2005

What Bush Wants to Hear

David Cole
Georgetown University Law Center

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/13


This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub
Part of the Constitutional Law Commons, and the International Law Commons
What Bush Wants to Hear


David Cole
Professor of Law
Georgetown University Law Center
cole@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: http://scholarship.law.georgetown.edu/facpub/13/

Posted with permission of the author
What Bush Wants to Hear

By David Cole

*The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*

by John Yoo

University of Chicago Press, 366 pp., $29.00

Few lawyers have had more influence on President Bush's legal policies in the "war on terror" than John Yoo. This is a remarkable feat, because Yoo was not a cabinet official, not a White House lawyer, and not even a senior officer within the Justice Department. He was merely a mid-level attorney in the Justice Department's Office of Legal Counsel with little supervisory authority and no power to enforce laws. Yet by all accounts, Yoo had a hand in virtually every major legal decision involving the US response to the attacks of September 11, and at every point, so far as we know, his advice was virtually always the same—the president can do whatever the president wants.

Yoo's most famous piece of advice was in an August 2002 memorandum stating that the president cannot constitutionally be barred from ordering torture in wartime—even though the United States has signed and ratified a treaty absolutely forbidding torture under all circumstances, and even though Congress has passed a law pursuant to that treaty, which without any exceptions prohibits torture. Yoo reasoned that because the Constitution makes the president the "Commander-in-Chief," no law can restrict the actions he may take in pursuit of war. On this reasoning, the president would be entitled by the Constitution to resort to genocide if he wished.

Yoo is now back in private life, having returned to the law faculty at the University of California at Berkeley. Unlike some other former members of the administration, he seems to have few if any second thoughts about what he did, and has continued to aggressively defend his views. His book *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* shows why Yoo was so influential in the Bush administration. It presents exactly the arguments that the president would have wanted to hear. Yoo contends that the president has unilateral authority to initiate wars without congressional approval, and to interpret, terminate, and violate international treaties at will. Indeed, ratified treaties, Yoo believes, cannot be enforced by courts unless Congress enacts additional legislation to implement them. According to this view, Congress's foreign affairs authority is largely limited to enacting domestic legislation and appropriating money. In other words, when it comes to foreign affairs, the president exercises unilateral authority largely unchecked by law—constitutional or international.

Yoo is by no means the first to advance such positions. Many conservatives favor a strong executive, especially when it comes to foreign affairs, and they are generally skeptical about international law. What Yoo offers that is new is an attempt to reconcile these modern-day conservative preferences with an influential conservative theory of constitutional interpretation: the "originalist" approach, which claims that the Constitution must be interpreted according to the specific understandings held by the framers, the ratifiers, and the public when the Constitution and its amendments were drafted.

The problem for originalists who believe in a strong executive and are cynical about international law is that the framers held precisely the opposite views—they were intensely wary of executive power, and as leaders of a new and vulnerable nation, they were eager to ensure that the mutual obligations they had
negotiated with other countries would be honored and enforced. During the last two centuries, of course, executive power has greatly expanded in practice; and the attitude of many US leaders toward international law has grown increasingly disrespectful as the relative strength of the US compared to other nations has increased. But these developments are difficult to square with the doctrine of "original intent," which, at least as expressed by Justice Antonin Scalia and other extreme conservatives, largely disregards the development of the law for the past two centuries. Yoo's task is to reconcile the contemporary uses of American power with his belief in original intent. His views prevailed under the Bush administration, and therefore should be examined not only for their cogency and historical accuracy, but for their consequences for US policy in the "war on terror."

1.

War

On its face, the Constitution divides power over foreign affairs. It gives Congress substantial responsibility, especially with respect to war. Congress has the power to raise and regulate the military; to declare war and issue "Letters of Marque and Reprisal," which authorize lesser forms of conflict; to define offenses against the law of nations; and to regulate international commerce. The Senate must confirm all treaties and all appointments of ambassadors. The president is named as the "Commander-in-Chief," and appoints ambassadors and makes treaties subject to the Senate's consent. In addition, the words "executive power" have, since the beginning of the republic, been regarded as giving the president an implicit authority to represent the nation in foreign affairs.

