts. First, Yoo exaggerates the role of presidential freelancing in American successes. Second, he overstates the role of presidential restraint in American failures. Third, he leans too heavily on the commonplace observation that Congress does not always manage to rein in presidential overreach. Fourth, he resorts in *Crisis and Command*’s closing section to false claims about the relatively mild legal restrictions on national security policy that have replaced his own limitless vision. Let us take these points in turn.

1. Suggesting that presidential aggression has been necessary for American success.

Crisis and Command is filled with sweeping, confident, and completely undemonstrable statements about the practical necessity of a preeminent executive. “Only the executive branch” under a structurally unitary authority, he says, “could successfully develop and pursue a coherent strategic policy that would avoid swings between isolationism and unnecessary war” (III, p 349). But Yoo has to actually make the case that, for example, a vigorous leader of a multi-member legislative body is incapable of generating this kind of resolve. That initial case is never made, yet the corollary counterfactuals come fast and furious: “A more vigorous President would have prevented Congress from . . . [pursuing] [w]ar with Britain” in 1812 (III, p 140). “Lincoln’s approach to civil liberties may well have been an indispensable part of

¹⁶³ Yoo nicely draws out some of the most difficult problems with detention issues, for example, in a well-executed section on the chaos of the Zacarias Moussaoui trial (II, pp 210–17).

his overall strategy to win the Civil War” (III, p 236). “A President who viewed his constitutional authority as narrowed to executing the will of Congress might well have lost World War II” (III, p 310). “Without recognizing broad constitutional powers in the Presidency, the United States could not have prevailed” in the Cold War (III, p 330). “[I]f Congress had held the upper constitutional hand . . . the Cold War may have ended very differently,” because the costs of legislative inaction “could well have been higher than the costs of executive action” (III, p 363).

It is worth pausing on this last assertion about the Cold War, because here Yoo gets specific about the connection between presidential power and American success. He argues that “Reagan’s victory” in the Cold War came about because Reagan reasserted powers held in abeyance since Watergate. Without that rebirth of presidential preeminence, Yoo suggests, “it is doubtful that [the United States] could have brought the Cold War to a successful . . . conclusion” (III, p 331). But the *prima facie* evidence actually pushes toward the opposite conclusion. Even on the very strongest view of Reagan as proximate cause of the Soviet Union’s collapse, the theory runs that Reagan succeeded by spending the Communists into the ground (III, pp 333–34, 354–55).¹⁶⁴ And spending is—under Article I, § 8, clause 1 of the US Constitution—a congressional power. Reagan’s advocacy of budget increases surely demonstrates the power of the bully pulpit, a phenomenon of generations that is impossible to deny. But however effectively that persuasive force is wielded, it has nothing to do with an expansive view of the executive’s inherent *constitutional* powers generally, let alone in the war on terror specifically.

2. Suggesting that presidential deference has caused American failures.

Yoo repeatedly warns that congressional interference in times of crisis risks catastrophe. His treatment of James Madison provides the rhetorical core of this claim, which he returns to frequently. On Yoo’s account, Madison is the poster child for “the dangers of modesty and deference” (III, pp 138, 143), and America’s decision to fight the War of 1812 becomes a leitmotif for disastrous presidential submissiveness (III, pp 138, 143, 198, 350, 361, 435, 437; II, p 123). Yoo claims that Congress imposed its will on an indifferent—or perhaps even unwilling—Madison, “driving the nation into an ill-conceived

¹⁶⁴ And this is even granting Yoo’s disregard for the complex interplay of forces within the USSR and his denial of meaningful agency to, for example, Mikhail Gorbachev, except as a meliorative force easing the transition (III, pp 358–59).

and disastrous war with Great Britain” (III, p 139). The milquetoast President’s “deferen[ce] to congressional wishes,” Yoo asserts, “led the nation to the precipice of disaster and its most humiliating military defeats” (III, p 138). A President who was “more vigorous” (III, p 140) and more “independent of Congress” not only “could have resisted such a foolhardy war” (III, p 142), but in fact “would have prevented Congress from making such a disastrous mistake” in choosing to challenge Great Britain to a contest of arms (III, p 140).

Yoo’s account of how America entered the War of 1812 contradicts the modern historical understanding at virtually every turn. In the first place, he gets Madison’s position backward. Histories of the period suggest not only that Madison *avored* war with Britain, but that he was in fact a central motivating force in the push for what his political opponents called “Mr. Madison’s War.”¹⁶⁵ To be clear, the President came to that decision with what appears to have been genuine regret, and only after it was clear that other diplomatic options had failed.¹⁶⁶ But Madison was contemplating war with Britain as early as 1809, and he seems to have conclusively settled on its necessity by 1811.¹⁶⁷

Moreover, once Madison was convinced of war’s necessity, his administration hardly “kept its own counsel” on the subject (III, p 140), even if it was not always successful at managing the process as a tactical matter. Well before Madison formally sought a declaration of war, his official proclamations were about as warlike as it gets, accusing Britain of taking actions with “the character as well as the effect of

¹⁶⁵ For two of the best summaries of this process—in which an initially cautious Madison became convinced that war was necessary and then worked vigorously to overcome powerful domestic opposition to conflict—see J.C.A. Stagg, *Mr. Madison’s War: Politics, Diplomacy, and Warfare in the Early American Republic, 1783–1830* 48–119 (Princeton 1983); Ralph Ketcham, *James Madison: A Biography* 491–533 (Macmillan 1971). See also Garry Wills, *James Madison* 96 (Times Books 2002) (“[F]ar from being pushed into war by a bellicose Congress, [Madison] had to drag his own hesitant party into it, past the determined obstruction of the Federalists.”); Walter LaFeber, *The American Age: United States Foreign Policy at Home and Abroad since 1750* 58–61 (Norton 1989) (emphasizing Madison’s leadership on the war issue); Donald R. Hickey, *The War of 1812: A Forgotten Conflict* 28, 37 (Illinois 1989) (emphasizing Madison’s support for war and leadership in pressing for it). Consider also Jack N. Rakove, *James Madison and the Creation of the American Republic* 150–58 (Scott, Foresman 1990) (emphasizing Madison’s initial reluctance to conclude that war was necessary); Robert Allen Rutland, *The Presidency of James Madison* 86 (Kansas 1990) (“President Madison was not pushed into war—he backed into it.”).

¹⁶⁶ On this point, see Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* 662–74 (Oxford 2009) (arguing that the War of 1812 was a necessary result of Republican foreign policy since the Jefferson administration, which had attempted to alter French and British behavior by “every mode of coercion short of war,” without success).

¹⁶⁷ See Hickey, *The War of 1812* at 28 (cited in note 165); Steven Watts, *The Republic Reborn: War and the Making of Liberal America, 1790–1820* 242–43 (Johns Hopkins 1987); LaFeber, *The American Age* at 58 (cited in note 165); Stagg, *Mr. Madison’s War* at 68–69, 76, 78–79 (cited in note 165); Ketcham, *James Madison* at 495 (cited in note 165).

war,” calling for Congress to put “the United States into an armor and an attitude demanded by the crisis,”¹⁶⁸ and warning that Britain was already in “a state of war against the United States.”¹⁶⁹ He worked to marshal legislative support, repeatedly sending senior cabinet officers to Congress to drum up support for hostilities.¹⁷⁰ And he actively sought to manipulate public opinion as well, releasing intelligence documents that suggested (incorrectly, as it turned out) that the British were plotting to dismember the United States.¹⁷¹

Yoo’s account also wholly misunderstands the congressional politics. Far from acting as the engine of war, legislative politics were the largest obstacle to Madison’s efforts to force the conflict.¹⁷² Congress dragged its feet on a series of administration proposals that either

¹⁶⁸ See James Madison, *Third Annual Message* (Nov 5, 1811), reprinted in Richardson, ed., *1 Messages and Papers of the Presidents* 476, 478–81 (cited in note 63) (describing the administration’s preparations for war in the face of “ominous indications” and calling for arms and troops to handle “the crisis”). Even though his secretary of the Treasury had convinced Madison to eliminate even more inflammatory language, contemporaries viewed Madison’s 1811 State of the Union as a “war message.” Hickey, *The War of 1812* at 30, 32 (cited in note 165); Ketcham, *James Madison* at 509 (cited in note 165). It is not hard to see why.

¹⁶⁹ Watts, *The Republic Reborn* at 265 (cited in note 167).