These divisions of responsibility were conceived for widely recognized historical and philosophical reasons. The Constitution was drafted following the Revolutionary War, in which the colonies rebelled against the abuses of the British monarchy, the prototypical example of an unaccountable executive. The new nation so distrusted executive power that the first attempt to form a federal government, the Articles of Confederation, created only a multi-member Continental Congress, which was in turn dependent on the states for virtually all significant functions, including imposing taxes, regulating citizens' behavior, raising an army, and going to war. That experiment failed, so the Constitution's drafters gave Congress more power, and revived the concept of a branch of government headed by a single executive. But they insisted on substantial limits on the power of the new executive branch, and accordingly assigned to Congress strong powers that had traditionally been viewed as belonging to the executive—including the power to declare war.

Many of the framers passionately defended the decision to deny the president the power to involve the nation in war. When Pierce Butler, a member of the Constitutional Convention, proposed giving the president the power to make war, his proposal was roundly rejected. George Mason said the president was "not to be trusted" with the power of war, and that it should be left with Congress as a way of "clogging rather than facilitating war."[2] James Wilson, another member, argued that giving Congress the authority to declare war "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large."[3] Even Alexander Hamilton, one of the founders most in favor of strong executive power, said that "the Legislature alone can interrupt [the blessings of peace] by placing the nation in a state of war."[4] As John Hart Ely, former dean of Stanford Law School, has commented, while the original intention of the Founders on many matters is often "obscure to the point of inscrutability," when it comes to war powers "it isn't."[5]

In the face of this evidence, Yoo boldly asserts that a deeper historical inquiry reveals a very different original intention—namely, to endow the president with power over foreign affairs virtually identical to that of the king of England, including the power to initiate wars without congressional authorization. He argues that the power to "declare War" given to Congress was not meant to include the power to
begin or authorize a war, but simply the power to state officially that a war was on—a statement that would be "a courtesy to the enemy" and would authorize the executive to exercise various domestic wartime powers. At most, Yoo contends, the clause giving Congress power to "declare War" was meant to require congressional approval for "total war," a term Yoo never defines, but it left to the president the unilateral decision to engage in all lesser hostilities. He quotes dictionaries from the founding period that defined "declare" as "to pronounce" or "to proclaim," not "to commence." He points out that the Constitution did not give Congress the power to "engage in" or to "levy" war, terms used in other constitutional provisions referring to war. And he notes that unlike some state constitutions of the time, the federal constitution did not require the president to consult Congress before going to war.

All the evidence Yoo cites, however, can be read more convincingly to corroborate the view he seeks to challenge—namely, that the Constitution gave the president only the power, as commander in chief, to carry out defensive wars when the country came under attack, and to direct operations in wars that Congress authorized. British precedent is of limited utility here, since the framers consciously departed from so much of it. Dictionary definitions of "declare" also offer little guidance, since Yoo ignores that there is a world of difference between someone's "declaring" his or her love for wine or Mozart and a sovereign's declaring war. "Declare War" was in fact a legal term of art, and there is evidence that it was used at the time to mean both the commencement of hostilities and a statement officially recognizing that war was ongoing. The use of the word "declare" rather than "levy" or "engage in" simply reflects the division of authority under which the president actually levies—or carries on—the war once it is begun. Indeed, the framers famously substituted "declare" for "make" in enumerating Congress's war powers for just this reason. And the framers had no reason to require the president to consult with Congress before going to war since it was Congress's decision, not the president's.

Most troubling for Yoo's thesis, his account renders the power to "declare War" a meaningless formality. At the time of the Constitution's drafting, a formal "declaration of war" was not necessary for the exercise of war powers under either domestic or international law, so Yoo's hypothesis that the declaration served that purpose fails.