¹⁷⁰ See Wills, *James Madison* at 94 (cited in note 165) (“Madison, largely through Monroe, coordinated ways to choreograph congressional developments.”); Rakove, *Madison and the Creation of the American Republic* at 157 (cited in note 165) (describing Madison’s use of Monroe and Albert Gallatin to push Congress toward war); Hickey, *The War of 1812* at 37 (cited in note 165) (“President Madison . . . used the powers of his office to stimulate the war spirit further.”); Stagg, *Mr. Madison’s War* at 84–85 (cited in note 165) (discussing Madison’s use of congressional allies to push administration policy); Ronald Hatzenbuehler, *The War Hawks and the Question of Congressional Leadership in 1812*, 45 *Pac Hist Rev* 1, 3 (1976) (“[T]he minutes of the Foreign Affairs Committee clearly indicate that Madison effectively used Monroe to communicate indirectly with Congress.”).

¹⁷¹ Hickey, *The War of 1812* at 37 (cited in note 165). This episode turned into an embarrassment for the administration when it became clear that the administration’s claims did not have nearly the evidentiary support that Madison suggested. *Id.* at 37–38. See also Stagg, *Mr. Madison’s War* at 104–05 (cited in note 165) (describing Madison’s secretary of state instructing sympathetic members of the press to print editorials calling for war with Britain).

¹⁷² See, for example, Wills, *James Madison* at 92–96 (cited in note 165). To be sure, there was a vigorous “war hawk” faction among congressional Republicans, and part of Madison’s political dilemma was the difficulty of reconciling their belligerence with the antiwar sentiment of other Republican factions. See, for example, Stagg, *Mr. Madison’s War* at 48–55 (cited in note 165). But even if we assume *arguendo* that the minority war hawk faction bullied Madison into war by dint of sheer personality—a reading that is now substantially discredited among historians—this does not get Yoo where he needs to go. See Harold S. Schultz, *James Madison* 153–57 (Twayne 1970) (refuting the erroneous perception by some of Madison’s contemporaries that the war hawks pressured him unwillingly into conflict); Rutland, *The Presidency of James Madison* at 85–86 (cited in note 165) (same); Bradford Perkins, *Prologue to War: England and the United States 1805–1812* 260 (California 1961) (same). Consider also Watts, *The Republic Reborn* at 251–63 (cited in note 167) (noting the intellectual influence and ideological leadership of some of these younger politicians). The problem of misguided influence by unwise advisors is distinct from Yoo’s argument about Congress as an *institution* of government. Indeed, the legislative branch is hardly the only source of misguided personal influence on the President, as at least some events of the past half century might suggest.

pushed the country in the direction of war or prepared it for that conflict, watering down some administrative proposals, rejecting others entirely, and holding up others for lengthy debate.¹⁷³ Even after a direct request from Madison to declare war, the declaration nearly failed to pass in the face of fierce senatorial opposition.¹⁷⁴ None of this suggests a reluctant President who trotted submissively alongside Congress while legislators picked a fight with the world's preeminent maritime power. If anything, the story behind America's declaration of war in 1812 suggests the opposite.

3. Observing that Congress is subject to error.

Yoo repeatedly returns to the observation that Congress does not always rein in presidential excess. The fact that Congress supported Jefferson's harsh embargo policy "disproves any direct link between executive power and reckless government policies" (III, pp 132–36). Consulting with Congress "did not improve [FDR's] national security decision-making" regarding Japanese internment (III, p 317). Congressional support for the 1789 Quasi War, the War of 1812, the 1846 war with Mexico, and the 1898 Spanish-American War proves that congressional involvement does not reduce armed conflict (III, p 361; II, p 123). Never mind that most of these incidents are elsewhere invoked as a demonstration of vigorous executive power; the fact that Congress agreed with the President in each case is simultaneously proof of congressional fallibility.

Yoo seems not to realize the weakness of this move. It is no doubt true, as he says, that Congress and the President can agree and still lead us to failure (III, p 136).¹⁷⁵ But Yoo travels from that premise straight to the conclusion that a congressional checking function is therefore unnecessary. Because the checks fail to prevent bad outcomes in some cases, in other words, we should eliminate the checks. That simply fails to convince. To be clear, Congress's own institutional failings are surely relevant to the allocation of decision authority, and other writers have offered more extended discussion of the

¹⁷³ See, for example, Wood, *Empire of Liberty* at 670–74 (cited in note 166); Rakove, *Madison and the Creation of the American Republic* at 150, 157 (cited in note 165); Hickey, *The War of 1812* at 41 (cited in note 165); LaFeber, *The American Age* at 60 (cited in note 70); Stagg, *Mr. Madison's War* at 86–91, 105–07 (cited in note 165).

¹⁷⁴ See Stagg, *Mr. Madison's War* at 110–15 (cited in note 165); Hickey, *The War of 1812* at 44–45 (cited in note 165). Before Madison made his request, Congress had been inclined simply to adjourn for recess. See Rutland, *The Presidency of James Madison* at 101 (cited in note 165).

¹⁷⁵ It sometimes appears that Yoo would only support congressional involvement if it were shown to increase the number of individual tactical wins in the run of armed conflict. See, for example, III, pp 350–51. This fails to appreciate that a key purpose of locating the "declare War" power in Article I was to avoid unnecessary war in the first place.

risk management tradeoffs involved.¹⁷⁶ But the one-sided balancing here suggests indifference to the competing interests involved.

4. Suggesting that presidential supremacy is essential in the war on terror.

When counterfactual history runs out, the last refuge of these books is a string of thinly sourced assertions that subjecting the President to national security restraints will reap catastrophe for us all.¹⁷⁷ It is worth pausing on what is described here as President Barack Obama's willingness to place America in deadly peril just to "please[] the left wing of the Democratic Party" (III, p 439). "Eliminating the Bush system entirely will mean that we get little timely information from al Qaeda terrorists."¹⁷⁸ The order prohibiting torture by any member or agent of the federal government has "dried up the most valuable sources of intelligence on al Qaeda" (III, p 440).¹⁷⁹ The interrogation controversies

¹⁷⁶ See, for example, Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 45–57 (Oxford 2007); Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* 36–37 (Oxford 2006).

¹⁷⁷ The last paragraph of the final book says that "Obama . . . may have opened the door to further terrorist acts on U.S. soil by shattering some of the nation's most critical defenses" (III, p 444). Comments like these pair well with Yoo's repeated suggestion that people who disagree with his legal conclusions are "following their personal policy views" (II, p 180), "put[ting] politics first" (II, p 187), "elevat[ing] [themselves] into the role of [] elected official[s]" (II, p 271 n 27), and "impos[ing] their preferred policies" (II, p 237) rather than honestly interpreting what the law actually is.

¹⁷⁸ This assertion has already been overtaken by events. See, for example, Carrie Johnson, *Man Held in Bomb Attempt Said to Be Cooperating*, Wash Post A3 (Feb 3, 2010); William Branigin and Anne E. Kornblut, *Holder Defends Decision to Read Miranda Rights to Shahzad, Cites His Continuing Cooperation*, Wash Post (May 6, 2010), online at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/06/AR2010050603380.html> (visited Sept 13, 2010); William Glaberson, *When a Suspect Likes to Talk, and Talk*, NY Times A13 (May 7, 2010). Even before *Crisis and Command* went to press, more careful attention to the public debate would have complicated the basis for Yoo's assertion. See, for example, Ali Soufan, *My Tortured Decision*, NY Times A27 (Apr 23, 2009) ("It is inaccurate, however, to say that Abu Zubaydah had been uncooperative [before he was waterboarded]. . . . There was no actionable intelligence gained from [our use of] enhanced interrogation techniques on Abu Zubaydah that wasn't, or couldn't have been, gained from regular tactics.").

¹⁷⁹ This is highly contested, and by people with better reason to know. See Scott Shane, David Johnston, and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, NY Times A1 (Oct 4, 2007) ("[A] former [senior agency] official said many C.I.A. professionals now believe patient, repeated questioning by well-informed experts is more effective than harsh physical pressure."); Department of the Army, *Army Field Manual 2-22.3: Human Intelligence Collector Operations* 5-22 (Sept 6, 2006) ("[T]orture . . . is a poor technique that yields unreliable results . . ."); Department of Defense, *News Briefing with Deputy Assistant Secretary Stimson and Lt Gen Kimmons from the Pentagon* (Sept 6, 2006), online at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=3712> (visited Sept 19, 2010) (statement of Lt Gen John Kimmons, Army Deputy Chief of Staff for Intelligence) ("I am absolutely convinced . . . [that] [n]o good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tell us that."). But see, for example, Stuart

implicated nothing more serious than “limiting a captured terrorist to six hours’ sleep, isolating him, interrogating him for several hours, or requiring him to exercise” (II, p 171).¹⁸⁰ And applying the Army Field Manual to agency interrogations “amounts to requiring . . . that CIA interrogators be polite” (III, p 441).¹⁸¹