Yoo's further suggestion that the clause recognizes a distinction between "total wars," which must be declared, and lesser wars, which need not be, has no historical basis. Despite his ostensible commitment to originalism, Yoo cites no evidence whatever to suggest that any such distinction existed for the founding generation. Nor does he ever explain what the distinction might mean today. And the fact that the text grants Congress both the power to "declare War" and to issue "Letters of Marque and Reprisal" strongly suggests an intent that Congress decide on all forms of military conflict other than repelling attacks. Once these explanations evaporate, all that is left for Yoo's theory of the war clause is that it gives Congress the power to provide a "courtesy to the enemy"—hardly a persuasive refutation of the clear language of the framers quoted above.

Yoo's evidence does not undermine the conclusion that the framers intended Congress to take responsibility for the decision to send the nation into war. But in some sense, arguments against his theory are academic. Modern practice is closer to Yoo's view than to the framers' vision. Beginning with the Korean War, presidents have routinely involved the nation in military conflicts without waiting for Congress to authorize their initiatives. Yoo notes that while the nation has been involved in approximately 125 military conflicts, Congress has declared war only five times. Were the framers lacking in practical judgment when they gave Congress this power?

Yoo claims that since September 11, it is all the more essential that the nation be able to act swiftly and without hesitation, even preemptively, to protect itself. We can't afford to wait around for Congress to figure out what it wants to do. The "war on terror" does not permit democratic deliberation, at least not in advance. And, as Yoo repeatedly insists, Congress remains free to cut off funds for any military action that it does not like.
But there is as good reason today as there was when the Constitution was drafted to give Congress the power to authorize military activities. As the framers accurately predicted, presidents have proven much more eager than Congress to involve the nation in wars. It is easier for one person to make up his mind than for a majority of two houses of Congress to agree on a war policy.

Presidents also tend to benefit from war more than members of Congress, by increasing their short-term popularity, by acquiring broader powers over both the civilian economy and the armed forces, and, sometimes, by the historical recognition later accorded them. Moreover, as the Vietnam War illustrated, even when a war becomes extremely unpopular, it is not easy to cut off funds for the troops.

It is true, as Yoo observes, that, since Harry Truman, presidents of both parties have generally resisted the view that they need congressional authorization to commit forces to military conflict. But this attitude is in fact a relatively recent development. While formal declarations of war have been rare, Yoo fails to note that presidents have generally sought congressional authorization for military actions. Until the Korean War, presidents either openly acknowledged that congressional authorization was necessary or offered rationales for why a particular military initiative was an exception to that rule. Thus, the view that Yoo promotes as "original" has in fact been advanced only during the last fifty years, and only by self-interested executives.

This view is particularly disputed by Congress, as can be seen in the 1973 War Powers Resolution, which sought to reaffirm and restore Congress's constitutional role in deciding on whether to go to war, and also in the legislative debates that inevitably take place when presidents talk of going to war. As the war in Iraq has painfully underscored, the decision to go to war, especially a war initiated by the president without broad international support, can have disastrous consequences; and extricating the country from such a war can be extremely difficult. Were Congress to be eliminated from the initial decision-making process, as Yoo would prefer, the result would almost certainly be even more wars, and more quagmires such as the one in Iraq. On this issue, the framers were persuasive, and it is Yoo who has failed to understand both the checks on executive power they imposed and the reasons they did so.

2. Treaties

Yoo's interpretation of the treaty power, like his view of the war power, departs dramatically from the text of the Constitution and its traditional understanding. The Constitution's Supremacy Clause explicitly provides that

all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.