That last point bears more than a footnote. Obama’s third executive order¹⁸² does not “amount[] to requiring” that CIA interrogators be “polite.” It amounts to requiring that they refrain from forcing a man into a sealed-shut “cramped confinement box” so small that a hunched-up crouch is the only position he can assume, with a loose caterpillar crawling over him in the darkness and blood leaking from his gunshot wounds.¹⁸³ It amounts to requiring that they refrain from shackling a prisoner to the ceiling, naked, for eleven days at time, keeping him awake so long that he begins hallucinating.¹⁸⁴ It amounts to requiring that they refrain from pouring water through a towel into an upside down man’s nose and mouth, inflicting forty seconds of “suffocation and incipient panic” on him,¹⁸⁵ along with “the acute impression that [he is] about to die.”¹⁸⁶ And it amounts to requiring that they refrain from

Taylor, Jr and Benjamin Wittes, *Looking Forward, Not Backward: Refining U.S. Interrogation Law*, in Benjamin Wittes, ed, *Legislating the War on Terror: An Agenda for Reform* 289, 310–26 (Brookings 2009) (discussing claims about the effectiveness of harsh coercion).

¹⁸⁰ This profoundly incomplete description of the techniques at issue is padded throughout with the constant caveat that it focuses on what was authorized “at Guantanamo Bay” (II, pp 195–98). So far as I can tell, the word “waterboarding” is used only once in these books, in a parenthetical at the very end of *Crisis and Command* (III, p 440).

¹⁸¹ See also II, p 39 (“We would be able to ask Osama bin Laden loud questions and nothing more.”); II, p 172 (“Limiting our intelligence and military officials to polite questioning . . . would only hurt our ability to stop future attacks.”); II, p 176 (“[T]hey have succeeded in convincing public opinion that anything beyond shouted questions is torture.”).

¹⁸² Executive Order 13491 § 3, 74 Fed Reg 4893, 4894 (2009) (extending Army Field Manual guidelines to all detainees under the “effective control” of the US Government).

¹⁸³ DOJ, OLC, *Interrogation of al Qaeda Operative* 2–3, 10 (Aug 1, 2002), online at <http://www.justice.gov/olc/docs/memo-bybee2002.pdf> (visited Nov 23, 2010); International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody* 13–14, 28, 30 (Feb 2007) (“ICRC Report”), online at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> (visited Dec 17, 2010).

¹⁸⁴ See DOJ, OLC, *Interrogation of al Qaeda Operative* at 6 (cited in note 183) (suggesting that this technique should be approved unless expected to produce “psychosis or permanent brain damage[]” in a particular case); DOJ, OLC, *Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* 12, 35–36, 39 (May 10, 2005), online at <http://www.justice.gov/olc/docs/memo-bradbury2005-2.pdf> (visited Nov 23, 2010); *ICRC Report* at 11–12 (cited in note 183); DOJ, OLC, *Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Convention to Certain Techniques That May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees* 9 (July 20, 2007), online at <http://www.justice.gov/olc/docs/memo-warcrimesact.pdf> (visited Nov 23, 2010).

¹⁸⁵ DOJ, OLC, *Interrogation of al Qaeda Operative* at 3–4 (cited in note 183) (describing waterboarding).

¹⁸⁶ *ICRC Report* at 10 (cited in note 183).

repeating that last technique 183 times in a single month,¹⁸⁷ and from throwing in another time or two extra after “the on-scene interrogation team judge[s] [the prisoner] to be compliant,” just for good measure.¹⁸⁸ Whatever else Obama’s order has accomplished, it is probably an understatement to summarize such changes as a question of etiquette.¹⁸⁹

¹⁸⁷ DOJ, OLC, *Application of United States Obligations under Article 16 of the Convention against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees* 37 (May 30, 2005) (“Memorandum on US Obligations”), online at <http://www.justice.gov/olc/docs/memo-bradbury2005.pdf> (visited Nov 22, 2010) (describing, at a minimum, the number of individual instances that water was poured into Khalid Shaikh Mohammed’s mouth and nose to achieve this drowning sensation). Marc Thiessen suggests, on the basis of anonymous agency sources, that the OLC memorandum overstates how many separate, individual instances of suffocation actually took place. See Thiessen, *Courting Disaster* at 178–79 (cited in note 13). Whether or not that is accurate, OLC assumed differently, and it is of course OLC memoranda that govern the outer bounds of permissible behavior.

¹⁸⁸ *Memorandum on US Obligations* at 31 n 28 (cited in note 187) (describing “at least one occasion” of “what might be deemed in retrospect to have been the unnecessary use of enhanced [interrogation] techniques”).

¹⁸⁹ To be clear, one scholar has recently read the revised Army Field Manual as precluding the use of less medieval techniques, too, including what was formerly called “Fear-Up (Harsh).” See Nathan Alexander Sales, *Self-Restraint and National Security* *9–10 (George Mason University Law and Economics Research Paper Series, No 10-41), online at http://ssrn.com/abstract_id=1664610 (visited Nov 2, 2010). But that reading of the text, while plausible on its face, conflicts with the Pentagon’s expressed understanding. Department of Defense, *News Briefing* (cited in note 179) (statement of Lt Gen John Kimmons, Army Deputy Chief of Staff for Intelligence) (“All of the techniques that were in the old Field Manual are still approved. There were 17; we combined two of them into one. That’s why there’s 16 that were carried forward. But if you have a copy of the old Field Manual, it’s exactly the same techniques.”). See also Department of the Army, *Army Field Manual 34-52: Intelligence Interrogation* 3-16 (Sept 28, 1992) (noting that an interrogator using Fear-Up (Harsh) “behaves in an overpowering manner with a loud and threatening voice” and may “throw objects across the room” to “heighten the implanted feelings of fear”), superseded by *Army Field Manual 2-22.3* (cited in note 179).

Even if the CIA took a more cautious approach than the Pentagon and interpreted the Field Manual as prohibiting some elements of Fear-Up (Harsh), the manual leaves room for many other kinds of harsh interaction. See, for example, Department of the Army, *Army Field Manual 2-22.3* at 8-3 (cited in note 179) (permitting the relationship between interrogator and detainee to “be based on . . . fear”); id at 8-13 (requiring interrogators to begin interactions in a “business-like” manner, “[u]nless there is rationale for acting otherwise”); id at 8-15 (“[The interrogator] must not show distaste [or] disgust . . . unless that reaction is a planned part of the approach strategy.”); id at 8-26 (“[S]upervisors should question the appropriateness of demeaning any racial group, including the [detainee]’s, to elicit an emotional response.”); id at 8-37 (“A fear-up approach is normally presented in a level, unemotional tone of voice.”); id at 8-38 (“It is often very effective to use the detainee’s own imagination against him. The detainee can often visualize exactly what he is afraid of better than the [interrogator] can express it.”); id at 8-47 (allowing interrogators to undermine a detainee by “attacking his loyalty, intelligence, abilities, leadership qualities, slovenly appearance, or any other perceived weakness”); id at 8-49 (inculcating “a feeling of hopelessness and helplessness” by “exploit[ing] the source’s psychological, moral, and sociological weaknesses”); id at 8-65 (describing the “Mutt & Jeff” good-cop–bad-cop technique). While the manual admonishes that an interrogator “must be extremely careful that he does not threaten or coerce a source” himself, id at 8-10, it delimits the scope of this prohibited “coercion” quite narrowly. See id at 5-22.

CONCLUSION

In concluding, I want to turn to an aspect of Yoo's discussion that suggests, almost reluctantly, another way to reconcile the competing imperatives that so often clash in this area. And that is Thomas Jefferson's version of what is often called the Lockean prerogative. In his *Second Treatise of Government*, John Locke defined the concept in the following terms: the executive officer's "power to act according to discretion for the public good, without the prescription of the law, and sometimes even against it."¹⁹⁰ Yoo notes that while this concept was left unaddressed during the Convention debates (III, p 32), Jefferson saw it as an inherent feature of the presidency, albeit as a power anterior to the Constitution itself (III, pp 102, 123–24, 201–02). But Yoo himself views the extraconstitutional prerogative as illegitimate, and he emphasizes that no President besides Jefferson has ever asserted it in a particular case (III, pp 44, 102, 124–26, 201–02). In fact, he seems viscerally opposed to the concept,¹⁹¹ on the ground that it places the executive branch outside of our system of laws as a matter of affirmative political theory (III, pp 125–26, 425–26; I, p 172).¹⁹²