On the strength of that clause, and statements made about treaties at the time of the framing, it has long been accepted that treaties have the force of law in the United States, create binding obligations, and may be enforced by courts. Indeed, the Supreme Court long ago stated that treaties are "to be regarded...as equivalent to an act of the legislature." In the modern era, Congress often specifies when ratifying a treaty that it should not be enforceable in court until further legislation is enacted. And even without such directives, courts sometimes find treaties not to be judicially enforceable; the US Court of Appeals for the D.C. Circuit did so recently in rejecting a Guantánamo detainee's claim that his pending trial in a military tribunal violated the Geneva Conventions.

Yoo would go further, insisting on a presumption against judicial enforcement unless Congress clearly
specifies otherwise. On this view, treaties lack the force of law, and become mere political promises, having about as much force as campaign rhetoric. And he further claims that the president has unilateral authority to interpret, reinterpret, and terminate treaties, effectively rendering presidents above the law when it comes to treaties.

To support these revisionist views, Yoo relies heavily and repeatedly on a rigid dichotomy between foreign affairs—which he sees, in the British tradition, as the executive's domain—and domestic matters—which he sees as the province of the legislature. But as we have seen, the Constitution's framers explicitly rejected such a rigid division, giving Congress and the Senate substantial power over functions that the British saw as executive in nature, including the power to make war and treaties, and expressly assigning the judiciary the responsibility to enforce treaties as the "Law of the Land."

If anything, Yoo's historical evidence is even thinner with respect to the treaty power and the Supremacy Clause than it is with respect to the clause on declaring war. As Jack Rakove, one of the foremost historians of the federal period, has concluded, the framers "were virtually of one mind when it came to giving treaties the status of law." As other historians have pointed out, one of the principal incentives for convening the Constitutional Convention was the embarrassing refusal of state governments to enforce treaties. The Supremacy Clause solved that problem in as direct a way as possible—by making treaties the "Law of the Land," enforceable in courts and binding on government and citizenry alike. That treaties were not thought to need further implementing is underscored by the framers' unanimous decision to omit treaty enforcement from Congress's enumerated powers, "as being superfluous since treaties were to be 'laws.'" Yoo's account turns that conclusion on its head; his reading would render superfluous the Supremacy Clause's assertion that treaties are laws. If treaties had domestic force only when implemented by a subsequent statute, as Yoo maintains, then the statute itself would have the status of the "Law of the Land," not the treaty.

Yoo is no more convincing with respect to presidential interpretation of treaties. He maintains that because foreign policy is an executive prerogative, the executive must be able to reinterpret and terminate treaties unilaterally. But while the Constitution plainly envisioned the president as the principal negotiator of treaties, it also gave clear responsibilities for treaties to the other branches; all treaties must be approved by two thirds of the Senate, and once ratified, treaties become "law" enforceable by the courts. The president must certainly be able to interpret treaties in order to "execute" the laws, just as he must be able to interpret statutes for that purpose. But there is no reason why his interpretations of treaties should be any more binding on courts or the legislature than his interpretations of statutes.

3.

The Rule of Law

Yoo's views on the war and treaty powers share two features. First, they both depart radically from the text of the Constitution. He would reduce the power to "declare War" to a mere formality, a courtesy to the enemy; and he would render entirely superfluous the Supremacy Clause's provision that treaties are the "Law of the Land." It is ironic that a president who proclaims his faith in "strict construction" of the Constitution would have found Yoo's interpretations so persuasive, for Yoo is anything but a strict constructionist. One of the arguments most often made in defense of "originalism" is that interpretations emphasizing a "living" or evolving Constitution are too open-ended, and accordingly they permit judges to stray too far from the text. Yoo unwittingly demonstrates that his brand of originalism is just as vulnerable to that criticism as other approaches, if not more so. He not only departs from the text, but contradicts the principles that underlie it.