At first this resistance is puzzling. As discussed above, it is all but impossible to discern what legal limits Yoo does accept on presidential

¹⁹⁰ John Locke, *Second Treatise of Civil Government* § 160 at 82 (Barnes & Noble 1966) (originally published 1689). See also I, pp 37–38; III, p 5. To be sure, acknowledging the Jeffersonian prerogative poses its own set of civil liberties risks. See Shane, Johnston, and Risen, *Secret U.S. Endorsement of Severe Interrogations*, NY Times at A1 (cited in note 179) (quoting John D. Hutson, former Judge Advocate General of the Navy, as saying, "I know from the military that if you tell someone they can do a little of this for the country's good, some people will do a lot of it for the country's better").

¹⁹¹ At times, Yoo seems attracted to the notion of post hoc absolution, suggesting, for example, that FDR and Lincoln "may have gone too far at times but we forgive them" (III, p 424). But this is just flirtation. His ultimate rejection of the prerogative as a mechanism of executive power is never in serious doubt (III, pp 425–26). Other scholars have been more sympathetic to the notion of a true prerogative. See, for example, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale L J 1011, 1096–1133 (2003); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L J 1385, 1427–28 (1989). See also Michael Walzer, *Political Action: The Problem of Dirty Hands*, in Marshall Cohen, Thomas Nagel and Thomas Scanlon, eds, *War and Moral Responsibility* 62, 63 (Princeton 1974).

¹⁹² The Louisiana Purchase is not the only American precedent for an extraconstitutional prerogative. For example, rather than arguing that he had a legal right to make unauthorized expenditures at the beginning of the Civil War, Lincoln "confessed that some of these measures 'were without any authority of law' . . . [and] to being responsible for 'whatever error, wrong or fault was committed'" thereby. Barron and Lederman, 121 Harv L Rev at 1003 (cited in note 19), quoting Cong Globe, 37th Cong, 2d Sess 2383 (May 27, 1862). Similarly, Jefferson ordered the purchase of gunboats and gunpowder without congressional authorization in response to an attack by the British warship *Leopard* (III, p 115). See also Barron and Lederman, 121 Harv L Rev at 974–76 (cited in note 19), quoting 17 Annals of Cong 17 (Oct 27, 1807) (noting that Jefferson defended the purchase on the grounds that he "trust[ed] that the Legislature . . . [would] approve, when done, what they would have seen so important to be done, if then assembled").

action. On his account, there appears to be nothing that either Congress or the Constitution can categorically prohibit the President from doing by force of law, from massacring a village that is a source of resistance to US military objectives¹⁹³ to crushing the testicles of a child whose father is a suspected terrorist.¹⁹⁴ When Yoo denies the existence of limits on the President's national security authority and extols the Constitution's "non-legalistic" approach to executive power, he really means it.

But the rejection here of formal prerogative in favor of a functionally unlimited view of Article II power may connect to something deeper than fussy questions of taxonomy.¹⁹⁵ On Jefferson's view, Presidents break the law at their own peril.¹⁹⁶ When they do so, they must openly acknowledge the violation and petition the American people to approve it under the special circumstances that made it necessary (III, pp 102, 120–21, 122–23). The admission of violation, of fault, of legal *wrongdoing* is a central component of this appeal: How can you be shriven before you have confessed? Conceding that you have violated the law and seeking absolution on the grounds of a greater, publicly acknowledged, and publicly approved good proceeds from completely different presumptions about virtue, authority, and righteousness than asserting that the President may constitutionally do whatever he deems necessary, under any circumstances he deems appropriate.

There are hints that it is precisely this that holds Yoo up. It is one thing to explain the torture memos, the assertions about unreviewable detention, or the blessing of FISA surveillance as failures of situation

¹⁹³ See DOJ, Office of Professional Responsibility, *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* (July 29, 2009), online at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf> (visited Nov 23, 2010) (quoting a colloquy between Yoo and an investigator from the Department of Justice's Office of Professional Responsibility: "Q: What about ordering a village of resitants to be massacred? . . . A: . . . [C]ertainly that would fall within the Commander-in-Chief's power over tactical decisions. Q: To order a village of civilians to be [exterminated]? A: Sure.") (second alteration in original).

¹⁹⁴ See Al Kamen, *No Treaty, No Law, No Problem*, Wash Post A17 (Feb 6, 2008) (quoting Yoo responding to the question whether Congress can prohibit such actions by stating, "I think it depends on why the president thinks he needs to do that"). For the audio of Yoo's response, see *John Yoo Says President Bush Can Legally Torture Children* (Sept 2, 2006), online at www.youtube.com/watch?v=hz01hN9l-BM (visited Nov 23, 2010).

¹⁹⁵ It is certainly true that a Jefferson-style prerogative might not yield all the advantages that Yoo seeks. Executive officers will doubtless be more hesitant to break the law if they have to hope for ex post absolution instead of being able to count on an ex ante golden ticket. And the judiciary may not always be capable of giving full effect to this process of forgiveness, political question doctrine and the like notwithstanding. But there would certainly be opportunity for "forgiveness" to operate through the political process.

¹⁹⁶ Letter from Thomas Jefferson to John B. Colvin (Sept 20, 1810), reprinted in Philip B. Kurland and Ralph Lerner, eds, 4 *The Founders' Constitution* 127, 127–28 (Chicago 1987).

sense in a time of terror and pressure within the executive branch.¹⁹⁷ One could even acknowledge that the strain on administration officials in the aftermath of September 11 is unimaginable to anyone not present in those rooms, forced to confront those questions and those stakes. But it is something else entirely to say that those decisions were legally correct then and are legally correct now, and that the only thing worth changing would be to add “a certain polish . . . rather than try to give unvarnished, straight-talk legal advice,”¹⁹⁸ and perhaps to “spend more time saying nice things about everybody.”¹⁹⁹ Jefferson’s prerogative requires a very different posture: admitting that the law was broken in service of a greater good and standing up to the consequences of that admission.

Others might find this feature of the prerogative more attractive. John McCain, famously opposed to torture on the strength of his own personal experience, once acknowledged that he could imagine a moral obligation to torture a detainee in the face of the kind of outlier hypotheticals that often drive these debates. In such cases, McCain suggested, our officials should rely on the hopes of a prosecutorial discretion that reflects the sensibilities of “We the People,” not on any formalized legal right to engage in an inherently repugnant act.²⁰⁰ To the extent that we find some measure of Yoo’s anxiety about the risks of a fettered presidency at least plausible, Jefferson’s embrace of civil disobedience may offer unexpected attractions. A surprising number of people—perhaps even some of our most committed civil libertarians—might be comfortable with this model of a tragic executive responsibility to break the law. Despite his own resistance to the concept, Yoo’s discussion of the extraconstitutional prerogative may cast light

¹⁹⁷ See Dan M. Kahan, *Yale Law School Commencement Remarks* (May 25, 2006), online at <http://www.law.yale.edu/documents/pdf/kahanREVISED.pdf> (visited Nov 23, 2010). See also DOJ, OLC, *Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* 1 (Jan 15, 2009), online at <http://www.justice.gov/olc/docs/memostatusolcopinions01152009.pdf> (visited Nov 21, 2010) (rescinding a series of post-September 11 memoranda as resting on “doubtful” premises, “[p]erhaps reflecting” their composition during “the months following 9/11,” “a time of great danger” and “extraordinary time pressure”).

¹⁹⁸ Eugene W. Fields, *Factbox*, Orange County Reg (Mar 3, 2009), online at <http://www.oregister.com/articles/government-142542-think-legal.html> (visited Nov 23, 2010).

¹⁹⁹ John Yoo and Bob Barr, Panel Discussion, *Presidential Powers versus Civil Liberties in Times of War* (The University of Chicago Law School, Feb 9, 2010), online at http://federalist.uchicago.edu/podcasts/Barr_Yoo_020910.mp3 (visited Dec 17, 2010) (statement of John Yoo). See also II, pp 169–71. Yoo writes elsewhere that the only real failing of the more notorious OLC memoranda was their failure to “paint a pretty picture” (II, p 172), be “more politically correct” (II, p viii), “placate the sensibilities” of hypersensitive readers, and “g[i]ve less offense” (II, p 171).

²⁰⁰ See David E. Sanger and Eric Schmitt, *Bush Says He’s Confident That He and McCain Will Reach Agreement on Interrogation Policy*, NY Times A22 (Dec 13, 2005) (quoting McCain as saying, “You do what you have to do. . . . But you take responsibility for it”).

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on one way out of the philosophical conundrums that mark the limits of every principled approach to justice.