Second, and more significantly, all of Yoo's departures from the text of the Constitution point in one direction—toward eliminating legal checks on presidential power over foreign affairs. He is candid about
this, and defends his theory on the ground that it preserves "flexibility" for the executive in foreign affairs. But the specific "flexibility" he seeks to preserve is the flexibility to involve the nation in war without congressional approval, and to ignore and violate international commitments with impunity. As Carlos Vazquez, a professor of law at Georgetown, has argued in response to Yoo, "flexibility has its benefits, but so does precommitment." The Constitution committed the nation to a legal regime that would make it difficult to go to war and that would provide reliable enforcement of international obligations. Yoo would dispense with both in the name of letting the president have his way.

Even if Yoo is wrong about the original understanding in 1787, is he wrong about 2005? As the subtitle of his book indicates, his argument rests not just on revisionist history, but also on arguments about what is practically necessary in a twenty-first-century world threatened by terrorism and weapons of mass destruction. He contends that these developments demand that the president have the leeway to insulate his foreign policy decisions both from the will of Congress and from the demands of international law.

Here it is worth reviewing the positions Yoo advocated while in the executive branch and since, and their consequences in the "war on terror." At every turn, Yoo has sought to exploit the "flexibility" he finds in the Constitution to advocate an approach to the "war on terror" in which legal limits are either interpreted away or rejected outright. Just two weeks after the September 11 attacks, Yoo sent an extensive memo to Tim Flanigan, deputy White House counsel, arguing that the President had unilateral authority to use military force not only against the terrorists responsible for the September 11 attacks but against terrorists anywhere on the globe, with or without congressional authorization.  

Yoo followed that opinion with a series of memos in January 2002 maintaining, against the strong objections of the State Department, that the Geneva Conventions should not be applied to any detainees captured in the conflict in Afghanistan. Yoo argued that the president could unilaterally suspend the conventions; that al-Qaeda was not party to the treaty; that Afghanistan was a "failed state" and therefore the president could ignore the fact that it had signed the conventions; and that the Taliban had failed to adhere to the requirements of the Geneva Conventions regarding the conduct of war and therefore deserved no protection. Nor, he argued, was the president bound by customary international law, which insists on humane treatment for all wartime detainees. Relying on Yoo's reasoning, the Bush administration claimed that it could capture and detain any person who the president said was a member or supporter of al-Qaeda or the Taliban, and could categorically deny all detainees the protections of the Geneva Conventions, including a hearing to permit them to challenge their status and restrictions on inhumane interrogation practices.

Echoing Yoo, Alberto Gonzales, then White House counsel, argued at the time that one of the principal reasons for denying detainees protection under the Geneva Conventions was to "preserve flexibility" and make it easier to "quickly obtain information from captured terrorists and their sponsors." When CIA officials reportedly raised concerns that the methods they were using to interrogate high-level al-Qaeda detainees—such as waterboarding—might subject them to criminal liability, Yoo was again consulted. In response, he drafted the August 1, 2002, torture memo, signed by his superior, Jay Bybee, and delivered to Gonzales. In that memo, Yoo "interpreted" the criminal and international law bans on torture in as narrow and legalistic a way as possible; his evident purpose was to allow government officials to use as much coercion as possible in interrogations.

Yoo wrote that threats of death are permissible if they do not threaten "imminent death," and that drugs designed to disrupt the personality may be administered so long as they do not "penetrate to the core of an individual's ability to perceive the world around him." He said that the law prohibiting torture did not prevent interrogators from inflicting mental harm so long as it was not "prolonged." Physical pain could be inflicted so long as it was less severe than the pain associated with "serious physical injury, such as organ failure, impairment of bodily function, or even death."
Even this interpretation did not preserve enough executive "flexibility" for Yoo. In a separate section of the memo, he argued that if these loopholes were not sufficient, the president was free to order outright torture. Any law limiting the president's authority to order torture during wartime, the memo claimed, would "violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."[18]

Since leaving the Justice Department, Yoo has also defended the practice of "extraordinary renditions," in which the United States has kidnapped numerous "suspects" in the war on terror and "rendered" them to third countries with records of torturing detainees.[19] He has argued that the federal courts have no right to review actions by the president that are said to violate the War Powers Clause.[20] And he has defended the practice of targeted assassinations, otherwise known as "summary executions."[21]

In short, the flexibility Yoo advocates allows the administration to lock up human beings indefinitely without charges or hearings, to subject them to brutally coercive interrogation tactics, to send them to other countries with a record of doing worse, to assassinate persons it describes as the enemy without trial, and to keep the courts from interfering with all such actions.

Has such flexibility actually aided the US in dealing with terrorism? In all likelihood, the policies and attitudes Yoo has advanced have made the country less secure. The abuses at Guantánamo and Abu Ghraib have become international embarrassments for the United States, and by many accounts have helped to recruit young people to join al-Qaeda. The US has squandered the sympathy it had on September 12, 2001, and we now find ourselves in a world perhaps more hostile than ever before.

With respect to detainees, thanks to Yoo, the US is now in an untenable bind: on the one hand, it has become increasingly unacceptable for the US to hold hundreds of prisoners indefinitely without trying them; on the other hand our coercive and inhumane interrogation tactics have effectively granted many of the prisoners immunity from trial. Because the evidence we might use against them is tainted by their mistreatment, trials would likely turn into occasions for exposing the United States' brutal interrogation tactics. This predicament was entirely avoidable. Had we given alleged al-Qaeda detainees the fair hearings required by the Geneva Conventions at the outset, and had we conducted humane interrogations at Guantánamo, Abu Ghraib, Camp Mercury, and elsewhere, few would have objected to the US holding some detainees for the duration of the military conflict, and we could have tried those responsible for war crimes. What has been so objectionable to many in the US and abroad is the government's refusal to accept even the limited constraints of the laws of war.

The consequences of Yoo's vaunted "flexibility" have been self-destructive for the US—we have turned a world in which international law was on our side into one in which we see it as our enemy. The Pentagon's National Defense Strategy, issued in March 2005, states,

Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial processes, and terrorism.

The proposition that judicial processes—the very essence of the rule of law—are to be dismissed as a strategy of the weak, akin to terrorism, suggests the continuing strength of Yoo's influence. When the rule of law is seen simply as a device used by terrorists, something has gone perilously wrong. Michael Ignatieff has written that "it is the very nature of a democracy that it not only does, but should, fight with one hand tied behind its back. It is also in the nature of democracy that it prevails against its enemies precisely because it does."[22] Yoo persuaded the Bush administration to untie its hand and abandon the constraints of the rule of law. Perhaps that is why we are not prevailing.

Notes
There are, of course, many reasons to question originalism as a theory of constitutional interpretation, chief among them that the framers used general and open-ended language that indicates a desire not to lock in subsequent generations to the specific understandings of the eighteenth century, as Chief Justice John Roberts himself acknowledged in his confirmation hearings. See Ronald Dworkin, "Judge Roberts on Trial," The New York Review, October 20, 2005. I assess Yoo’s arguments both with respect to the originalist claims he makes and from a more modern perspective.


Article I, Section 10 limits the states' ability to "engage in War," and Article III defines treason to include "levying War" against the United States.


See Farrand, The Records of the Federal Convention of 1787, Vol. 2, pp. 318–319 (quoting James Madison explaining that the change was designed to preserve for the president "the power to repel sudden attacks").


For a proposal to reinvigorate Congress's powers over military action, see Leslie H. Gelb and Anne-Marie Slaughter, "Declare War," The Atlantic Monthly, November 2005.


Memo from John Yoo to Timothy Flanigan, "Re: Memorandum Opinion for the Deputy Counsel to the President," September 25, 2001.

These memos, and the State Department responses to them, can be found on the New Yorker Web

Memo from Jay Bybee to Alberto Gonzales, "Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," August 1, 2002. While this memo is signed by Bybee, Yoo has acknowledged that he drafted it.


John Yoo, "Assassination or War?" San Francisco Chronicle, September 18, 2005.